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FEDERAL RESERVE SYSTEM

12 CFR Part 265

[Docket No. R–1025]

Rules Regarding Delegation of Authority

AGENCY: Board of Governors of the Federal Reserve System.

ACTION: Final rule.

SUMMARY: The Board is amending its Rules Regarding Delegation of Authority (12 CFR Part 265) pursuant to sections 11(i) and (k) of the Federal Reserve Act (12 U.S.C. 248(i) and (k)). Specifically, the Board is revising and expanding the delegation of authority to the Director of Division of Consumer and Community Affairs to include: issuing interpretations under the Fair Credit Reporting Act, adjusting the dollar amount to determine coverage under the Home Ownership and Equity Protection Act, adjusting the depository institution exemption threshold under the Home Mortgage Disclosure Act, making certain determinations under the Community Reinvestment Act regulations, and holding public hearings on financial service issues in keeping with congressional mandates.

EFFECTIVE DATE: November 25, 1998.

FOR FURTHER INFORMATION CONTACT: Pamela Morris Blumenthal, Staff Attorney, Division of Consumer and Community Affairs, at (202) 452–3667; for users of Telecommunications Device for the Deaf (TDD) *only,* contact Diane Jenkins at (202) 452–3544.

SUPPLEMENTARY INFORMATION:

I. Background

Section 11(k) of the Federal Reserve Act (12 U.S.C. 248(k)) provides that the Board may delegate any of its functions, other than those relating to rulemaking or pertaining principally to monetary and credit policies, to members or employees of the Board. Section 11(i) authorizes the Board to make rules and regulations necessary to enable the Board to perform its duties effectively.

Several consumer protection statutes impose a number of duties on the Board. These include issuing interpretations and applying formulas for determining exemption from or application of a statutory provision. The Board is delegating authority for the tasks described below to the Director of Division of Consumer and Community Affairs (DCCA) to enable the Board to fulfill its responsibilities more efficiently by eliminating the need for Board review of certain technical matters and administrative duties.

Delegation of the responsibilities described below does not relate to rulemaking or monetary and credit policies and is consistent with previous Board practices with respect to interpretations and actions required under consumer protection statutes.

II. Analysis of Revisions

Clarifications to Authority to Issue Examination Manuals, Forms, and Other Materials

The following clarifying revisions are being made to the authority delegated to the DCCA Director: (1) in § 265.9(a), the text has been clarified and the Truth in Savings Act has been added to the list of statutes for which the Director may issue manuals, forms, and other materials; (2) in § 265.9(a)(1), the titles of acts encompassed in the statutory citations have been added; (3) a new paragraph 265.9(a)(8) has been added to reference the provisions of the Truth in Savings Act; and (4) in § 265.9(c)(1), (c)(4) and (c)(5), the text has been clarified by adding a reference to the particular section of the controlling regulations.

Interpretations under the Fair Credit Reporting Act

Section 621(e) of the Fair Credit Reporting Act (FCRA; 15 U.S.C. 1681s(e)) authorizes the Board to issue interpretations of the FCRA as it applies to depository institutions and their holding companies and affiliates. The Board is directed to consult with the other federal financial supervisory agencies in connection with such interpretations.

The FCRA is part of the Consumer Credit Protection Act that encompasses statutes such as the Truth in Lending Act (15 U.S.C. 1601–1667e) and the Equal Credit Opportunity Act (15 U.S.C. 1691–1691f). This delegation parallels authority delegated to DCCA officials to issue official staff interpretations of the regulations. (See 12 CFR part 226, App. C; 12 CFR part 202, App. D, respectively.) (Unlike TILA, the ECOA, and several other statutes, the FCRA does not assign the Board or any other agency the authority to issue implementing regulations.) Delegating interpretive authority enables the Board to provide guidance more efficiently by eliminating the need for Board review of minor matters and technical issues.

Annual adjustments under TILA and HMDA

TILA requires creditors to disclose credit terms. TILA is implemented by the Board's Regulation Z (12 CFR Part 226). The Home Ownership and Equity Protection Act of 1994 (Pub. L. 103–325, 108 Stat. 2160) amended TILA to include additional disclosure requirements and restrictions for home-secured loans with total points and fees exceeding the greater of $400 or 8 percent of the total loan amount. Congress directed the Board to adjust the $400 amount annually effective January 1 based on the annual percentage change in the Consumer Price Index (CPI) as reported on June 1 of the year preceding the adjustment. 15 U.S.C. 1602(aa)(3). Section 226.32(a)(1)(ii) of Regulation Z implements the statutory requirement.

The Home Mortgage Disclosure Act (HMDA; 12 U.S.C. 2801–2810) requires most mortgage lenders located in metropolitan statistical areas to collect data about their housing-related lending activity. The Board's Regulation C (12 CFR Part 203) implements HMDA. Provisions of the Economic Growth and Regulatory Paperwork Reduction Act of 1996 (Pub. L. 104–208, 110 Stat. 3009) amended HMDA to modify the exemption threshold for small depository institutions. The amendments direct the Board to adjust the depository institution exemption threshold annually based on the annual percentage change in the CPI for Urban Wage Earners and Clerical Workers. Section 203.3(a)(1)(ii) of Regulation C sets forth the formula for determining the annual adjustment.

The Board is delegating implementation of these annual adjustments, which require application of a mathematical formula, to the Director of DCCA.

Community Reinvestment Act determinations

The Community Reinvestment Act (12 U.S.C. 2901–2907) requires the federal financial supervisory agencies to assess how depository institutions are meeting the credit needs of their communities in connection with the examination of each institution by its regulator. Each agency is authorized to issue regulations implementing the act. Regulation BB (12 CFR part 228) sets forth the standards the Board will apply in evaluating a bank's performance in meeting its community's credit needs.

Section 228.25 of Regulation BB permits the Board to approve or disapprove a bank's request to be designated as a wholesale or limited-purpose bank, and to revoke such designation as appropriate. In addition, the Board may approve or disapprove a bank's strategic plan submitted pursuant to section 228.27. These tasks require application of criteria established in the regulation. The Board is delegating authority to make these determinations to the Director of DCCA to implement review of proposed strategic plans and to respond to designation requests without the need for Board review.

Public hearings on consumer law issues

The Congress on occasion directs the Board to conduct public hearings or other proceedings regarding consumer law issues. For example, the Riegle Community Development and Regulatory Improvement Act of 1994 required the Board to hold hearings on home-equity lending within two years and periodically thereafter. The Board is delegating to the Director of DCCA the authority to arrange and conduct these proceedings in keeping with congressional mandates.

III. Public Comment Not Required

The Administrative Procedures Act provides that notice and opportunity for public comment are not required for rules of agency organization, procedure, or practice. 5 U.S.C. 553(b)(3)(A). Since the regulatory changes described above are procedural and do not constitute a substantive rule subject to the requirements of section 553(b) of the Administrative Procedures Act, the Board, for good cause, finds that notice and public comment in connection with this amendment are unnecessary.

List of Subjects in 12 CFR Part 265

Authority delegations (Government agencies), Banks, banking, Federal Reserve System.

For the reasons set forth above, the Board amends part 265 in chapter II of title 12 of the Code of Federal Regulations as set forth below:

PART 265—RULES REGARDING DELEGATION OF AUTHORITY

1. The authority citation for part 265 continues to read as follows:

Authority: 12 U.S.C. 248(i) and (k).

2. Section 265.9 is amended by revising paragraphs (a) introductory text, (a)(1), (c)(1), (c)(4), and (c)(5), and adding new paragraphs (a)(8) and (d) through (g). The revisions and additions read as follows:

§ 265.9 Functions delegated to the Director of Division of Consumer and Community Affairs.

* * * * *

(a) *Issuing examination manuals, forms, and other materials.* To issue examination or inspection manuals; report, agreement, and examination forms; examination procedures, guidelines, instructions, and other similar materials pursuant to: section 11(a) of the Federal Reserve Act (12 U.S.C. 248(a)); sections 108(b), 621(c), 704(b), 814(c), and 917(b) of the Consumer Credit Protection Act (15 U.S.C. 1607(b), 1681s(b), 1691c(b), 1692*l*(c) and 1693o(b)); section 305(c) of the Home Mortgage Disclosure Act (12 U.S.C. 2804(c)); section 18(f)(3) of the Federal Trade Commission Act (15 U.S.C. 57a(f)(3)); section 808(c) of the Civil Rights Act of 1968 (42 U.S.C. 3608(c)); section 270(b) of the Truth in Savings Act (12 U.S.C. 4309); and section 5 of the Bank Holding Company Act of 1956 (12 U.S.C. 1844(c)). The foregoing manuals, forms, and other materials are for use within the Federal Reserve System in the administration of enforcement responsibilities in connection with:

(1) Sections 1–200 and 501–921 of the Consumer Credit Protection Act (15 U.S.C. 1601–1693r), in regard to the Truth in Lending Act, the Consumer Leasing Act, the Equal Credit Opportunity Act, the Electronic Fund Transfer Act, the Fair Credit Reporting Act and the Fair Debt Collection Practices Act;

* * * * *

(8) Sections 261–274 of the Truth in Savings Act (12 U.S.C. 4301–4313).

* * * * *

(c) *Determining inconsistencies between state and federal laws.* * * *

(1) Sections 111, 171(a) and 186(a) of the Truth in Lending Act (15 U.S.C. 1610(a), 1666j(a), 1667e(a)) and § 226.28 of Regulation Z (12 CFR part 226) and § 213.7 of Regulation M (12 CFR part 213);

* * * * *

(4) Section 306(a) of the Home Mortgage Disclosure Act (12 U.S.C. 2805(a)) and § 203.3 of Regulation C (12 CFR part 203); and

(5) Section 273 of the Truth in Savings Act (12 U.S.C. 4312) and § 230.1 of Regulation DD (12 CFR part 230).

(d) *Interpreting the Fair Credit Reporting Act.* To issue interpretations pursuant to section 621(e) of the Fair Credit Reporting Act (15 U.S.C. 1681s(e));

(e) *Annual adjustments.* To adjust as required by law:

(1) The amount specified in section 103(aa)(1)(B)(ii) of the Truth in Lending Act and § 226.32(a)(1)(ii) of Regulation Z (12 CFR part 226), relating to mortgages bearing fees above a certain amount in accord with section 103(aa)(3) of that act (15 U.S.C. 1602(aa)); and

(2) The amount specified in section 309(b)(1) of the Home Mortgage Disclosure Act (12 U.S.C. 2808(b)(1)) and § 203.3(a)(1)(ii) of Regulation C (12 CFR part 203) relating to the asset threshold above which a depository institution must collect and report data.

(f) *Community Reinvestment Act determinations.* To make determinations, pursuant to section 804 of the Community Reinvestment Act (12 U.S.C. 2903), approving or disapproving:

(1) Strategic plans and any amendments thereto pursuant to § 228.27(g) and (h) of Regulation BB (12 CFR part 228); and

(2) Requests for designation as a wholesale or limited purpose bank or the revocation of such designation, pursuant to § 228.25(b) of Regulation BB (12 CFR part 228).

(g) *Public hearings.* To conduct hearings or other proceedings required by law, concerning consumer law or other matters within the responsibilities of the Division of Consumer and Community Affairs, in consultation with other interested divisions of the Board where appropriate.

* * * * *

By order of the Board of Governors of the Federal Reserve System, November 20, 1998.

Robert deV. Frierson,

Associate Secretary of the Board.

[FR Doc. 98–31508 Filed 11–24–98; 8:45 am]

BILLING CODE 6210–01–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 98–NM–84–AD; Amendment 39–10911; AD 98–24–25]

RIN 2120–AA64

Airworthiness Directives; Lockheed Model L–188A and L–188C Series Airplanes

AGENCY: Federal Aviation Administration, DOT.

ACTION: Final rule.

SUMMARY: This amendment adopts a new airworthiness directive (AD), applicable to all Lockheed Model L–188A and L–188C series airplanes, that requires revising the Airplane Flight Manual to provide the flightcrew with modified procedures and limitations for operating in icing conditions. This amendment is prompted by incidents and accidents involving airplanes equipped with turboprop engines that experienced tailplane stall due to ice accretion on the horizontal stabilizer of the airplane. The actions specified by this AD are intended to prevent undetected accretion of ice on the horizontal stabilizer, which could result in ice contaminated tailplane stall and consequent loss of pitch control.

DATES: Effective December 30, 1998.

The incorporation by reference of certain publications listed in the regulations is approved by the Director of the **Federal Register** as of December 30, 1998.

ADDRESSES: The service information referenced in this AD may be obtained from Lockheed Aeronautical Systems Support Company (LASSC), Field Support Department, Dept. 693, Zone 0755, 2251 Lake Park Drive, Smyrna, Georgia 30080. 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, Small Airplane Directorate, Atlanta Aircraft Certification Office, One Crown Center, 1895 Phoenix Boulevard, suite 450, Atlanta, Georgia; or at the Office of the Federal Register, 800 North Capitol Street, NW., suite 700, Washington, DC.

FOR FURTHER INFORMATION CONTACT: Thomas Peters, Aerospace Engineer, Systems and Flight Test Branch, ACE–116A, FAA, Small Airplane Directorate, Atlanta Aircraft Certification Office, One Crown Center, 1895 Phoenix Boulevard, suite 450, Atlanta, Georgia 30337–2748; telephone (770) 703–6063; fax (770) 703–6097.

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 Lockheed Model L–188A and L–188C series airplanes was published in the **Federal Register** on August 13, 1998 (63 FR 43340). That action proposed to require revising the Airplane Flight Manual to provide the flightcrew with modified procedures and limitations for operating in icing conditions.

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 75 airplanes of the affected design in the worldwide fleet. The FAA estimates that 32 airplanes of U.S. registry will be affected by this AD, that it will take approximately 1 work hour per airplane to accomplish the required incorporation of the AFM revisions, and that the average labor rate is $60 per work hour. Based on these figures, the cost impact of the AD on U.S. operators is estimated to be $1,920, or $60 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 substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order 12612, it is determined that this final rule does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

For the reasons discussed above, I certify that this action (1) is not a ''significant regulatory action'' under Executive Order 12866; (2) is not a ''significant rule'' under DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); and (3) will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act. A 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:

98–24–25 Lockheed: Amendment 39–10911. Docket 98–NM–84–AD.

Applicability: All Model L–188A and L–188C 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 (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 undetected accretion of ice on the horizontal stabilizer, which could result in ice contaminated tailplane stall and consequent loss of pitch control, accomplish the following:

(a) Within 30 days after the effective date of this AD, revise the Limitations, Normal Procedures, and Performance Sections and Appendix III of the FAA-approved Electra 188A or 188C Airplane Flight Manual (AFM), as applicable, to include the pages specified in Table 1 (for Model L–188A series airplanes), Table 2 (for Model L–188C series airplanes not equipped with Hamilton Standard propellers), or Table 3 (for Model L–188C series airplanes equipped with Hamilton Standard propellers) of this AD, as applicable.

TABLE 1.—REVISIONS TO THE ELECTRA 188A AFM FOR ALL MODEL L–188A SERIES AIRPLANES

Section number	Section	Page number	Date shown on page
Preface	Log of Pages	i	March 10, 1998.
Preface	Log of Pages	ii	March 10, 1998.
1	Limitations	6	December 1, 1997.
3	Normal Procedures	10.1	December 1, 1997.
3	Normal Procedures	11	March 10, 1998.
3	Normal Procedures	12	December 1, 1997.
4	Performance	A	December 1, 1997.
4	Performance	6	December 1, 1997.
4	Performance	8	December 1, 1997.
4	Performance	12	December 1, 1997.
4	Performance	12.1	December 1, 1997.
4	Performance	12.2	December 1, 1997.
Appendix III	Alt. Flap Data	B	December 1, 1997.

TABLE 2.—REVISIONS TO THE ELECTRA 188C AFM FOR MODEL L–188C SERIES AIRPLANES NOT EQUIPPED WITH HAMILTON STANDARD PROPELLERS

Section number	Section	Page number	Date shown on page
Preface	Log of Pages	i	March 10, 1998.
Preface	Log of Pages	ii	March 10, 1998.
1	Limitations	6	December 1, 1997.
3	Normal Procedures	12.1	December 1, 1997.
3	Normal Procedures	13	March 10, 1998
3	Normal Procedures	14	December 1, 1997.
4	Performance	A	December 1, 1997.
4	Performance	6	December 1, 1997.
4	Performance	8	December 1, 1997.
4	Performance	12	December 1, 1997.
4	Performance	12.1	December 1, 1997.
4	Performance	12.2	December 1, 1997.
Appendix III	Alt. Flap Data	B	December 1, 1997.

TABLE 3.—REVISIONS TO THE ELECTRA 188C AFM FOR MODEL L–188C SERIES AIRPLANES NOT EQUIPPED WITH HAMILTON STANDARD PROPELLERS

Section number	Section	Page number	Date shown on page
Preface	Log of Pages	i	March 10, 1998.
Preface	Log of Pages	ii	March 10, 1998.
1	Limitations	6	December 1, 1997.
3	Normal Procedures	12.1	December 1, 1997.
3	Normal Procedures	13	March 10, 1998.
3	Normal Procedures	14	December 1, 1997.
A4	Performance	A	December 1, 1997.
A4	Performance	6	December 1, 1997.
A4	Performance	8	December 1, 1997.
A4	Performance	12	December 1, 1997.
A4	Performance	12.1	December 1, 1997.
A4	Performance	12.2	December 1, 1997.
Appendix AIII	Alt. Flap Data	B	December 1, 1997.

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

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

(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.

(d) The AFM revisions shall be done in accordance with the following Lockheed Airplane Flight Manuals, which contain the specified list of effective pages:

Airplane flight manuals	Page number	Date shown on page
Electra Model 188A	Log of Pages	March 10, 1998.
March 10, 1998	Pages i through Jii	
Electra Model 188C	Log of Pages	March 10, 1998.
March 10, 1998	Pages i through Lii	

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 Lockheed Aeronautical Systems Support Company (LASSC), Field Support Department, Dept. 693, Zone 0755, 2251 Lake Park Drive, Smyrna, Georgia 30080. Copies may be inspected at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington; or at the FAA, Small Airplane Directorate, Atlanta Aircraft Certification Office, One Crown Center, 1895 Phoenix Boulevard, suite 450, Atlanta, Georgia; or at the Office of the Federal Register, 800 North Capitol Street, NW., suite 700, Washington, DC.

(e) This amendment becomes effective on December 30, 1998.

Issued in Renton, Washington, on November 17, 1998.

Darrell M. Pederson,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 98–31319 Filed 11–24–98; 8:45 am]

BILLING CODE 4910–13–U

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 98–NM–71–AD; Amendment 39–10910; AD 98–24–24]

RIN 2120–AA64

Airworthiness Directives; McDonnell Douglas Model MD–11 Series Airplanes

AGENCY: Federal Aviation Administration, DOT.

ACTION: Final rule.

SUMMARY: This amendment adopts a new airworthiness directive (AD), applicable to certain MD–11 series airplanes, that requires a one-time visual inspection to detect discrepancies of the seat tracks and adjacent structure underneath lavatories, and repair, if necessary. This amendment also requires installation of a non-metallic barrier on the bottom of each lavatory foot fitting, and replacement of existing seat track fittings with new seat track fittings. This amendment is prompted by reports of galvanic corrosion found on the seat tracks at attachment points under certain lavatories. The actions specified by this AD are intended to prevent corrosion of seat tracks and adjacent structure. Corrosion of the seat tracks and adjacent structure could result in shifting of lavatories, which could lead to injury of passengers and crew, as well as damage to aircraft structure and systems.

DATES: Effective December 30, 1998.

The incorporation by reference of certain publications listed in the regulations is approved by the Director of the Federal Register as of December 30, 1998.

ADDRESSES: The service information referenced in this AD may be obtained from The Boeing Company, Douglas Products 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: David Hsu, Aerospace Engineer, Airframe Branch, ANM–120L, FAA, Transport Airplane Directorate, Los Angeles Aircraft Certification Office, 3960 Paramount Boulevard, Lakewood, California 90712–4137; telephone (562) 627–5323; 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 MD–11 series airplanes was published in the **Federal Register** on September 3, 1998 (63 FR 46934). That action proposed to require a one-time visual inspection to detect discrepancies of the seat tracks and adjacent structure underneath lavatories, and repair, if necessary. The action also proposed to require installation of a non-metallic barrier on the bottom of each lavatory foot fitting, and replacement of existing seat track fittings with new seat track fittings.

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 143 airplanes of the affected design in the worldwide fleet. The FAA estimates that 46 airplanes of U.S. registry will be affected by this AD, that it will take approximately 40 work hours per airplane to accomplish the required inspection, installation, and replacement, and that the average labor rate is $60 per work hour. Required parts will cost less than $1,000 per airplane. Based on these figures, the cost impact of the AD on U.S. operators is estimated to be $156,400, or $3,400 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 substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order 12612, it is determined that this final rule does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

For the reasons discussed above, I certify that this action (1) is not a ''significant regulatory action'' under Executive Order 12866; (2) is not a ''significant rule'' under DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); and (3) will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act. A 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:

98–24–24 McDonnell Douglas: Amendment 39–10910. Docket 98–NM–71–AD.

Applicability: Model MD–11 series airplanes, as listed in McDonnell Douglas Service Bulletin MD11–53–043, Revision 02, dated May 28, 1996; 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 detect and correct corrosion of seat tracks and adjacent structure, which could result in shifting of lavatories causing injury to passengers and crew, as well as damage to aircraft structure and systems, accomplish the following:

(a) Within 15 months after the effective date of this AD, conduct a visual inspection to detect discrepancies (i.e., corrosion and breakage) of the seat tracks and adjacent structure at the lavatory locations defined in JAMCO Service Bulletin MD11–25–1010, dated July 12, 1994.

(1) If no discrepancy is detected, prior to further flight, install a non-metallic barrier on the bottom of each lavatory foot fitting and replace existing seat track fittings with new fittings, in accordance with McDonnell Douglas Service Bulletin MD–11–53–043, Revision 02, dated May 28, 1996.

(2) If any discrepancy is detected, prior to further flight, repair in accordance with the McDonnell Douglas MD–11 Structural Repair Manual, or in accordance with a method approved by the Manager, Los Angeles Aircraft Certification Office (ACO), FAA, Transport Airplane Directorate. Prior to further flight following accomplishment of the repair, install a non-metallic barrier on the bottom of each lavatory foot fitting and replace existing seat track fittings with new fittings, in accordance with McDonnell Douglas Service Bulletin MD–11–53–043, Revision 02, dated May 28, 1996.

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

(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.

(d) The installation and replacement shall be done in accordance with McDonnell Douglas Service Bulletin MD11–53–043, Revision 02, dated May 28, 1996. 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 The Boeing Company, Douglas Products 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 December 30, 1998.

Issued in Renton, Washington, on November 17, 1998.

Darrell M. Pederson,

Acting Manager,

Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 98–31318 Filed 11–24–98; 8:45 am]

BILLING CODE 4910–13–U

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 96–CE–40–AD; Amendment 39–10905; AD 98–24–20]

RIN 2120–AA64

Airworthiness Directives; Grob Luft- und Raumfahrt, GmbH Models G 109 and G 109B Sailplanes

AGENCY: Federal Aviation Administration, DOT.

ACTION: Final rule.

SUMMARY: This amendment adopts a new airworthiness directive (AD) that applies to certain Grob Luft-und Raumfahrt (Grob) Models G 109 and G 109B sailplanes. This AD requires inspecting the radius of the landing gear retaining bars, installing additional supportive parts, and replacing the retaining bars if the retaining bars' chamfer radius is less than 3.0 millimeters (mm). This AD also requires inspecting the landing gear legs for cracks and proper thickness, and either polishing out the cracks or replacing the landing gear legs with parts of improved design depending on the crack length. This AD is the result of mandatory continuing airworthiness information (MCAI) issued by the airworthiness authority for Germany. The actions specified by this AD are intended to detect and correct fatigue cracking of the landing gear legs, which could result in landing gear failure with consequent loss of control of the sailplane during landing operations.

DATES: Effective January 9, 1999.

The incorporation by reference of certain publications listed in the regulations is approved by the Director of the Federal Register as of January 9, 1999.

ADDRESSES: Service information that applies to this AD may be obtained from Grob-Werke GmbH & Co. KG, Unternehmensbereich, Burkhart Grob Flugzeugbau, Flugplatz Mattsies, 86874 Tussenhausen, Germany. This information may also be examined at the Federal Aviation Administration (FAA), Central Region, Office of the

Regional Counsel, Attention: Rules Docket No. 96–CE–40–AD, Room 1558, 601 E. 12th Street, Kansas City, Missouri 64106; or at the Office of the Federal Register, 800 North Capitol Street, NW, suite 700, Washington, DC.

FOR FURTHER INFORMATION CONTACT: Mr. Mike Kiesov, Aerospace Engineer, FAA, Small Airplane Directorate, 1201 Walnut, suite 900, Kansas City, Missouri 64106; telephone: (816) 426–6932; facsimile: (816) 426–2169.

SUPPLEMENTARY INFORMATION:

Events Leading to the Issuance of This AD

A proposal to amend part 39 of the Federal Aviation Regulations (14 CFR part 39) to include an AD that would apply to certain Grob G 109 and G 109B sailplanes was published in the **Federal Register** as a notice of proposed rulemaking (NPRM) on February 19, 1997 (62 FR 7373). The NPRM proposed to require inspecting the radius of the landing gear retaining bars, installing additional supportive parts, and replacing the retaining bars if the retaining bars' chamfer radius is less than 3.0 mm. The NPRM also proposed to require inspecting the landing gear legs for cracks and proper thickness, and either polishing out the cracks or replacing the landing gear legs with parts of improved design depending on the crack length.

Accomplishment of the proposed action as specified in the NPRM would be required in accordance with Grob Service Bulletin TM 817–39, dated January 4, 1994.

The NPRM was the result of mandatory continuing airworthiness information (MCAI) issued by the airworthiness authority for Germany.

Interested persons have been afforded an opportunity to participate in the making of this amendment. No comments were received on the proposed rule or the FAA's determination of the cost to the public.

The FAA's Determination

After careful review of all available information related to the subject presented above, the FAA has determined that air safety and the public interest require the adoption of the rule as proposed except for minor editorial corrections. The FAA has determined that these minor corrections will not change the meaning of the AD and will not add any additional burden upon the public than was already proposed.

Cost Impact

The FAA estimates that 63 sailplanes in the U.S. registry will be affected by this AD.

The required inspection and modification of the retaining bars will take approximately 4 workhours per sailplane (2 workhours per landing gear leg) to accomplish, at an average labor rate of approximately $60 an hour. Parts to accomplish the required modifications cost $90. Based on these figures, the total cost impact of this inspection and modification on U.S. operators is estimated to be $20,790, or $330 per sailplane.

The initial inspection will take approximately 18 workhours per sailplane (9 workhours per landing gear leg) to accomplish, at an average labor rate of $60 per hour. Based on these figures, the total cost impact of the initial inspection on U.S. operators is estimated to be $68,040, or $1,080 per sailplane.

The above figures only take into account the costs of the initial inspection of the landing gear leg and do not take into account costs associated with repetitive inspections or any required crack polishing or landing gear leg replacement. The FAA has no way of determining the number of repetitive inspections each owner/operator of the affected sailplanes would incur, or the number of landing gear legs that will be found cracked and either need polishing or replacement.

Compliance Time

The compliance time of this AD is presented in calendar time instead of hours time-in-service (TIS). The FAA has determined that a calendar time compliance is the most desirable method because the unsafe condition of the landing gear legs described by this AD is caused by corrosion. Corrosion initiates as a result of sailplane operation, but can continue to develop regardless of whether the sailplane is in service. In order to assure that the above-referenced condition is detected and corrected on all sailplanes within a reasonable period of time without inadvertently grounding any sailplanes, the FAA is requiring a compliance schedule based upon calendar time instead of hours TIS.

Regulatory Impact

The regulations adopted herein will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order 12612, it is determined that this final rule does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

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

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, 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 (AD) to read as follows:

98–24–20 Grob Luft-und Raumfahrt, GMBH: Amendment 39–10905, Docket No. 96–CE–40–AD.

Applicability: Models G 109 and G 109B sailplanes, all serial numbers, certificated in any category.

Note 1: This AD applies to each sailplane 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 sailplanes 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 in the body of this AD, unless already accomplished.

To detect and correct fatigue cracking of the landing gear legs, which could result in landing gear failure with consequent loss of control of the sailplane during landing operations, accomplish the following:

(a) *For all of the affected sailplanes:* Within the next 120 calendar days after the effective date of this AD, inspect the retaining bars chamfer on both landing gear legs for a minimum of 3.0 millimeters (mm) radius in accordance with the ''Actions'' section, paragraph A3, of Grob Service Bulletin (SB) 817–39, dated January 4, 1994.

(1) If the chamfer radius is 3.0 mm or greater, prior to further flight, glue a reinforcing plastic strip (part number (P/N) 109–5000.07) to the retaining bar in accordance with the ''Actions'' section, paragraph A4, of Grob SB 817–39, dated January 4, 1994.

(2) If the chamfer radius is less than 3.0 mm, prior to further flight, replace the retaining bar with a new improved design retaining bar, P/N 109–5000.02; and install the plastic strip, P/N 109–5000.07. Accomplish these actions in accordance with the ''Actions'' section, paragraph A5, of Grob SB 817–39, dated January 1994.

(b) *For sailplanes that are not equipped with landing gear legs, P/N 109B–5001.01/1:* Upon the accumulation of 1,000 hours TIS on the landing gear leg or within the next 100 hours TIS after the effective date of this AD, whichever occurs later, and thereafter at intervals not to exceed 500 hours TIS, inspect the landing gear legs for cracks (using the magnetic particle or X-ray analysis method) in accordance with the ''Actions'' section, paragraph B9, of Grob SB 817–39, dated January 4, 1994.

(1) If any crack(s) is found that does not exceed a maximum depth of 0.5 millimeters (mm) on each side, prior to further flight, polish out the crack(s) in accordance with the ''Actions'' section, paragraph B10, of Grob SB 817–39, dated January 4, 1994.

(2) If after polishing out any crack, as specified in paragraph (b)(1) of this AD, the undercarriage thickness is not at least 13 mm, prior to further flight, replace the cracked landing gear leg with a P/N 109B–5001.01/1 landing gear leg, in accordance with the ''Actions'' section, paragraph B10, of Grob SB 817–39, dated January 4, 1994.

(3) If any crack(s) is found that is equal to or exceeds a maximum depth of 0.5 mm on either side, prior to further flight, replace the cracked landing gear leg with a P/N 109B–5001.01/1 landing gear leg, in accordance with the ''Actions'' section, paragraph B10, of Grob SB 817–39, dated January 4, 1994.

(4) Replacing both landing gear legs with P/N 109B–5001.01/1 may be accomplished at any time as terminating action for the repetitive inspection requirement of this AD, but must be accomplished prior to further flight on any landing gear found cracked as specified in paragraph (b)(2) or (b)(3) of this AD.

(5) If one landing gear leg is replaced prior to further flight when a crack is found, the other landing gear leg must still be repetitively inspected every 500 hours TIS until replacement with the improved design part.

Note 2: Landing gear legs (P/N 109B–5001.01/1) have a ''0'' stamped on the front side of the leg for easy identification.

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

(d) An alternative method of compliance or adjustment of the initial or repetitive compliance times that provides an equivalent level of safety may be approved by the Manager, Small Airplane Directorate, 1201 Walnut, suite 900, Kansas City, Missouri 64106. The request shall be forwarded through an appropriate FAA Maintenance Inspector, who may add comments and then send it to the Manager, Small Airplane Directorate.

Note 3: Information concerning the existence of approved alternative methods of compliance with this AD, if any, may be obtained from the Small Airplane Directorate.

(e) Questions or technical information related to Grob Service Bulletin TM 817–39, dated January 4, 1994, should be directed to Grob-Werke GmbH & Co. KG, Unternehmensbereich, Burkhart Grob Flugzeugbau, Flugplatz Mattsies, 86874 Tussenhausen, Germany. This service information may be examined at the FAA, Central Region, Office of the Regional Counsel, Room 1558, 601 E. 12th Street, Kansas City, Missouri 64106.

(f) The inspections, installation, polishing, and replacements required by this AD shall be done in accordance to Grob Service Bulletin TM 817–39, dated January 4, 1994. 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 Grob-Werke GmbH & Co. KG, Unternehmensbereich, Burkhart Grob Flugzeugbau, Flugplatz Mattsies, 86874 Tussenhausen, Germany. Copies may be inspected at the FAA, Central Region, Office of the Regional Counsel, Room 1558, 601 E. 12th Street, Kansas City, Missouri, or at the Office of the Federal Register, 800 North Capitol Street, NW, suite 700, Washington, DC.

(g) This amendment becomes effective on January 9, 1999.

Issued in Kansas City, Missouri, on November 16, 1998.

Michael Gallagher,

Manager, Small Airplane Directorate, Aircraft Certification Service.

[FR Doc. 98–31317 Filed 11–24–98; 8:45 am]

BILLING CODE 4910–13–U

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 98–NM–317–AD; Amendment 39–10904; AD 98–24–19]

RIN 2120–AA64

Airworthiness Directives; Empresa Brasileira de Aeronautica S.A. (EMBRAER) Model EMB–145 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 Empresa Brasileira de Aeronautica S.A. (EMBRAER) Model EMB–145 series airplanes. This action requires revising the Performance Section of the Airplane Flight Manual (AFM) to provide the flightcrew with procedures to adjust landing distances for landings performed with the anti-icing system active. This action also requires revising the Limitations Sections of the AFM to prohibit certain types of approaches with the anti-icing system active. This amendment is prompted by a report that increased (i.e., higher than normal) flight idle thrust may occur when the anti-icing system is active. The actions specified in this AD are intended to ensure that the flightcrew is advised of appropriate landing field lengths when operating with the anti-icing system active, and that instrument approaches at certain flap settings are prohibited with the anti-icing system active. Increased flight idle thrust when the anti-icing system is active, if not corrected, could result in landing overrun.

DATES: Effective December 10, 1998.

The incorporation by reference of certain publications listed in the regulations is approved by the Director of the Federal Register as of December 10, 1998.

Comments for inclusion in the Rules Docket must be received on or before December 28, 1998.

ADDRESSES: Submit comments in triplicate to the Federal Aviation Administration (FAA), Transport Airplane Directorate, ANM–114, Attention: Rules Docket No. 98–NM–317–AD, 1601 Lind Avenue, SW., Renton, Washington 98055–4056.

The service information referenced in this AD may be obtained from Empresa Brasileira de Aeronautica S.A. (EMBRAER), P.O. Box 343—CEP 12.225,

Sao Jose dos Campos—SP, Brazil. This information may be examined at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington; or at the FAA, Small Airplane Directorate, Atlanta Aircraft Certification Office, One Crown Center, 1895 Phoenix Boulevard, suite 450, Atlanta, Georgia; or at the Office of the Federal Register, 800 North Capitol Street, NW., suite 700, Washington, DC.

FOR FURTHER INFORMATION CONTACT: Thomas Peters, Aerospace Engineer, ACE–118A, FAA, Small Airplane Directorate, Atlanta Aircraft Certification Office, One Crown Center, 1895 Phoenix Boulevard, suite 450, Atlanta, Georgia 30349; telephone (770) 703–6063; fax (770) 703–6097.

SUPPLEMENTARY INFORMATION: The Departmento de Aviacao Civil (DAC), which is the airworthiness authority for Brazil, recently notified the FAA that an unsafe condition may exist on certain EMBRAER Model EMB–145 series airplanes. The DAC advises that a fault was discovered during a review of Version II.2 of the Full Authority Digital Engine Control, which is installed on Model EMB–145 series airplanes equipped with Allison Model AE3007A1/2 engines. That fault affects operations when the anti-icing system is active, and causes increased (i.e., higher than normal) flight idle thrust during landing. Such increased flight idle thrust increases landing distances over those shown in the existing Performance Section of the FAA-approved Airplane Flight Manual (AFM), which could result in landing overrun if the landing distance is greater than the available runway. Also, such increased flight idle thrust during instrument approaches using the Flaps 22 setting could result in reduced controllability of the airplane due to inadequate drag to slow the airplane or to descend. This condition, if not corrected, also could result in landing overrun.

Explanation of Relevant Service Information

The FAA has reviewed EMBRAER EMB–145 Airplane Flight Manual 145/1153, Revision 19, dated October 23, 1998, which describes procedures for revising the Performance Section of the FAA-approved AFM to provide the flightcrew with procedures to adjust landing distances for landings performed with the anti-icing system active.

FAA's Determination

The FAA has determined that it is necessary to revise the Limitations Section of the FAA-approved AFM to prohibit instrument approaches using the Flaps 22 setting when the anti-icing system is active. This determination is based on the fact that, in conditions of increased flight idle thrust, such a setting may not provide adequate drag, which could reduce the ability of the flightcrew to slow the airplane or to descend, and could result in increased landing distances.

U.S. Type Certification of the Airplane

This airplane model is manufactured in Brazil and is type certificated for operation in the United States under the provisions of section 21.29 of the Federal Aviation Regulations (14 CFR 21.29) and the applicable bilateral airworthiness agreement. Pursuant to this bilateral airworthiness agreement, the DAC has kept the FAA informed of the situation described above.

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 ensure that the flightcrew is advised of appropriate landing field lengths when operating with the anti-icing system active. This AD also is being issued to ensure that the flightcrew is advised that instrument approaches at certain flap settings are prohibited with the anti-icing system active. Increased flight idle thrust when the anti-icing system is active, if not corrected, could result in landing overrun. This AD requires revising the Performance Section of the FAA-approved AFM to advise the flightcrew of adjustments to landing distances for landings performed with the anti-icing system active. This AD also requires revising the Limitations Section of the FAA-approved AFM to prohibit certain types of approaches with the anti-icing system active. Accomplishment of the AFM revisions is intended to adequately address the identified unsafe condition.

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 98–NM–317–AD.'' The postcard will be date stamped and returned to the commenter.

Regulatory Impact

The regulations adopted herein will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order 12612, it is determined that this final rule does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

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:

98–24–19 Empresa Brasileira de Aeronautica S.A. (EMBRAER): Amendment 39–10904. Docket 98–NM–317–AD.

Applicability: Model EMB–145 series airplanes, equipped with Allison Model AE3007A1/2 engines; certificated in any category.

Compliance: Required as indicated, unless accomplished previously.

To ensure that the flightcrew is advised of appropriate landing field lengths when operating with the anti-icing system active, and that instrument approaches at certain flap settings are prohibited with the anti-icing system active, accomplish the following:

(a) Within 10 days after the effective date of this AD, accomplish the actions specified by paragraphs (a)(1) and (a)(2) of this AD.

(1) Revise the Performance Section of the FAA-approved Airplane Flight Manual (AFM) by inserting a copy of EMBRAER EMB–145 AFM 145/1153, Revision 19, dated October 23, 1998, into the AFM.

Note 1: When landing in abnormal configurations per the emergency and abnormal procedures of Section 3 of the AFM and operating with the anti-icing system active, the landing field length multiples specified in Section 3 should be applied to the landing field lengths specified in Supplement 6 of Revision 19 of the AFM.

(2) Revise the Limitations Section of Supplement 12 of the FAA-approved AFM to include the following statement. This action may be accomplished by inserting a copy of this AD into the AFM.

''Flaps 22 instrument approaches with anti-ice on are not approved.''

(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, Atlanta Aircraft Certification Office (ACO), FAA, Small 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, Atlanta ACO.

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

(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.

(d) The AFM revision specified in paragraph (a)(1) of this AD shall be done in accordance with EMBRAER EMB–145 Airplane Flight Manual 145/1153, Revision 19, dated October 23, 1998, which contains the following list of effective pages:

Page No.	Revision level shown on page	Date shown on page
List of Effective Pages, Pages A, S6–i, S6–ii	19	October 23, 1998.
List of Effective Pages, Page B	18	August 6, 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 Empresa Brasileira de Aeronautica S.A. (EMBRAER), P.O. Box 343—CEP 12.225, Sao Jose dos Campos—SP, Brazil. Copies may be inspected at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington; or at the FAA, Small Airplane Directorate, Atlanta Aircraft Certification Office, One Crown Center, 1895 Phoenix Boulevard, suite 450, Atlanta, Georgia; or at the Office of the Federal Register, 800 North Capitol Street, NW., suite 700, Washington, DC.

(e) This amendment becomes effective on December 10, 1998.

Issued in Renton, Washington, on November 16, 1998.

Darrell M. Pederson,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 98–31316 Filed 11–24–98; 8:45 am]

BILLING CODE 4910–13–U

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 98–SW–17–AD; Amendment 39–10909; AD 98–24–23]

RIN 2120–AA64

Airworthiness Directives; Eurocopter France Model SE.3160, SA.316B, SA.316C, and SA.319B Helicopters

AGENCY: Federal Aviation Administration, DOT.

ACTION: Final rule; request for comments.

SUMMARY: This amendment adopts a new airworthiness directive (AD) that is applicable to Eurocopter France Model SE.3160, SA.316B, SA.316C, and SA.319B helicopters. This action requires inspecting certain horizontal stabilizer spar tubes and replacing them if cracks are found or repairing them if crazing, corrosion, fretting marks, or scratches are found and are repairable. This amendment is prompted by several service reports of spar tube corrosion and fatigue cracks discovered during normal maintenance inspections, which could cause loss of the horizontal stabilizer and subsequent loss of control of the helicopter.

DATES: Effective December 10, 1998.

The incorporation by reference of certain publications listed in the regulations is approved by the Director of the Federal Register as of December 10, 1998.

Comments for inclusion in the Rules Docket must be received on or before January 25, 1999.

ADDRESSES: Submit comments in triplicate to the Federal Aviation Administration (FAA), Office of the Regional Counsel, Southwest Region, Attention: Rules Docket No. 98–SW–17–AD, 2601 Meacham Blvd., Room 663, Fort Worth, Texas 76137.

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, 2601 Meacham Blvd., Room 663, Fort Worth, Texas; or at the Office of the Federal Register, 800 North Capitol Street, NW., suite 700, Washington, DC.

FOR FURTHER INFORMATION CONTACT: Mr. Shep Blackman, Aerospace Engineer, FAA, Rotorcraft Directorate, Rotorcraft Standards Staff, 2601 Meacham Blvd., Fort Worth, Texas 76137, telephone (817) 222–5296, fax (817) 222–5961.

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 Eurocopter France Model SE.3160, SA.316B, SA.316C, and SA.319B helicopters. The DGAC advises that fatigue cracks in certain horizontal spar tubes have been reported originating at or near the airframe attaching fitting.

Eurocopter France has issued Eurocopter France Service Bulletin 05.84, Revision 2, dated December 19, 1997 (SB). The SB specifies inspections of horizontal stabilizer spar tubes, part numbers (P/N) 3160.35.30.031.1 or .2, for fatigue cracks caused by corrosion or fretting and specifies a procedure to repair them if no cracks are present. The DGAC classified this SB as mandatory and issued AD 91–020–049(A)R2, dated March 11, 1998, to assure the continued airworthiness of these helicopters in France.

These helicopter models are manufactured in France and are type certificated for operation in the United States under the provisions of § 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.

Since an unsafe condition has been identified that is likely to exist or develop on other Model SE.3160, SA.316B, SA.316C, and SA.319B helicopters of the same type design registered in the United States, this AD is being issued to prevent failure of the horizontal stabilizer due to fatigue cracks in the horizontal stabilizer spar tubes, P/N's 3160.35.30.031.1 and .2, which could cause loss of the horizontal stabilizer and subsequent loss of control of the helicopter. The short compliance time involved is required because the previously described critical unsafe condition can adversely affect the controllability of the helicopter. Therefore, inspections of the horizontal stabilizer spar tubes for cracks are required within 50 hours time-in-service (TIS), 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 66 helicopters of U.S. registry will be affected by this AD, that it will take 6 work hours per helicopter to accomplish the actions, and that the average labor rate is $60 per work hour. Required parts will cost approximately $1987 per helicopter. Based on these figures, the total cost impact of this AD on U.S. operators is estimated to be $154,902.

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. 98–SW–17–AD.'' The postcard will be date stamped and returned to the commenter.

The regulations adopted herein will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order 12612, it is determined that this final rule does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

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 98–24–23 Eurocopter France: Amendment 39–10909. Docket No. 98–SW–17–AD.

Applicability: Model SE.3160, SA.316B, SA.316C, and SA.319B helicopters, certificated in any category.

Note 1: This AD applies to each helicopter 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 helicopters that have been modified, altered, or repaired so that the performance of the requirements of this AD is affected, the owner/operator must use the authority provided in paragraph (b) to request approval from the FAA. This approval may address either no action, if the current configuration eliminates the unsafe condition, or different actions necessary to address the unsafe condition described in this AD. Such a request should include an assessment of the effect of the changed configuration on the unsafe condition addressed by this AD. In no case does the presence of any modification, alteration, or repair remove any helicopter from the applicability of this AD.

Compliance: Required as indicated, unless accomplished previously.

To prevent failure of the horizontal stabilizer due to a fatigue crack in a spar tube, Part Number (P/N) 3160.35.30.031.1 or .2, which could cause loss of control of the helicopter, accomplish the following:

(a) Within 50 hours time-in-service (TIS) and thereafter at intervals not to exceed 200 hours TIS or 12 calendar months, whichever comes first, using a 10-power or higher magnifying glass, visually inspect the horizontal stabilizer spar tubes, particularly the embedded areas adjacent to the left and right attach fittings in accordance with paragraph 1.C.1) through 5) of the Planning Information of Eurocopter France Service Bulletin 05.84, Revision 2, dated December 19, 1997 (SB).

(1) If the inspection reveals a crack, before further flight, replace the spar tube with an airworthy spar tube in accordance with paragraph 1.C.7) of the SB.

(2) If the inspection reveals any crazing (fine cracking in the paint), before further flight, remove the paint by rubbing with 200 grit abrasive paper down to bare metal and inspect the spar tube in accordance with paragraphs 1.C.5) and 1.C.6) a) of the SB.

(3) If corrosion pitting, fretting marks, or scratches are found, before further flight, inspect in accordance with paragraphs 1.C.4), 1.C.5), and 1.C.6)a) and c).

(4) If any corrosion pit equals or exceeds 0.5 mm in diameter or if a crack is found as a result of the dye penetrant inspection specified in paragraph 1.C.6)(a) of the SB, before further flight, replace the spar tube with an airworthy spar tube in accordance with paragraph 1.C.7) of the SB.

(5) If pits are less than 0.5mm in diameter or corrosion, fretting, or scratches are repairable, before further flight, repair the spar tube in accordance with paragraph 1.C.6) and reinstall the spar tube in accordance with paragraph 1.C.7) of the SB.

(6) If no corrosion pitting, fretting marks, scratches or crazing are found, reinstall the spar tube in accordance with paragraph 1.C.7) of the SB.

(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, Rotorcraft Standards Staff, 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, Rotorcraft Standards Staff.

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

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

(d) The inspection, replacement and repair shall be done in accordance with Eurocopter France Service Bulletin 05.84, Revision 2, dated December 19, 1997. 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, 2601 Meacham Blvd., Room 663, Fort Worth, Texas 76137; or at the Office of the Federal Register, 800 North Capitol Street, NW., suite 700, Washington, DC.

(e) This amendment becomes effective on December 10, 1998.

Note 3: The subject of this AD is addressed in Direction Generale De L'Aviation Civile (France) AD 91–020–049(A)R2 dated March 11, 1998.

Issued in Fort Worth, Texas, on November 17, 1998.

Eric Bries,

Acting Manager, Rotorcraft Directorate, Aircraft Certification Service.

[FR Doc. 98–31330 Filed 11–24–98; 8:45 am]

BILLING CODE 4910–13–U

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 97–NM–13–AD; Amendment 39–10913; AD 98–24–26]

RIN 2120–AA64

Airworthiness Directives; Boeing Model 747–400 Series Airplanes

AGENCY: Federal Aviation Administration, DOT.

ACTION: Final rule.

SUMMARY: This amendment adopts a new airworthiness directive (AD), applicable to certain Boeing Model 747–400 series airplanes, that requires replacing the cam assembly, cam bellcrank assembly, and thrust reverser control switch actuator on all four thrust levers with new components. This amendment is prompted by a report of an uncommanded automatic retraction of the leading edge flaps during takeoff. The actions specified by this AD are intended to prevent such uncommanded automatic retraction, which would seriously degrade liftoff and climb capabilities, and could result in near-stall conditions at a critical phase of the flight.

DATES: Effective December 30, 1998.

The incorporation by reference of certain publications listed in the regulations is approved by the Director of the Federal Register as of December 30, 1998.

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: Frank van Leynseele, Aerospace Engineer, Systems and Equipment Branch, ANM–130S, FAA, Seattle Aircraft Certification Office, 1601 Lind Avenue, SW., Renton, Washington; telephone (206) 227–2671; fax (206) 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 certain Boeing Model 747–400 series airplanes was published in the **Federal Register** on April 14, 1997 (62 FR 18063). That action proposed to require replacing the cam assembly, cam bellcrank assembly, and thrust reverser control switch actuator on all four thrust levers with new components.

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

Request To Cite the Latest Service Information

Three commenters request that the proposed rule be revised to reflect the latest revision of Boeing Alert Service Bulletin 747–27A2356; the original issue of that service bulletin was referenced in the proposal as the appropriate source of service information.

The FAA concurs with the commenters' request to reference the latest revision of the service bulletin. The FAA has reviewed and approved Boeing Service Bulletin 747–27A2356, Revision 1, dated August 13, 1998. That

revision of the service bulletin provides a correction to certain part numbers of the cam bellcrank assemblies and clarifies certain part-marking instructions. In addition, Revision 1 of the service bulletin describes a revision of the operating position of the reverse thrust isolation valve switches in the thrust levers. The FAA has revised the final rule to reference Boeing Service Bulletin 747–27A2356, Revision 1, dated August 13, 1998, as the appropriate source of service information. The FAA has determined that requiring the replacements to be performed in accordance with Revision 1 of the service bulletin will not pose an additional burden on any operator.

Request To Revise the Cost Impact Information

One commenter, the manufacturer, requests that the cost impact information be corrected to reflect that 46 airplanes of U.S. registry will be affected by this AD, rather than the 35 airplanes estimated in the proposal. The FAA concurs and has revised the cost impact information accordingly.

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 described previously. 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 394 Boeing Model 747–400 series airplanes of the affected design in the worldwide fleet. The FAA estimates that 46 airplanes of U.S. registry will be affected by this AD, that it will take approximately 8 work hours per airplane to accomplish the required actions, and that the average labor rate is $60 per work hour. Required parts would cost between $3,412 and $4,740 per airplane. Based on these figures, the cost impact of the AD is estimated to be between $179,032 and $240,120, or between $3,892 and $5,220 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 substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order 12612, it is determined that this final rule does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

For the reasons discussed above, I certify that this action (1) is not a ''significant regulatory action'' under Executive Order 12866; (2) is not a ''significant rule'' under DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); and (3) will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act. A 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:

98–24–26 Boeing: Amendment 39–10913. Docket 97–NM–13–AD.

Applicability: Model 747–400 series airplanes, line positions 696 through 1090 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 (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 uncommanded automatic retraction of the leading edge flaps during takeoff, which would seriously degrade liftoff and climb capabilities, and could result in near-stall conditions, accomplish the following:

(a) Within 18 months after the effective date of this AD, accomplish the requirements of paragraph (a)(1) or (a)(2) of this AD, as applicable, in accordance with Boeing Service Bulletin 747–27A2356, Revision 1, dated August 13, 1998.

(1) For Groups 1 and 2 airplanes, as listed in the service bulletin: Replace the cam assembly, cam bellcrank assembly, and thrust reverser control switch actuator on all four thrust levers with new components.

(2) For Groups 3 and 4 airplanes, as listed in the service bulletin: Replace the cam bellcrank assembly and thrust reverser control switch actuator on all four thrust levers with new components.

(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, 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.

(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.

(d) The actions shall be done in accordance with Boeing Service Bulletin 747–27A2356, Revision 1, dated August 13, 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 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.

(e) This amendment becomes effective on December 30, 1998.

Issued in Renton, Washington on November 18, 1998.

Darrell M. Pederson,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 98–31324 Filed 11–24–98; 8:45 am]

BILLING CODE 4910–13–U

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 97–CE–139–AD; Amendment 39–10916; AD 98–24–29]

RIN 2120–AA64

Airworthiness Directives; Aerostar Aircraft Corporation PA–60–600 and PA–60–700 Series Airplanes

AGENCY: Federal Aviation Administration, DOT.

ACTION: Final rule.

SUMMARY: This amendment adopts a new airworthiness directive (AD) that applies to all Aerostar Aircraft Corporation (Aerostar) PA–60–600 and PA–60–700 series airplanes. This AD requires repetitively inspecting the forward face of each wing's 55-percent upper spar cap for cracks above the main landing gear fitting in the top of the wheel well, and replacing or repairing any cracked upper spar cap. Reports of spanwise cracks in the area above the main landing gear attachment on two of the affected airplanes prompted this action. The actions specified by this AD are intended to detect and correct fatigue cracking of the wing upper spar cap, which could result in structural failure of the wing spar to the point of failure with consequent loss of control of the airplane.

DATES: Effective January 8, 1999.

The incorporation by reference of certain publications listed in the regulations is approved by the Director of the Federal Register as of January 8, 1999.

ADDRESSES: Service information that applies to this AD may be obtained from the Aerostar Aircraft Corporation, 10555 Airport Drive, Coeur d'Alene Airport, Hayden Lake, Idaho 83835–9742; telephone: (208) 762–0338. This information may also be examined at the Federal Aviation Administration (FAA), Central Region, Office of the Regional Counsel, Attention: Rules Docket No. 97–CE–139–AD, Room 1558, 601 E. 12th Street, Kansas City, Missouri 64106; or at the Office of the Federal Register, 800 North Capitol Street, NW, suite 700, Washington, DC.

FOR FURTHER INFORMATION CONTACT: Mr. Richard N. Simonson, Aerospace Engineer, FAA, Seattle Aircraft Certification Office, 1601 Lind Avenue, SW, Renton, Washington 98055–4056; telephone: (425) 227–2597; facsimile: (425) 227–1181.

SUPPLEMENTARY INFORMATION:

Events Leading to the Issuance of This AD

A proposal to amend part 39 of the Federal Aviation Regulations (14 CFR part 39) to include an AD that would apply to all Aerostar PA–60–600 and PA–60–700 series airplanes was published in the **Federal Register** as a notice of proposed rulemaking (NPRM) on August 21, 1998 (63 FR 44818). The NPRM proposed to require repetitively inspecting the forward face of each wing's 55-percent upper spar cap for cracks above the main landing gear fitting in the top of the wheel well, and replacing or repairing any cracked upper spar cap.

Accomplishment of the proposed inspections as specified in the NPRM would be required in accordance with Aerostar Service Bulletin SB600–132, dated September 3, 1997. Accomplishment of the proposed repair (if necessary) would be required in accordance with an FAA-approved repair scheme. Accomplishment of the proposed replacement (if necessary) would be required in accordance with the applicable maintenance manual.

The NPRM was the result of reports of spanwise cracks in the area above the main landing gear attachment on two of the affected airplanes.

Interested persons have been afforded an opportunity to participate in the making of this amendment. No comments were received on the proposed rule or the FAA's determination of the cost to the public.

The FAA's Determination

After careful review of all available information related to the subject presented above, the FAA has determined that air safety and the public interest require the adoption of the rule as proposed except for minor editorial corrections. The FAA has determined that these minor corrections will not change the meaning of the AD and will not add any additional burden upon the public than was already proposed.

Cost Impact

The FAA estimates that 600 airplanes in the U.S. registry will be affected by this AD, that it will take approximately 2 workhours per airplane to accomplish the initial inspection, and that the average labor rate is approximately $60 an hour. Based on these figures, the total cost impact of the initial inspection specified in this AD on U.S. operators is estimated to be $72,000, or $120 per airplane.

These figures only take into account the costs of the initial inspection and do not take into account the costs of repetitive inspections and the costs associated with any repair that will be necessary if cracks are found. The FAA has no way of determining the number of repetitive inspections an owner/operator will incur over the life of the airplane, or the number of airplanes that will need replacement or repair.

Regulatory Impact

The regulations adopted herein will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order 12612, it is determined that this final rule does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

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

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, 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 (AD) to read as follows:

98–24–29 Aerostar Aircraft Corporation: Amendment 39–10916; Docket No. 97–CE–139–AD.

Applicability: All serial numbers of the following airplane models, certificated in any category:

PA–60–600 (Aerostar 600)
PA–60–601 (Aerostar 601)
PA–60–601P (Aerostar 601P)
PA–60–602P (Aerostar 602P)
PA–60–700P (Aerostar 700P)

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 (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 in the body of this AD, unless already accomplished.

To detect and correct fatigue cracking of the wing upper spar cap, which could result in structural failure of the wing spar to the point of failure with consequent loss of control of the airplane, accomplish the following:

(a) Within the next 100 hours time-in-service (TIS) after the effective date of this AD, unless already accomplished, and thereafter at intervals not to exceed 100 hours TIS, inspect the forward face of each wing's 55-percent upper spar cap for cracks above the main landing gear fitting in the top of the wheel well. Accomplish this inspection in accordance with the INSTRUCTIONS section of Aerostar Service Bulletin SB600–132, dated September 3, 1997. The initial inspection must be accomplished using dye penetrant methods and all subsequent inspections must be, at the very least, visual inspections.

(b) If any crack(s) is/are found during any inspection required by paragraph (a) of this AD, prior to further flight, accomplish either paragraph (b)(1) or (b)(2) of this AD (below):

(1) Replace the upper spar cap in accordance with the applicable maintenance manual, and continue to repetitively inspect as required by paragraph (a) of this AD; or

(2) Obtain a repair scheme from the manufacturer through the FAA, Small Airplane Directorate, at the address specified in paragraph (d) of this AD; incorporate this scheme; and continue to repetitively inspect as required by paragraph (a) of this AD, unless specified differently in the instructions to the repair scheme.

(c) Special flight permits may be issued in accordance with §§ 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.

(d) An alternative method of compliance or adjustment of the initial or repetitive compliance times that provides an equivalent level of safety may be approved by the Manager, Seattle Aircraft Certification Office (ACO), 1601 Lind Avenue, SW, Renton, Washington 98055–4056. The request shall be forwarded through an appropriate FAA 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.

(e) The inspections required by this AD shall be done in accordance with Aerostar Service Bulletin SB600–132, dated September 3, 1997. 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 the Aerostar Aircraft Corporation, 10555 Airport Drive, Coeur d'Alene Airport, Hayden Lake, Idaho 83835–9742. Copies may be inspected at the FAA, Central Region, Office of the Regional Counsel, Room 1558, 601 E. 12th Street, Kansas City, Missouri, or at the Office of the Federal Register, 800 North Capitol Street, NW, suite 700, Washington, DC.

(f) This amendment becomes effective on January 8, 1999.

Issued in Kansas City, Missouri, on November 17, 1998.

Michael Gallagher,

Manager, Small Airplane Directorate, Aircraft Certification Service.

[FR Doc. 98–31435 Filed 11–24–98; 8:45 am]

BILLING CODE 4910–13–U

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 98–CE–106–AD; Amendment 39–10917; AD 98–24–30]

RIN 2120–AA64

Airworthiness Directives; Stemme GmbH & Co. KG Models S10, S10–V, and S10–VT Sailplanes

AGENCY: Federal Aviation Administration, DOT.

ACTION: Final rule; request for comments.

SUMMARY: This amendment adopts a new airworthiness directive (AD) that applies to certain Stemme GmbH & Co. KG (Stemme) Models S10, S10–V, and S10–VT sailplanes. This AD requires inspecting certain areas in the flight control system for cracks; immediately replacing any cracked parts; and eventually replacing all longitudinal coupling with modified coupling regardless if found cracked. This AD is the result of mandatory continuing airworthiness information (MCAI) issued by the airworthiness authority for Germany. The actions specified by this AD are intended to detect and correct cracks in certain areas of the flight control system, which could result in flight control system failure with consequent reduced or loss of control of the sailplane.

DATES: Effective December 18, 1998.

The incorporation by reference of certain publications listed in the regulations is approved by the Director of the Federal Register as of December 18, 1998.

Comments for inclusion in the Rules Docket must be received on or before December 28, 1998.

ADDRESSES: Submit comments in triplicate to the Federal Aviation Administration (FAA), Central Region, Office of the Regional Counsel, Attention: Rules Docket 98–CE–106–AD, Room 1558, 601 E. 12th Street, Kansas City, Missouri 64106.

Service information that applies to this AD may be obtained from Stemme GmbH & Co. KG, Gustav-Meyer-Allee 25, D–13355 Berlin, Federal Republic of Germany; telephone: 49.33.41.31.11.70; facsimile: 49.33.41.31.11.73. This information may also be examined at the Federal Aviation Administration (FAA), Central Region, Office of the Regional Counsel, Attention: Rules Docket 98–CE–106–AD, Room 1558, 601 E. 12th Street, Kansas City, Missouri 64106; or at the Office of the Federal Register, 800 North Capitol Street, NW, suite 700, Washington, DC.

FOR FURTHER INFORMATION CONTACT: Mr. Mike Kiesov, Aerospace Engineer, FAA, Small Airplane Directorate, 1201 Walnut, suite 900, Kansas City, Missouri 64106; telephone: (816) 426–6934; facsimile: (816) 426–2169.

SUPPLEMENTARY INFORMATION:

Discussion

The Luftfahrt-Bundesamt (LBA), which is the airworthiness authority for Germany, recently notified the FAA that an unsafe condition may exist on certain Stemme Models S10, S10–V, and S10–VT sailplanes. The LBA reports that cracks were found on the flight control longitudinal coupling during a static load test on the elevator control system.

The cracks were such that the flight control system would have most likely failed in a short period of operating time with reduced or loss of control of the sailplane.

Other parts in the flight control system have the same type of force intersection design and cracks could exist or develop in these areas also. These areas are the wing flap coupling, part number (P/N) 10SW–RVW; the airbrake control coupling, P/N 10SB–RVW; the flap drive rocker, P/N 10SW–RMW; and the flap/aileron interference shaft, P/N 10SQ–RMW.

Cracks in any of these areas, if not detected and corrected in a timely manner, could result in flight control system failure with consequent reduced or loss of control of the sailplane.

Relevant Service Information

Stemme has issued Service Bulletin A31–10–032, Amendment-Index 02.a, dated July 10, 1998, which specifies procedures for inspecting the following parts for cracks:

- The flight control longitudinal coupling, part number (P/N) 10SH–RVH;
- The wing flap coupling, P/N 10SW–RVW;
- The airbrake control coupling, P/N 10SB–RVW;
- The flap drive rocker, P/N 10SW–RMW; and
- The flap/aileron interference shaft, P/N 10SQ–RMW.

This service bulletin also references Stemme Installation Instructions A34–10–032–E, Amendment-Index 01.a, dated August 10, 1998, which includes procedures for replacing the flight control longitudinal coupling, with modified P/N 10SH–RVH coupling.

The LBA classified this service information as mandatory and issued German AD 1998–323, dated July 1, 1998, in order to assure the continued airworthiness of these sailplanes in Germany.

The FAA's Determination

These sailplane models are manufactured in Germany and are type certificated for operation in the United States under the provisions of § 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, including the service information referenced above; and determined that AD action is necessary for products of this type design that are certificated for operation in the United States.

Explanation of the Provisions of This AD

Since an unsafe condition has been identified that is likely to exist or develop in other Stemme Models S10, S10–V, and S10–VT sailplanes of the same type design registered for operation in the United States, the FAA is taking AD action. This AD requires inspecting the areas of the flight control system previously referenced for cracks; immediately replacing any cracked parts; and eventually replacing all longitudinal coupling with modified coupling regardless if found cracked.

Accomplishment of the inspection will be required in accordance with Stemme Service Bulletin A31–10–032, Amendment-Index 02.a, dated July 10, 1998.

Accomplishment of the longitudinal coupling replacement will be required in accordance with Stemme Installation Instructions A34–10–032–E, Amendment-Index 01.a, dated August 10, 1998.

Accomplishment of the replacement of any other cracked part in the flight control system will be required in accordance with procedures obtained from the manufacturer through the FAA, Small Airplane Directorate.

Possible Follow-up Action

Stemme has modified the longitudinal coupling, but has not modified the wing flap coupling, the airbrake control coupling, the flap drive rocker, and the flap/aileron interference shaft. If cracks are found on parts other than the longitudinal coupling, then Stemme will develop modified parts upon demand as quickly as possible. Operation of the sailplane while the parts are being developed will not be allowed. The FAA has determined that this alternative is better than operating the sailplane with cracked parts in the flight control system.

The FAA will continue to monitor this situation, and may issue additional AD action to require mandatory replacement of modified flight control system parts other than the longitudinal coupling, as these parts become available.

Compliance Time of This AD

The replacement compliance of this AD is presented in calendar time and hours time-in-service (TIS). Cracks in the flight control system occur because of sailplane operation; however, there is a potential for corrosion in this area, which could enhance crack growth. For this reason, the FAA has determined that requiring the replacement at 6 calendar months will assure the safety of the low-usage sailplanes; and requiring the replacement at 100 hours TIS will assure the safety of the high-usage sailplanes. The prevalent compliance time will be that which occurs first.

Differences Between This AD, the Service Information, and the German AD

Stemme Service Bulletin A31–10–032, Amendment-Index 02.a, dated July 10, 1998, specifies inspecting certain areas of the flight control system coupling prior to further flight on sailplanes with over 100 hours TIS. The German AD requires this on all sailplanes registered for operation in Germany.

The FAA does not have the justification to require the initial inspection prior to further flight on all sailplanes with over 100 hours TIS. The FAA is giving a grace period of 5 hours TIS for those sailplanes that have more than 100 hours TIS on the flight control system.

Determination of the Effective Date of the AD

Since a situation exists (possible flight control system failure) that requires the immediate adoption of this regulation, it is found that notice and opportunity for public prior 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 immediate flight safety and, thus, was not preceded by notice and opportunity to 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 above. 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. 98–CE–106–AD.'' The postcard will be date stamped and returned to the commenter.

Regulatory Impact

The regulations adopted herein will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order 12612, it is determined that this final rule does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

The FAA has determined that this regulation is an emergency regulation that must be issued immediately to correct an unsafe condition in aircraft, and 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 (otherwise, an evaluation is not required). A copy of it, if filed, may be obtained from the Rules Docket.

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 (AD) to read as follows:

98–24–30 STEMME GMBH & Co. KG: Amendment 39–10917; Docket No. 98–CE–106–AD.

Applicability: The following models and serial number sailplanes, certificated in any category:

Model	Serial numbers
S10	10–03 through 10–63.
S10–V ..	14–002 through 14–030 and transformed S10–V sailplanes with serial numbers of 14–012M through 14–063M.
S10–VT	11–001, 11–004 through 11–013, and 11–015.

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

Compliance: Required as indicated in the body of this AD, unless already accomplished.

To detect and correct cracks in certain areas of the flight control system, which could result in flight control system failure with consequent reduced or loss of control of the sailplane, accomplish the following:

(a) Upon accumulating 100 hours time-in-service (TIS) on the flight control system or within the next 5 hours TIS after the effective date of this AD, whichever occurs later, inspect the following areas in the flight control system, in accordance with the Instructions section of Stemme Service Bulletin A31–10–032, Amendment-Index 02.a, dated July 10, 1998:

(1) The longitudinal coupling, part number (P/N) 10SH–RVH;

(2) The wing flap coupling, P/N 10SW–RVW;

(3) The airbrake control coupling, P/N 10SB–RVW;

(4) The flap drive rocker, P/N 10SW–RMW; and

(5) The flap/aileron interference shaft, P/N 10SQ–RMW.

(b) Prior to further flight after the inspection required by paragraph (a) of this AD, replace any cracked part with a modified part.

(1) Obtain modified parts (including installation instructions), except for the longitudinal coupling, from the manufacturer through the FAA, Small Airplane Directorate, at the address specified in paragraph (e) of this AD.

(2) Obtain modified longitudinal coupling from the manufacturer as specified in Stemme Service Bulletin A31–10–032, Amendment-Index 02.a, dated July 10, 1998; and install this modified longitudinal coupling in accordance with Stemme Installation Instructions A34–10–032–E, Amendment-Index 01.a, dated August 10, 1998.

Note 2: Stemme Service Bulletin A31–10–032, Amendment-Index 02.a, dated July 10, 1998, includes a return form for reporting the findings of the crack inspection required by paragraph (a) of this AD. The FAA encourages all owners/operators of the affected sailplanes to have this form filled out and send it to the manufacturer at the address specified in paragraph (g) of this AD.

(c) Within the next 6 calendar months after the effective date of this AD or within the next 100 hours TIS after the effective date of this AD, whichever occurs first, unless already accomplished (compliance with the applicable part of paragraph (b) of this AD), obtain modified longitudinal coupling from the manufacturer as specified in Stemme Service Bulletin A31–10–032, Amendment-Index 02.a, dated July 10, 1998; and install this modified longitudinal coupling in accordance with Stemme Installation Instructions A34–10–032–E, Amendment-Index 01.a, dated August 10, 1998.

(d) As of the effective date of this AD, no person may install on any affected sailplane, longitudinal coupling that has not been modified as specified in Stemme Service Bulletin A31–10–032, Amendment-Index 02.a, dated July 10, 1998; and installed in accordance with Stemme Installation Instructions A34–10–032–E, Amendment-Index 01.a, dated August 10, 1998.

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

(f) An alternative method of compliance or adjustment of the compliance times that provides an equivalent level of safety may be approved by the Manager, Small Airplane Directorate, 1201 Walnut, suite 900, Kansas City, Missouri 64106. The request shall be forwarded through an appropriate FAA Maintenance Inspector, who may add comments and then send it to the Manager, Small Airplane Directorate.

Note 3: Information concerning the existence of approved alternative methods of compliance with this AD, if any, may be obtained from the Small Airplane Directorate.

(g) Questions or technical information related to the service information referenced in this AD should be directed to Stemme GmbH & Co. KG, Gustav-Meyer-Allee 25, D–13355 Berlin, Federal Republic of Germany; telephone: 49.33.41.31.11.70; facsimile: 49.33.41.31.11.73. This service information may be examined at the FAA, Central Region, Office of the Regional Counsel, Room 1558, 601 E. 12th Street, Kansas City, Missouri 64106.

(h) The inspection required by this AD shall be done in accordance with Stemme

Service Bulletin A31–10–032, Amendment-Index 02.a, dated July 10, 1998. The longitudinal coupling replacement required by this AD shall be done in accordance with Stemme Installation Instructions A34–10–032–E, Amendment-Index 01.a, dated August 10, 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 Stemme GmbH & Co. KG, Gustav-Meyer-Allee 25, D–13355 Berlin, Federal Republic of Germany. Copies may be inspected at the FAA, Central Region, Office of the Regional Counsel, Room 1558, 601 E. 12th Street, Kansas City, Missouri, 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 German AD 1998–323, dated July 1, 1998.

(i) This amendment becomes effective on December 18, 1998.

Issued in Kansas City, Missouri, on November 17, 1998.

Michael Gallagher,

Manager, Small Airplane Directorate, Aircraft Certification Service.

[FR Doc. 98–31434 Filed 11–24–98; 8:45 am]

BILLING CODE 4910–13–U

DEPARTMENT OF THE TREASURY

Customs Service

19 CFR Part 191

[T.D. 98–16]

RIN 1515–AB95

Drawback; Correction

AGENCY: Customs Service, Department of the Treasury.

ACTION: Correcting amendment.

SUMMARY: This document corrects an error appearing in an appendix to the final regulations relating to drawback (T.D. 98–16) that were published in the **Federal Register** (63 FR 10970) on March 5, 1998.

EFFECTIVE DATE: April 6, 1998.

FOR FURTHER INFORMATION CONTACT: Margaret R. McKenna, Duty and Refund Determination Branch, 202–927–2077.

SUPPLEMENTARY INFORMATION:

Background

The final regulations (T.D. 98–16) that were published in the **Federal Register** on March 5, 1998 (63 FR 10970) revised part 191 of the Customs Regulations relating to drawback (19 CFR part 191). These final regulations contained an error in one of the general manufacturing drawback rulings in Appendix A to part 191, that could prove misleading. This document corrects the error.

Need for Correction

In Appendix A to part 191, the introductory text for general manufacturing drawback ruling ''IV.'' incorrectly describes the exported articles that are manufactured under the ruling as burlap or other textile material. As made clear in the body of the general ruling, however, the exported articles in fact consist of bags or meat wrappers. The bags or meat wrappers are manufactured from imported burlap or other textile material.

The general ruling is largely a republication of a general drawback contract that formerly appeared in the Customs Bulletin in T.D. 83–53, 17 Cust. Bull. 96 (1983). As published, the introductory text in T.D. 83–53 misdescribed the exported articles. This error was repeated in the corresponding introductory text of general manufacturing drawback ruling ''IV.'' in Appendix A to part 191.

Accordingly, this document corrects the introductory text of general manufacturing drawback ruling ''IV.'' to properly reflect the exported articles that are manufactured under the ruling.

List of Subjects in 19 CFR Part 191

Drawback, Reporting and recordkeeping requirements.

Amendment to the Regulations

Accordingly, Appendix A to part 191, Customs Regulations (19 CFR part 191, Appendix A), is corrected by making the following correcting amendment.

PART 191—DRAWBACK

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

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

* * * * *

Appendix A—[Amended]

2. In Appendix A to part 191, following the heading of general manufacturing drawback ruling ''IV.'', the introductory text immediately preceding paragraph ''A.'' of the general ruling is revised to read as follows: ''Drawback may be allowed under 19 U.S.C. 1313(a) upon the exportation of bags or meat wrappers manufactured with the use of imported burlap or other textile material, subject to the following special requirements:''

Dated: November 19, 1998.

Harold M. Singer,

Chief, Regulations Branch.

[FR Doc. 98–31488 Filed 11–24–98; 8:45 am]

BILLING CODE 4820–02–P

DEPARTMENT OF JUSTICE

28 CFR Part 16

[AAG/A Order No. 155–98]

Exemption of System of Records Under the Privacy Act

AGENCY: Department of Justice.

ACTION: Final rule.

SUMMARY: The Department of Justice, Federal Bureau of Investigation, is exempting the National Instant Criminal Background Check System (NICS) from 5 U.S.C. 552a (c) (3) and (4); (d); (e) (1), (2), and (3); (e)(4) (G) and (H); (e) (5) and (8); and (g). The purposes of the exemptions are to maintain the confidentiality and security of information compiled for purposes of criminal or other law enforcement investigation, or of reports compiled at any stage of the law enforcement process. The exemptions are necessary because some information in NICS is from law enforcement records, and may (in the case of NICS denials, for example) relate to additional law enforcement interest. Therefore, to the extent that they may be subject to exemption under subsections (j)(2), (k)(2), and (k)(3), these records are not available under the Privacy Act and not subject to certain of its procedures such as obtaining an accounting of disclosures, notification, access, or amendment/correction.

EFFECTIVE DATE: November 25, 1998.

FOR FURTHER INFORMATION CONTACT: Patricia E. Neely, Program Analyst (202) 616–0178.

SUPPLEMENTARY INFORMATION: This rule finalizes a proposed rule published in the **Federal Register** with an invitation to comment on June 4, 1998 (63 FR 30429). The FBI accepted comments on the proposed rule from interested parties dated on or before July 6, 1998.

Significant Comments

A number of comments raised matters that were more pertinent to other notices of proposed rulemaking relating to the NICS: The National Instant Criminal Background Check System Regulation published in the **Federal Register** on June 4, 1998 (63 FR 30430), and the National Instant Criminal Background Check System User Fee Regulation, published in the **Federal Register** on August 17, 1998 (63 FR 43893). Such comments are addressed in the final NICS rule, the National Instant Criminal Background Check System Regulation, published in the **Federal Register** on October 30, 1998 (63 FR 58303). Other comments raised

matters that were more pertinent to the notice of the establishment of the NICS as a new system of records, the National Instant Criminal Background Check System (NICS) JUSTICE/FBI–018, published in the **Federal Register** on June 4, 1998 (63 FR 30514). Such comments are addressed in a revised NICS records system notice, the National Instant Criminal Background Check System (NICS) JUSTICE/FBI–018, published in the notices section of today's **Federal Register**.

Several comments questioned the authority for exempting records in the NICS. One comment pointed out that certain records in the NICS might not meet the Privacy Act's requirements for exemptions and should therefore not be subject to exemptions. As in the proposed rule, the final rule specifically states that exemptions will apply only to the extent that information in the system is subject to exemption. The comment questioned whether even records relating to criminal matters would be exempt. Case law has established that criminal records do not lose their exempt status even if replicated in a non-criminal law system. (Likewise, other law enforcement records would retain any exempt status even if replicated in a non-law enforcement system.) In addition, however, to the extent it bears on possible violations of the Brady Act, the Gun Control Act (19 U.S.C. Chapter 44), or the National Firearms Act (26 U.S.C. Chapter 53), information in the NICS may comprise law enforcement material in its own right. For instance, NICS denials presumptively relate to an illegal attempt to acquire a firearm in violation of federal law. Even information on approved transactions (which the NICS destroys after a limited time) may implicate law enforcement interests, for example, where audits identify instances in which the NICS is used for unauthorized purposes, such as running checks of people other than actual gun transferees, or where potential handgun transferees or transferors have submitted false identification information to thwart the name check system. One comment suggested that the rule more clearly delineate which NICS records would be subject to exemptions. The Privacy Act itself delineates exemption requirements, and based on the FBI's long experience with similar provisions of other FBI records systems, the proposed language is fully sufficient to guide government officials and preclude adverse impact on individual rights.

Other comments addressed specific exemptions. Several comments objected to the NICS being exempted from 5 U.S.C. 552a(c)(3), which permits an individual to request access to an accounting of certain disclosures of records about the individual. Release of an accounting of disclosures would place an individual on notice of the existence of an outside interest in his or her activities. This would be of particular concern for situations involving NICS denials, which may presumptively indicate an attempted violation of federal criminal law. Even information on approved transactions (which the NICS destroys after a limited time) may implicate law enforcement interests, for example, where audits identify instances in which the NICS is used for unauthorized purposes, such as running checks of people other than actual gun transferees, or where potential handgun transferees or transferors have submitted false identification information to thwart the name check system. Releases of accountings could result in destruction of evidence, intimidation or endangerment of witnesses and victims, flight of the subject from the area, or other activities that would seriously impede law enforcement investigations.

Several comments in essence objected to the NICS' being exempted from 5 U.S.C. 552a(d) and (e)(4) (G) and (H), which permit an individual to request access to (and amendment of) records about the individual. Access to system records subject to exemption would compromise ongoing investigations, reveal investigatory techniques and confidential informants, invade the privacy of persons who provide information in connection with a particular investigation, or constitute a potential danger to the health or safety of law enforcement personnel. In addition, requiring the FBI to amend information thought to be not accurate, timely, relevant, and complete, because of the nature of the information collected and the length of time it is maintained, would create an impossible administrative burden by forcing the agency to continuously update its investigations attempting to resolve these issues. Individuals concerned with the accuracy of records maintained about them remain free to avail themselves of any means for access or amendment applicable to the record sources, and record contributors have a continuing responsibility to delete or update contributions determined to be invalid or incorrect (see 28 CFR 25.5(b)). Moreover, the NICS itself provides an alternate procedure for amending erroneous records resulting in transfer denials (28 CFR 25.10).

One comment objected to the NICS being exempted from 5 U.S.C. 552a(e)(1) and (5), which require that an agency maintain only relevant records necessary to accomplish the system's purpose and with such accuracy, relevance, timeliness, and completeness as is reasonably necessary to assure fairness to the individual. Without this exemption, the NICS might be prevented from acquiring data not shown to be accurate, relevant, timely, and complete at the moment of its acquisition by the NICS. This exemption is necessary because it is impossible to predict when and for whom it will be necessary to use the information in the NICS, and, accordingly, it is not possible to determine in advance when the records will be timely or relevant. Relevance and necessity are questions of circumstance and timing, and it is only after the information is evaluated that the relevance and necessity of the information can be established. In addition, since most of the records are from state, local, and other federal agency record systems, it would be impossible to review all of the records as they are submitted to verify their accuracy. However, as previously discussed, affected persons remain free to avail themselves of any means for addressing accuracy, timeliness, or completeness applicable to the record sources, and record contributors have a continuing responsibility to delete or update contributions determined to be invalid or incorrect (see 28 CFR 25.5(b)). In addition, the Department and the FBI have made efforts to enhance the quality of NICS records. Using funding authorized by the Brady Act, section 106(b), the Department has provided substantial assistance to the states for the purpose of improving their criminal history record systems. The FBI will be responsible for maintaining data integrity during NICS operations managed and carried out by the FBI, including the conduct of periodic quality control checks to verify that the information provided to the NICS Index remains valid and correct (28 CFR 25.5(a)). Finally, the NICS itself provides an alternate procedure for amending erroneous records resulting transfer denials (28 CFR 25.10).

This order relates to individuals rather than small business entities. Nevertheless, pursuant to the requirements of the Regulatory Flexibility Act, 5 U.S.C. 601–612, it is hereby stated that this order will not have ''a significant economic impact on a substantial number of small entities.''

List of Subjects in 28 CFR Part 16

Administrative practices and procedures, Courts, Freedom of

Information Act, Government in the Sunshine Act, and the Privacy Act.

Pursuant to the authority vested in the Attorney General by 5 U.S.C. 552a and delegated to me by Attorney General Order 793–78, 28 CFR part 16 is amended as set forth below.

Dated: November 19, 1998.

Stephen R. Colgate,

Assistant Attorney General for Administration.

PART 16—[AMENDED]

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

Authority: 5. U.S.C. 301, 552, 552a, 552b(g), 553; 18 U.S.C. 4203 (a)(1); 28 U.S.C. 509, 510, 534; 31 U.S.C. 3717, 9701.

2. 28 CFR 16.96 is amended by adding paragraphs (p) and (q) to read as follows:

§ 16.96 Exemption of Federal Bureau of Investigation (FBI) Systems—limited access.

* * * * *

(p) The National Instant Criminal Background Check System (NICS), (JUSTICE/FBI–018), a Privacy Act system of records, is exempt:

(1) Pursuant to 5 U.S.C. 552a(j)(2), from subsections (c) (3) and (4); (d); (e) (1), (2) and (3); (e)(4) (G) and (H); (e) (5) and (8); and (g); and

(2) Pursuant to 5 U.S.C. 552a(k) (2) and (3), from subsections (c)(3), (d), (e)(1), and (e)(4) (G) and (H).

(q) These exemptions apply only to the extent that information in the system is subject to exemption pursuant to 5 U.S.C. 552a(j)(2), (k)(2), and (k)(3). Exemptions from the particular subsections are justified for the following reasons:

(1) From subsection (c)(3) because the release of the accounting of disclosures would place the subject on notice that the subject is or has been the subject of investigation and result in a serious impediment to law enforcement.

(2) From subsection (c)(4) to the extent that it is not applicable since an exemption is claimed from subsection (d).

(3)(i) From subsections (d) and (e)(4) (G) and (H) because these provisions concern an individual's access to records which concern the individual and such access to records in the system would compromise ongoing investigations, reveal investigatory techniques and confidential informants, invade the privacy of persons who provide information in connection with a particular investigation, or constitute a potential danger to the health or safety of law enforcement personnel.

(ii) In addition, from subsection (d)(2) because, to require the FBI to amend information thought to be not accurate, timely, relevant, and complete, because of the nature of the information collected and the essential length of time it is maintained, would create an impossible administrative burden by forcing the agency to continuously update its investigations attempting to resolve these issues.

(iii) Although the Attorney General is exempting this system from subsections (d) and (e)(4) (G) and (H), an alternate method of access and correction has been provided in 28 CFR, part 25, subpart A.

(4) From subsection (e)(1) because it is impossible to state with any degree of certainty that all information in these records is relevant to accomplish a purpose of the FBI, even though acquisition of the records from state and local law enforcement agencies is based on a statutory requirement. In view of the number of records in the system, it is impossible to review them for relevancy.

(5) From subsections (e) (2) and (3) because the purpose of the system is to verify information about an individual. It would not be realistic to rely on information provided by the individual. In addition, much of the information contained in or checked by this system is from Federal, State, and local criminal history records.

(6) From subsection (e)(5) because it is impossible to predict when it will be necessary to use the information in the system, and, accordingly, it is not possible to determine in advance when the records will be timely. Since most of the records are from State and local or other Federal agency records, it would be impossible to review all of them to verify that they are accurate. In addition, an alternate procedure is being established in 28 CFR, part 25, subpart A, so the records can be amended if found to be incorrect.

(7) From subsection (e)(8) because the notice requirement could present a serious impediment to law enforcement by revealing investigative techniques and confidential investigations.

(8) From subsection (g) to the extent that, pursuant to subsections (j)(2), (k)(2), and (k)(3), the system is exempted from the other subsections listed in paragraph (p) of this section.

[FR Doc. 98–31502 Filed 11–24–98; 8:45 am]

BILLING CODE 4410–02–P

DEPARTMENT OF THE INTERIOR

Office of Surface Mining Reclamation and Enforcement

30 CFR Part 904

[SPATS No. AR–032–FOR]

Arkansas Regulatory Program

AGENCY: Office of Surface Mining Reclamation and Enforcement (OSM), Interior.

ACTION: Final rule; approval of amendment.

SUMMARY: OSM is approving an amendment to the Arkansas regulatory program (Arkansas program) under the Surface Mining Control and Reclamation Act of 1977 (SMCRA). Arkansas proposed to revise the Arkansas Surface Coal Mining and Reclamation Code (ASCMRC) concerning revegetation success standards. Arkansas also proposed to add policy guidelines for determining Phase III revegetation success for pasture and previously mined areas, cropland, forest products, recreation and wildlife habitat, and industrial/commercial and residential areas. Arkansas intends to revise its program to be consistent with the corresponding Federal regulations.

EFFECTIVE DATE: November 25, 1998.

FOR FURTHER INFORMATION CONTACT: Michael C. Wolfrom, Director, Tulsa Field Office, Office of Surface Mining Reclamation and Enforcement, 5100 East Skelly Drive, Suite 470, Tulsa, Oklahoma 74135–6548. Telephone: (918) 581–6430. Internet: mwolfrom@mcrgw.osmre.gov.

SUPPLEMENTARY INFORMATION:

I. Background on the Arkansas Program

On November 21, 1980, the Secretary of the Interior conditionally approved the Arkansas program. You can find background information on the Arkansas program, including the Secretary's findings, the disposition of comments, and the conditions of approval in the November 21, 1980, **Federal Register** (45 FR 77003). You can find information on later actions concerning the Arkansas program at 30 CFR 904.12, 904.15, and 904.16.

II. Submission of the Proposed Amendment

By letter dated August 27, 1998 (Administrative Record No. AR–562), Arkansas sent us an amendment to its program under SMCRA. Arkansas proposed to amend its program in response to the November 26, 1985, and October 14, 1997, letters (Administrative Record Nos. AR–332 and AR–559.02, respectively) that we sent to Arkansas under 30 CFR 732.17(c).

We announced receipt of the amendment in the September 11, 1998, **Federal Register** (63 FR 48661). In the same document, we opened the public comment period and provided an opportunity for a public hearing or meeting on the adequacy of the amendment. The public comment period closed on October 13, 1998. Because no one requested a public hearing or meeting, we did not hold one.

During our review of the amendment, we identified concerns relating to Arkansas' proposal to remove the definition of ''grazingland'' and associated references from its regulations. We discussed our concerns with Arkansas during a telephone conversation on October 6, 1998 (Administrative Record No. AR–562.06).

By letter dated October 8, 1998 (Administrative Record No. AR–562.05), Arkansas withdrew its proposal to remove the definition of ''grazingland'' from its regulations at ASCMRC 701.5. Arkansas also withdrew its proposals to remove references to the land use category of ''grazingland'' from the definition of ''renewal resource lands'' at ASCMRC 701.5 and ASCMRC 816.116(b)(1). We find that Arkansas' withdrawal of these proposed revisions is an adequate response to our concerns. Therefore, we are proceeding with this final rule **Federal Register** document.

III. Director's Findings

Following, under SMCRA and the Federal regulations at 30 CFR 732.15 and 732.17, are our findings concerning the amendment.

Any revisions that we do not discuss below concern nonsubstantive wording changes, or revised cross-references and paragraph notations to reflect organizational changes resulting from this amendment.

1. ASCMRC 701.5 Definition of ''Renewable Resource Lands''

Arkansas corrected a typographical error by changing the words ''these charge'' to the words ''the recharge.'' With the correction of this error, Arkansas' definition is the same as the Federal definition of ''Renewal resource lands'' at 30 CFR 701.5.

2. ASCMRC 816.116(b)(1) Revegetation Success Standards for Areas Developed for Use as Pasture Land

Arkansas amended ASCMRC 816.116(b)(1) by replacing the general phrase ''such other success standards approved by the Department'' with a reference to its revegetation guidelines. ASCMRC 816.116(b)(1) now requires ground cover and production of living plants on areas developed for use as grazing and pasture land to be at least equal to that of a reference area or to comply with the criteria contained in Arkansas' ''Phase III Revegetation Success Standards for Pasture and Previously Mined Areas.''

The counterpart Federal regulations at 30 CFR 816.116(b)(1) and 817.116(b)(1) require ground cover and production of living plants on revegetated grazing land and pasture land areas to be at least equal to that of a reference area or such other success standards approved by the regulatory authority. As discussed later in this document, Arkansas' revegetation success guidelines for pasture are consistent with the Federal regulations for revegetation of disturbed areas. Therefore, the revisions to ASCMRC 816.116(b)(1) are consistent with and no less effective than the counterpart Federal regulations at 30 CFR 816.116(b)(1) and 817.116(b)(1).

3. ASCMRC 816.116(b)(2) Revegetation Success Standards for Areas Developed for Use as Cropland

Arkansas revised ASCMRC 816.116(b)(2) by replacing the reference to ''such other success standards approved by the Department'' with a reference to its revegetation guidelines. ASCMRC 816.116(b)(2) now requires crop production on areas developed for use as cropland to be at least equal to that of a reference area or to comply with the criteria contained in Arkansas' ''Phase III Revegetation Success Standards for Cropland.''

The Federal regulations at 30 CFR 816.116(b)(2) and 817.116(b)(2) require crop production on revegetated cropland areas to be at least equal to that of a reference area or such other success standards approved by the regulatory authority. As discussed later in this document, Arkansas' revegetation success guidelines for cropland are no less effective than the Federal regulations for revegetation of disturbed areas. Therefore, we find that the revisions to ASCMRC 816.116(b)(2) are consistent with and no less effective than the counterpart Federal regulations at 30 CFR 816.116(b)(2) and 817.116(b)(2).

4. ASCMRC 816.116(b)(3)(iv) Revegetation Success Standards for Areas to be Developed for Fish and Wildlife Habitat, Recreation, Shelter Belts, or Forest Products

Arkansas added a new paragraph (b)(3)(iv) that requires vegetation success for areas to be developed for fish and wildlife habitat, recreation, shelter belts, or forest products to comply with the criteria contained in its ''Phase III Revegetation Success Standards for Forest Products'' or its ''Phase III Revegetation Success Standards for Recreation and Wildlife Habitat.''

There is no direct Federal counterpart to this provision at 30 CFR 816.116(b)(3). However, the Federal regulations at 30 CFR 816.116(a)(1) and 817.116(a)(1) require a regulatory authority to include standards for success and statistically valid sampling techniques for measuring success in an approved program. As discussed later in this document, Arkansas' guidelines for revegetation success standards and sampling techniques for measuring success of forest products and of recreation and wildlife habitat are no less effective than the Federal regulations for revegetation of disturbed areas. Therefore, we are approving the addition of ASCMRC 816.116(b)(3)(iv), which references these guidelines.

5. ASCMRC 816.116(b)(4) Revegetation Success Standards for Areas to be Developed for Industrial, Commercial, or Residential Use

Arkansas revised ASCMRC 816.116(b)(4) by requiring that vegetative ground cover comply with the criteria contained in its revegetation guidelines. ASCMRC 816.116(b)(4) now requires vegetative ground cover for areas to be developed for industrial, commercial, or residential use less than two years after regrading is completed to not be less than that required to control erosion and to comply with the criteria contained in Arkansas' ''Phase III Revegetation Success Standards for Industrial, Commercial, and Residential Revegetation.''

The counterpart Federal regulations at 30 CFR 816.116(b)(4) and 817.116(b)(4) require vegetative ground cover for areas to be developed for industrial, commercial, or residential use less than two years after regrading is completed to not be less than that required to control erosion. As discussed later in this document, Arkansas' revegetation success guidelines for industrial, commercial, and residential areas are no

less effective than the Federal regulations for revegetation of disturbed areas. Therefore, we find that the revisions to ASCMRC 816.116(b)(4) are no less effective than the Federal regulations at 30 CFR 816.116(b)(4) and 817.116(b)(4).

6. ASCMRC 816.116(b)(5) Revegetation Success for Areas Previously Disturbed by Mining

Arkansas added a new provision at ASCMRC 816.116(b)(5) which requires vegetative ground cover for areas previously disturbed by mining that were not reclaimed to the requirements of Subchapter K and that are remined or otherwise redisturbed by surface coal mining operations to comply with the criteria contained in its Phase III Revegetation Success Standards for Pasture and Previously Mined Areas. This provision is in addition to the existing requirement that the vegetative ground cover must be no less than the ground cover existing before redisturbance and must be adequate to control erosion.

There are no direct Federal counterparts to this additional provision at 30 CFR 816.116(b)(5) and 817.116(b)(5), which also concern areas previously disturbed by mining. However, the Federal regulations at 30 CFR 816.116(a)(1) and 817.116(a)(1) require a regulatory authority to include standards for success and statistically valid sampling techniques for measuring success in an approved program. As discussed later in this document, Arkansas' guidelines for revegetation success standards and sampling techniques for measuring success of previously mined areas are no less effective than the Federal regulations for revegetation of disturbed areas. Therefore, we are approving the addition of Arkansas' new provision at ASCMRC 816.116(b)(5).

7. Phase III Revegetation Success Standards for Pasture and Previously Mined Areas

Arkansas added policy guidelines in a guidance document entitled ''Phase III Revegetation Success Standards for Pasture and Previously Mined Areas.'' This guidance document describes the criteria and procedures for determining Phase III ground cover and production success for areas being restored to pasture under ASCMRC 816.116(b)(1) and for areas that were previously mined under ASCMRC 816.116(b)(5). It provides general revegetation requirements and success standards and measurement frequency for ground cover and forage production. It also includes sampling procedures and techniques, data submission and analysis criteria, and mitigation plan requirements.

Arkansas requires revegetation success on pasture and previously mined land to be determined on the basis of the general revegetation requirements of the approved permit, ground cover, and production. The permittee is responsible for measuring the vegetation and for submitting the data to Arkansas for analysis. Any previously mined land that was remined or redisturbed and reclaimed to a land use of pasture must achieve the same success standard for cover as land that was not previously disturbed by mining. However if the area is not reclaimed to the requirements of ASCMRC 816.111(b)(4), the vegetative cover must not be less than the ground cover existing before redisturbance and must be adequate to control erosion. The permittee must determine the ground cover standard and incorporate it into the permit prior to disturbance. Arkansas must determine that the general requirements for revegetation success are satisfied as stated in ASCMRC 816.111. The permittee must measure the vegetation in accordance with the procedures outlined in the guidance document. The guidance document sets out specific success standards and measurement frequencies for ground cover and production based on the regulatory requirements. The permittee must determine the forage production standard with a reference area or a current United States Department of Agriculture, Natural Resources Conservation Service (USDA/NRCS) high management target yield. The permittee must use statistically valid random sampling methods. Ground cover is to be measured by the line-point transect method. Forage production is to be measured utilizing sampling frames or whole area harvest. The guidance document also provides a method for establishing representative test plots. The permittee is to use a prescribed formula to determine sample adequacy. If the data indicate that the vegetation is close to but less than the standard, the permittee must submit the data to Arkansas for statistical analysis. Arkansas must determine if the differences are statistically significant within the limits allowed by regulation. The permittee must provide maps for each Phase III plan. The maps are to indicate the location of each sampling transect and sample frame point, the area covered by the sampling, and all permit boundaries. If the permittee can not demonstrate revegetation success in the fourth year after completion of the last augmented seeding, the permittee must submit a mitigation plan to Arkansas. The mitigation plan must include a statement of the problem, a discussion of methods to correct the problem, and a new Phase III liability release plan. If the plan involves augmented activities, the five year responsibility period will begin again. The appendices that are included with the guidance document illustrate the selection of random sampling sites; data forms for line point transects; summary data forms for sampling frames; a T-table; data forms for forage crop production data harvested as baled hay; an example use of sample adequacy formula for ground cover measurements and hay production measurements; statistical analysis on sampling frame data and whole release area harvesting; yield adjustments for release areas due to differing soil series; and grasses of acceptable plant species for permanent ground cover on agricultural areas.

The Federal regulations at 30 CFR 816.116(a)(1) and 817.116(a)(1) require a regulatory authority to include standards for success and statistically valid sampling techniques for measuring success in its approved program. Arkansas accomplished this by adoption of a detailed guidance document illustrating the methods to be used by the permittee to measure revegetation success for pasture and previously mined areas. We find that Arkansas' policy guidelines for pasture land use areas and previously mined areas are consistent with the requirements of 30 CFR 816.116(a)(1) and 817.116(a)(1) and are no less effective than the Federal regulations for revegetation of disturbed areas.

8. Phase III Revegetation Success Standards for Cropland

Arkansas added policy guidelines in a guidance document entitled ''Phase III Revegetation Success Standards for Cropland.'' This guidance document describes the criteria and procedures for determining Phase III production success standards for areas being restored to cropland under ASCMRC 816.116 (b)(2). It provides success standards and measurement frequency for ground cover and crop production. It also includes sampling procedures and techniques, data submission and analysis criteria, and mitigation plan requirements.

Arkansas requires that revegetation success on cropland be determined on the basis of ground cover and crop production. The permittee is responsible for measuring the vegetation and for submitting the data to Arkansas for analysis. Measurements of the

vegetation must be made in accordance with the procedures outlined in the guidance document. The guidance document sets out specific success standards and measurement frequencies for ground cover and crop production based on the regulatory requirements of ASCMRC 816.111. The permittee is to determine the crop production standard in accordance with a reference area or a technical standard. Approved technical standards include the county average or target yield established by the USDA/NRCS. Target yields must be adjusted annually and be representative of yields expected when using high management practices common to the area. The permittee is to use statistically valid random sampling methods. Ground cover is to be measured by the line-point transect method. Crop production is to be measured utilizing sampling frames for forage production or whole area harvest for forage or row crop production. Arkansas must approve any manual sampling of row crops. It is only allowed when weather or other factors prevent mechanical harvest. The guidance document also provides a method for establishing representative test plots for use with row crop production. The permittee is to use a prescribed formula to determine sample adequacy. If the data indicate that the vegetation is close to but less than the standard, the permittee must submit the data to Arkansas for statistical analysis. Arkansas must determine if the differences are statistically significant within the limits allowed by regulation. The permittee must provide maps for each Phase III plan. The maps must indicate the location of each sampling transect and sample frame point, the area covered by the sampling, and all permit boundaries. If the permittee can not demonstrate revegetation success in the fifth year after completion of initial seeding, the permittee must submit a mitigation plan to Arkansas. The permittee must include a statement of the problem, a discussion of methods to correct the problem, and a new Phase III liability release plan. If the plan involves augmented activities, the five year responsibility period will begin again. The appendices that are included with the guidance document illustrate the selection of random sampling sites; summary data forms for sampling frames; data forms for crop production data; a T-table; an example of sample adequacy determination for hay production measurements; statistical analysis for sampling frame data; a data form for forage crop production data harvested as baled hay; statistical analysis of whole release area harvesting; yield adjustments for release areas due to differing soil series and for moisture; crop surveyor's affidavit of qualifications and crop production yields; grasses of acceptable plant species for permanent ground cover on agricultural areas; and procedures for manually sampling row crops.

The Federal regulations at 30 CFR 816.116(a)(1) and 817.116(a)(1) require a regulatory authority to include standards for success and statistically valid sampling techniques for measuring success in its approved program. Arkansas accomplished this by adoption of a detailed guidance document illustrating the methods to be used by the permittee to measure revegetation success for cropland. We find that Arkansas' policy guidelines for cropland are consistent with the requirements of 30 CFR 816.116(a)(1) and 817.116(a)(1) and are no less effective than the Federal regulations for revegetation of disturbed areas.

9. Phase III Revegetation Success Standards for Forest Products

Arkansas added policy guidelines in a guidance document entitled ''Phase III Revegetation Success Standards for Forest Products.'' This guidance document describes the criteria and procedures for determining Phase III ground cover and tree and shrub stocking success for areas being restored to forest products under ASCMRC 816.116(b)(3). It provides general revegetation requirements and success standards and measurement frequency for ground cover and tree and shrub stocking rates. It also includes sampling procedures and techniques, data submission and analysis criteria, and mitigation plan requirements.

Arkansas requires that revegetation success for forest products be determined on the basis of the general revegetation requirements of the approved permit, ground cover, and tree and shrub stocking and survival. The permittee is responsible for measuring the vegetation and for submitting the data to Arkansas for analysis. The permittee must measure the vegetation in accordance with the procedures outlined in the guidance document. Arkansas must determine that the general requirements for revegetation success are satisfied as stated in ASCMRC 816.111. The guidance document sets out specific success standards and measurement frequencies for ground cover and tree and shrub stocking rates based on the regulatory requirements and consultation and approval of the Arkansas Forestry Commission on a permit specific basis. The permittee must use statistically valid random sampling methods. Ground cover is to be measured by the line-point transect method, and tree and shrub stocking is to be measured with sampling circles. The permittee must use a prescribed formula to determine sample adequacy. If the data indicate that the vegetation is close to but less than the standard, the permittee must submit the data to Arkansas for statistical analysis. Arkansas must determine if the differences are statistically significant within the limits allowed by regulation. The permittee must provide maps for each Phase III plan. The maps must indicate the location of each sampling transect and sample frame point, the area covered by the sampling, and all permit boundaries. If the permittee can not demonstrate revegetation success in the fifth year after completion of initial seeding, the permittee must submit a mitigation plan to Arkansas. The permittee must include a statement of the problem, a discussion of methods to correct the problem, and a new Phase III liability release plan. If the plan involves augmented activities, the five year responsibility period will begin again. The appendices that are included with the guidance document illustrate the selection of random sampling sites; data forms for line-point transect; data forms for sample circles; a T-table; examples of sample adequacy determinations for ground cover and tree and shrub stocking; statistical analysis for ground cover and tree and shrub stocking; and accepted plant species.

The Federal regulations at 30 CFR 816.116(a)(1) and 817.116(a)(1) require a regulatory authority to include standards for success and statistically valid sampling techniques for measuring success in its approved program. Arkansas accomplished this by adoption of a detailed guidance document illustrating the methods to be used by the permittee to measure revegetation success for forest products. We find that Arkansas' policy guidelines for forest products are consistent with the requirements of 30 CFR 816.116(a)(1) and 817.116(a)(1) and are no less effective than the Federal regulations for revegetation of disturbed areas.

10. Phase III Revegetation Success Standards for Recreation and Wildlife Habitat

Arkansas added policy guidelines in a guidance document entitled ''Phase III Revegetation Success Standards for Recreation and Wildlife Habitat.'' This guidance document describes the criteria and procedures for determining

Phase III success for areas being restored to recreation and wildlife habitat under ASCMRC 816.116(b)(3). It provides success standards and measurement frequency for ground cover and tree and shrub stocking. It also includes sampling procedures and techniques, data analysis criteria, and mitigation plan requirements.

Arkansas requires that revegetation success on recreation areas and wildlife habitat be determined on the basis of the general revegetation requirements of the approved permit, ground cover, and tree and shrub stocking and survival. The permittee is responsible for measuring the vegetation and for submitting the data to Arkansas for analysis. Measurements of the vegetation must be made in accordance with the procedures outlined in the guidance document. Arkansas must determine that the general requirements for revegetation success are satisfied as stated in ASCMRC 816.111. The guidance document sets out specific success standards and measurement frequencies for ground cover and tree and shrub stocking rates based on the regulatory requirements and consultation and approval of the Arkansas Game and Fish Commission on a permit specific basis. The permittee must use statistically valid random sampling methods. Ground cover is to be measured by the line-point transect method, and tree and shrub stocking is to be measured with sampling circles. Sample adequacy is to be determined using a prescribed formula. If the data indicate that the vegetation is close to but less than the standard, the permittee must submit the data to Arkansas for statistical analysis. Arkansas must determine if the differences are statistically significant within the limits allowed by regulation. The permittee must provide maps for each Phase III plan. The maps must indicate the location of each sampling transect and sample frame point, the area covered by the sampling, and all permit boundaries. If the permittee can not demonstrate revegetation success in the fifth year after completion of initial seeding, the permittee must submit a mitigation plan to Arkansas. The mitigation plan must include a statement of the problem, a discussion of methods to correct the problem, and a new Phase III liability release plan. If the plan involves augmented activities then the five year responsibility period will begin again. The appendices that are included with the guidance document illustrate the selection of random sampling sites; data forms for line-point transects; data forms for sample circles; a T-table; examples of sample adequacy determinations for ground cover and for tree and shrub stocking; statistical analysis for ground cover and tree and shrub stocking; and accepted plant species.

The Federal regulations at 30 CFR 816.116(a)(1) and 817.116(a)(1) require a regulatory authority to include standards for success and statistically valid sampling techniques for measuring success in its approved program. Arkansas accomplished this by adoption of a detailed guidance document illustrating the methods to be used by the permittee to measure revegetation success for recreation areas and wildlife habitat. We find that Arkansas' policy guidelines for recreation areas and wildlife habitat are consistent with the requirements of 30 CFR 816.116(a)(1) and 817.116(a)(1) and are no less effective than the Federal regulations for revegetation of disturbed areas.

11. Phase III Success Standards for Industrial/Commercial and Residential Revegetation

Arkansas added policy guidelines in a guidance document entitled ''Phase III Success Standards for Industrial/Commercial and Residential Revegetation.'' This guidance document describes the criteria and procedures for determining Phase III ground cover success for areas being restored to an industrial/commercial or residential land use under ASCMRC 816.116(b)(4). It provides general revegetation requirements and success standards and measurement frequency for ground cover. It also includes sampling procedures and techniques, data submission and analysis criteria, and mitigation plan requirements.

Arkansas requires that revegetation success on industrial/commercial and residential land use areas be determined on the basis of the general revegetation requirements of the approved permit and ground cover density. The permittee is responsible for measuring the vegetation and for submitting the data to Arkansas for analysis. The permittee must measure the vegetation in accordance with the procedures outlined in the guidance document. Arkansas must determine that the general requirements for revegetation success are satisfied as stated in ASCMRC 816.111. The guidance document sets out specific success standards and measurement frequencies for ground cover based on the regulatory requirements. The permittee must use statistically valid random sampling methods. Ground cover is to be measured by the line-point transect method. Sample adequacy is to be determined using a prescribed formula. If the data indicate that the vegetation is close to but less than the standard, the permittee must submit the data to Arkansas for statistical analysis. Arkansas must determine if the differences are statistically significant within the limits allowed by regulation. The permittee must provide maps for each Phase III plan. The maps must indicate the location of each sampling transect and sample frame point, the area covered by the sampling, and all permit boundaries. If the permittee can not demonstrate revegetation success, a mitigation plan must be submitted to Arkansas. The permittee must include a statement of the problem, a discussion of methods to correct the problem, and a new Phase III liability release plan. If the plan involves augmented activities, the five year responsibility period will begin again. The appendices that are included with the guidance document illustrate the selection of random sampling sites; data forms for line-point transects; a T-table; an example of sample adequacy determination for ground cover; statistical analysis for ground cover; and accepted plant species.

The Federal regulations at 30 CFR 816.116(a)(1) and 817.116(a)(1) require a regulatory authority to include standards for success and statistically valid sampling techniques for measuring success in its approved program. Arkansas accomplished this by adoption of a detailed guidance document illustrating the methods to be used by the permittee to measure revegetation success for industrial/commercial and residential land uses. We find that Arkansas' policy guidelines for industrial/commercial and residential land uses are consistent with the requirements of 30 CFR 816.116(a)(1) and 817.116(a)(1) and are no less effective than the Federal regulations for revegetation of disturbed areas.

12. Prime Farmland and Grazing Land Revegetation Success Guidelines

Prime farmland and grazing land are also potential pre- and post-mining land uses in the State. In its letters dated August 27, 1998, and October 8, 1998, Arkansas indicated that prime farmland and grazing land guidelines will be submitted at a later date.

IV. Summary and Disposition of Comments

Public Comments

We asked for public comments on the amendment, but we did not receive any.

Federal Agency Comments

Under 30 CFR 732.17(h)(11)(i), we requested comments on the amendment from various Federal agencies with an actual or potential interest in the Arkansas program (Administrative Record No AR–562.01).

By letter dated September 28, 1998 (Administrative Record No. AR–562.07), the U.S. Army Corps of Engineers responded that its review found the amendment satisfactory.

Environmental Protection Agency (EPA)

The Federal regulation at 30 CFR 732.17(h)(11)(ii) requires us to get written consent from the EPA for those provisions of a program amendment that relate to air or water quality standards promulgated under the authority of the Clean Water Act (33 U.S.C. 1251 *et seq.*) or the Clean Air Act (42 U.S.C. 7401 *et seq.*). None of the revisions that Arkansas proposed to make in this amendment pertain to air or water quality standards. Therefore, we did not request the EPA's consent.

Under 30 CFR 732.17(h)(11)(i), we requested comments on the amendment from the EPA (Administrative Record No. AR–562.03). The EPA did not respond to our request.

State Historical Preservation Officer (SHPO) and the Advisory Council on Historic Preservation (ACHP)

Under 30 CFR 732.17(h)(4), we are required to request comments from the SHPO and ACHP on proposed amendments which may have an effect on historic properties. We requested the SHPO and ACHP to comment on Arkansas' amendment (Administrative Record No. AR–562.02), but neither responded to our request.

V. Director's Decision

Based on the above findings, we approve the amendment as submitted by Arkansas on August 27, 1998, and as revised on October 8, 1998.

We approve the revegetation guidelines that Arkansas proposed with the provision that they be fully placed in force in identical form to the guidelines submitted to and reviewed by OSM and the public.

To implement this decision, we are amending the Federal regulations at 30 CFR Part 904, which codifies decisions concerning the Arkansas program. This final rule is effective immediately to expedite the State program amendment process and to encourage Arkansas to bring its program into conformity with the Federal standards. SMCRA requires consistency of State and Federal standards.

VI. Procedural Determinations

Executive Order 12866

The Office of Management and Budget (OMB) exempts this rule from review under Executive Order 12866 (Regulatory Planning and Review).

Executive Order 12988

The Department of the Interior conducted the reviews required by section 3 of Executive Order 12988 (Civil Justice Reform) and determined that, to the extent allowed by law, this rule meets the applicable standards of subsections (a) and (b) of that section. However, these standards are not applicable to the actual language of State regulatory programs and program amendments since each such program is drafted and published by a specific State, not by OSM. Under sections 503 and 505 of SMCRA (30 U.S.C. 1253 and 1255) and 30 CFR 730.11, 732.15, and 732.17(h)(10), decisions on State regulatory programs and program amendments submitted by the States must be based solely on a determination of whether the submittal is consistent with SMCRA and its implementing Federal regulations and whether the other requirements of 30 CFR Parts 730, 731, and 732 have been met.

National Environmental Policy Act

This rule does not require an environmental impact statement since section 702(d) of SMCRA (30 U.S.C. 1292(d)) provides that agency decisions on State regulatory program provisions do not constitute major Federal actions within the meaning of section 102(2)(C) of the National Environmental Policy Act (42 U.S.C. 4332(2)(C)).

Paperwork Reduction Act

This rule does not contain information collection requirements that require approval by OMB under the Paperwork Reduction Act (44 U.S.C. 3507 *et seq.*).

Regulatory Flexibility Act

The Department of the Interior determined that this rule will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). The State submittal which is the subject of this rule is based upon corresponding Federal regulations for which an economic analysis was prepared and certification made that such regulations would not have a significant economic effect upon a substantial number of small entities. Therefore, this rule will ensure that existing requirements previously published by OSM will be implemented by the State. In making the determination as to whether this rule would have a significant economic impact, the Department relied upon the data and assumptions for the corresponding Federal regulations.

Unfunded Mandates

OSM determined and certifies under the Unfunded Mandates Reform Act (2 U.S.C. 1502 *et seq.*) that this rule will not impose a cost of $100 million or more in any given year on local, state, or tribal governments or private entities.

List of Subjects in 30 CFR Part 904

Intergovernmental relations, Surface mining, Underground mining.

Dated: November 6, 1998.

Brent Wahlquist,

Regional Director, Mid-Continent Regional Coordinating Center.

For the reasons set out in the preamble, 30 CFR Part 904 is amended as set forth below:

PART 904—ARKANSAS

1. The authority citation for Part 904 continues to read as follows:

Authority: 30 U.S.C. 1201 *et seq.*

2. Section 904.15 is amended in the table by adding a new entry in chronological order by ''Date of final publication'' to read as follows:

§ 904.15 Approval of Arkansas regulatory program amendments.

* * * * *

Original amendment submission date	Date of final publication	Citation/description
*	*	* * * * * *
August 27, 1998	November 25, 1998	ASCMRC 701.5; 816.116(b)(1), (2), (3)(iv), (4), (5); Policy Guidelines for Phase III Revegetation Success Standards for Pasture and Previously Mined Areas, Cropland, Forest Products, Recreation and Wildlife Habitat, Industrial/Commercial and Residential Revegetation.

[FR Doc. 98–31490 Filed 11–24–98; 8:45 am]
BILLING CODE 4310–05–P

DEPARTMENT OF THE INTERIOR

Office of Surface Mining Reclamation and Enforcement

30 CFR Part 943

[SPATS No. TX–039–FOR]

Texas Abandoned Mine Land Reclamation Plan

AGENCY: Office of Surface Mining Reclamation and Enforcement (OSM), Interior.

ACTION: Final rule; approval of amendment.

SUMMARY: OSM is approving an amendment to the Texas abandoned mine land reclamation plan (from now on referred to as the ''Texas plan'') under the Surface Mining Control and Reclamation Act of 1977 (SMCRA). Texas proposed additions, deletions, and revisions to its plan pertaining to Responsibilities; Definitions; Abandoned mine land reclamation fund; Eligible coal lands and water; Reclamation objectives and priorities; Reclamation project evaluations; Utilities and other facilities; Limited liability; Entry for studies or exploration; Contractor responsibility; Eligible noncoal lands and water; Reclamation priorities for noncoal program; Exclusion of certain noncoal reclamation sites; Land acquisition authority—noncoal; Lien requirements; Written consent for entry; Operations on private land; Entry and consent to reclaim; Appraisals; Liens; Satisfaction of liens; Entry for emergency reclamation; Land eligible for acquisition; Procedures for acquisition; Acceptance of gifts of land; Management of acquired land; and Disposition of reclaimed lands. Texas intended to revise its plan to be consistent with the corresponding Federal regulations.

EFFECTIVE DATE: November 25, 1998.

FOR FURTHER INFORMATION CONTACT: Michael C. Wolfrom, Director, Tulsa Field Office, Office of Surface Mining, 5100 East Skelly Drive, Suite 470, Tulsa, Oklahoma 74135–6547, Telephone: (918) 581–6430, E-mail: mwolfrom@mcrgw.osmre.gov.

SUPPLEMENTARY INFORMATION:

I. Background on the Texas Plan

On June 23, 1980, the Secretary of the Interior approved the Texas plan. You can find background information on the Texas plan, including the Secretary's findings, the disposition of comments, and the approval of the plan in the June 23, 1980, **Federal Register** (45 FR 41937). You can also find later actions concerning the Texas plan and amendments at 30 CFR 943.25.

II. Submission of the Proposed Amendment

By letter dated December 1, 1997 (Administrative Record No. TAML–61), Texas submitted a proposed amendment to its plan under the provisions of SMCRA. Texas submitted the amendment at its own initiative. We announced receipt of the amendment in the December 29, 1997, **Federal Register** (62 FR 67592). In the same document, we opened the public comment period and provided an opportunity for a public hearing on the adequacy of the amendment. The public comment period closed on January 28, 1998.

During our review of the amendment, we identified concerns relating to the following sections: Eligible coal lands and water; Reclamation priorities for noncoal program; Land acquisition authority-noncoal; Lien requirements; Satisfaction of liens; Entry and consent to reclaim; Appraisals; Entry for emergency reclamation; Land eligible for acquisition; Disposition of reclaimed lands; Liens. We also identified editorial corrections in the two sections, Responsibilities and Definitions. We notified Texas of the concerns by facsimiles dated March 9, and August 25, 1998 (Administrative Record Nos. TAML–61.08 and TAML–61.10, respectively). Texas responded in letters dated July 20, and September 3, 1998, by submitting additional explanatory information and a revised amendment (Administrative Record Nos. TAML–61.09 and TAML–61.12, respectively).

Texas proposed additional revisions to the following sections: 12.803 Eligible coal lands and water; 12.809 Reclamation priorities for noncoal program; 12.811 Land acquisition authority-noncoal; 12.812 Lien requirements; 12.814 Entry and consent to reclaim; 12.815 Appraisals; 12.816 Liens; 12.817 Satisfaction of liens; 12.818 Entry for emergency reclamation; 12.819 Land eligible for acquisition; 12.820 Procedures for acquisition; 12.821 Acceptance of gifts of lands; 12.822 Management of acquired land; and 12.823 Disposition of reclaimed lands.

Based upon the additional explanatory information and revisions to the proposed plan amendment submitted by Texas, we reopened the public comment period in the October 2, 1998, **Federal Register** (63 FR 53003). The public comment period closed on October 19, 1998.

III. Director's Findings

Set forth below, under the provisions of SMCRA and the Federal regulations at 30 CFR 884.14 and 884.15, are our findings concerning the proposed amendment. Revisions not specifically discussed below concern nonsubstantive wording changes, or revised cross-references and paragraph notations to reflect organizational changes resulting from this amendment.

A. Sections That Texas Deleted From Its Regulations

1. Section 12.805, Reclamation Project Evaluation

Texas proposed to delete this section. We are approving this deletion because we have no counterpart Federal regulation and the deletion will not make the Texas regulations inconsistent with the Federal regulations.

2. Section 12.814, Operations on Private Lands

Texas proposed to delete this section. We are approving this deletion because the provisions in this section are contained in new Sections 12.814, Entry and Consent to Reclaim and 12.815, Entry for Emergency Reclamation. Also, the deletion will not make the Texas regulations inconsistent with the Federal regulations.

B. Revisions to Texas' Plan That Are Substantively Identical to the Corresponding Provisions of the Federal Regulations

The proposed State regulations listed in the table contain language that is the same as or similar to the corresponding sections of the Federal regulations. Differences between the proposed State provisions and the Federal provisions are nonsubstantive.

Topic	State regulation	Federal counterpart regulation
Definitions for abandoned mine reclamation fund or fund, eligible lands and water, emergency, extreme danger, left or abandoned in either an unreclaimed or inadequately reclaimed condition, mineral owner, OSM, permanent facility, project, reclamation activity, State reclamation program, Texas abandoned mine reclamation fund or State fund.	Section 12.801	30 CFR 870.5.
Texas Abandoned Mine Reclamation Fund	Section 12.802	30 CFR 872.12.
Eligible Coal Lands and Water	Section 12.803	30 CFR 874.12.
Reclamation Objectives and Priorities	Section 12.804	30 CFR 874.13.
Utilities and other Facilities	Section 12.805	30 CFR 874.14 (b) and (d).
Limited Liability	Section 12.806	30 CFR 874.15.
Contractor Responsibility	Section 12.807	30 CFR 874.16 and 875.20.
Eligible Noncoal Lands and Water	Section 12.808	30 CFR 875.14.
Reclamation Priorities for Noncoal Program	Section 12.809	30 CFR 875.15.
Exclusion of Certain Noncoal Reclamation Sites	Section 12.810	30 CFR 875.16.
Land Acquisition Authority—Noncoal	Section 12.811	30 CFR 875.17.
Lien Requirements	Section 12.812	30 CFR 875.18.
Written Consent for Entry	Section 12.813	30 CFR 877.11
Procedures for Acquisition	Section 12.820	30 CFR 879.12.
Management of Acquired Land	Section 12.822	30 CFR 879.14.

Because the above proposed revisions are identical in meaning to the corresponding Federal regulations, we find that Texas' revised plan is in compliance with the Federal regulations.

C. Revisions to Texas' Plan That Are Not Substantively Identical to the Corresponding Provisions of the Federal Regulations

1. Section 12.814, Entry and Consent to Reclaim

Texas proposed to repeal section 12.814, Operations on Private lands, and adopt new section 12.814, Entry and Consent to Reclaim. This new section authorizes the Commission to enter land to perform reclamation activities or conduct studies or exploratory work to determine the existence of the adverse effects of past coal mining with or without the landowner's permission. The Commission must give a minimum of 30 days written notice to the landowner before entering property where the landowner's permission to enter has not been obtained or where the landowner is not known or is readily available. If the landowner is known, the Commission will send the written notice by mail, return receipt requested, along with a copy of the written findings required under paragraph (c)(1) of this section. If the landowner is not known, or if the current mailing address of the landowner is not known, the Commission will post a notice in one or more places on the property to be entered where it is readily visible to the public. The Commission will also advertise once in a newspaper of general circulation in the locality in which the land is located. The advertisement must include a statement of where the findings required under paragraph (c)(1) of this section may be inspected or obtained.

We are approving this revision because it is consistent with the counterpart Federal regulations at 30 CFR 877.13.

2. 12.816, Liens

In paragraph (a)(2), Texas proposed to add a provision that allows it to notify landowners of the amount of the proposed lien and to give the landowners a reasonable amount of time to pay the lien before the lien is placed against the property.

Also, in paragraph (d), Texas proposed to conduct hearings and any appeals by landowners concerning the amounts of the liens under Chapter 2001, Government Code.

The State removed language that *required* it to place a lien against reclaimed land if the reclamation results in an increase in the fair market value with one exception. This exception is that the State may waive the lien if the cost of filing it exceeds the increase in fair market value as a result of the reclamation activities. The State proposed to allow itself the discretion to place a lien against the reclaimed land and to also retain the exception for waiving liens.

We are approving these revisions because they are in compliance with the counterpart Federal regulations at 30 CFR 882.13.

3. 12.818, Entry for Emergency Reclamation

Texas proposed to adopt this new section to conform with the Texas Natural Resources Code, Section 134.152 (b) and (c). This new section allows the Commission to enter land where an emergency exists and other land necessary to have access to that land. It also allows the Commission to restore, reclaim, abate, control, or prevent the adverse effects of coal mining practices, and to do whatever is necessary and suitable to protect the public health, safety, or general welfare.

We are approving this new section because it is consistent with the counterpart Federal regulations at 30 CFR 877.14(a). However, because Texas has not formally assumed responsibility for its abandoned mine land emergency program, we are under no obligation to reimburse it for expenses it acquires in handling any emergencies under this section.

4. Section 12.819, Land Eligible for Acquisition

This section sets forth the criteria that any land must meet before the State can purchase the land with abandoned mine land reclamation funds. We are approving this section because it is in compliance with the Federal regulations at 30 CFR 879.11.

5. Section 12.821, Acceptance of Gifts of Land

Texas proposed to renumber this section from Section 12.812 to 12.821. Texas revised paragraphs (a) and (c) to read as follows:

(a) The Commission under an approved reclamation plan may accept donations of title to land or interests in land if the land proposed for donation meets the requirements set out in § 12.819 of this title (relating to Land Eligible for Acquisition).

(c) If the offer is accepted, a deed of conveyance shall be executed, acknowledged and recorded. The deed shall state that it is made ''as a gift under the Texas Surface Coal Mining and Reclamation Act.'' Title to donated land shall be in the name of the state of Texas.

We are approving these revisions because they are consistent with the Federal regulations at 30 CFR 879.13.

6. Section 12.823, Disposition of Reclaimed Land

Texas proposed to renumber this section from Section 12.813 to 12.823, and to reformat this section. This section sets forth the criteria under which the State may dispose of land acquired under Section 12.819, Land Eligible for Acquisition. We are approving this revision because it is in compliance with the Federal regulations at 30 CFR 879.15.

D. Revisions to Texas' Plan That Do Not Have Corresponding Provisions in the Federal Regulations

Texas proposed section 12.800 Responsibilities as an addition to its regulations. This section sets forth the responsibilities that the Commission will have regarding the Texas Abandoned Mine Land Reclamation Program. We previously approved this section in the April 22, 1998, **Federal Register** notice (63 FR 19821).

IV. Summary and Disposition of Comments

Public Comments

We asked the public for comments and provided an opportunity for a public hearing on the proposed amendment. We did not receive any public comments, and because no one requested an opportunity to speak at a public hearing, we did not hold one.

Federal Agency Comments

Under the provisions of 30 CFR 884.14(a)(2) and 884.15(a), we requested comments on the proposed amendment from various other Federal agencies with an actual or potential interest in the Texas plan. We received comments from the U.S. Army Corps of Engineers in letters dated January 27, and October 5, 1998 (Administrative Record Nos. TAML–61.06 and TAML–61.16, respectively). The letters stated that the changes Texas proposed in its amendment were satisfactory.

V. Director's Decision

Based on the above findings, we approve the proposed plan amendment as submitted by Texas on December 1, 1997, and as revised on September 3, 1998. We approve the regulations as proposed by Texas with the provision that Texas fully issue, in identical form, the regulations they submitted and we and the public reviewed.

We are amending the Federal regulations at 30 CFR Part 943, that codify decisions concerning the Texas plan. We are also making this final rule effective immediately to expedite the State plan amendment process and to encourage States to bring their plans into conformity with the Federal standards without undue delay. SMCRA requires consistency of State and Federal standards.

VI. Procedural Determinations

Executive Order 12866

This proposed rule is exempted from review by the Office of Management and Budget (OMB) under Executive Order 12866 (Regulatory Planning and Review).

Executive Order 12988

The Department of the Interior has conducted the reviews required by section 3 of Executive Order 12988 (Civil Justice Reform) and has determined that, to the extent allowed by law, this rule meets the applicable standards of subsections (a) and (b) of that section. However, these standards are not applicable to the actual language of State and Tribal abandoned mine land reclamation plans and revisions since each plan is drafted and issued by a specific State or Tribe, not by OSM. Decisions on proposed abandoned mine land reclamation plans and revisions submitted by a State or Tribe are based on a determination of whether the submittal meets the requirements of Title IV of SMCRA (30 U.S.C. 1231–1243) and 30 CFR Part 884.

National Environmental Policy Act

This rule does not require an environmental impact statement since agency decisions on proposed State and Tribal abandoned mine land reclamation plans and revisions are categorically excluded from compliance with the National Environmental Policy Act (42 U.S.C. 4332) by the Manual of the Department of the Interior (516 DM 6, appendix 8, paragraph 8.4B(29)).

Paperwork Reduction Act

This rule does not contain information collection requirements that require approval by OMB under the Paperwork Reduction Act (44 U.S.C. 3507 *et seq.*).

Regulatory Flexibility Act

The Department of the Interior has determined that this rule will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). The submittal which is the subject of this rule is based upon corresponding Federal regulations for which an economic analysis was prepared and certification made that the regulations would not have a significant economic effect upon a substantial number of small entities. Accordingly, this rule will ensure that existing requirements previously issued by OSM will be implemented. In making the determination as to whether this rule would have a significant economic impact, the Department relied upon the data and assumptions in the analyses for the corresponding Federal regulations.

Unfunded Mandates

OSM has determined and certifies under the provisions of the Unfunded Mandates Reform Act (2 U.S.C. 1502 *et seq.*) that this rule will not impose a cost of $100 million or more in any given year on local, state, or tribal governments or private entities.

List of Subjects in 30 CFR Part 943

Intergovernmental relations, Surface mining, Underground mining.

Dated: November 6, 1998.

Brent Wahlquist,

Regional Director, Mid-Continent Regional Coordinating Center.

For the reasons set out in the preamble, 30 CFR Part 943 is amended as set forth below:

PART 943—TEXAS

1. The authority citation for Part 943 continues to read as follows:

Authority: 30 U.S.C. 1201 *et seq.*

2. Section 943.25 is amended in the table by adding a new entry in chronological order by ''Date of final publication'' to read as follows:

§ 943.25 Approval of Texas abandoned mine land reclamation plan amendments.

* * * * *

Original amendment submission date	Date of final publication	Citation/description
*	*	*
December 1, 1997	November 25, 1998	12.800 through .814; .815(d); .816; .818 through .823.

[FR Doc. 98–31491 Filed 11–24–98; 8:45 am]
BILLING CODE 4310–05–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 180

[OPP–300752; FRL–6040–9]
RIN 2070–AB78

Hydramethylnon; Extension of Tolerance for Emergency Exemptions

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: This rule extends a time-limited tolerance for residues of the insecticide hydramethylnon in or on pineapples at 0.05 part per million (ppm) for an additional one and one-half-year period, to May 30, 2001. This action is in response to EPA's granting of an emergency exemption under section 18 of the Federal Insecticide, Fungicide, and Rodenticide Act authorizing use of the pesticide on pineapples. Section 408(l)(6) of the Federal Food, Drug, and Cosmetic Act 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.

DATES: This regulation becomes effective November 25, 1998. Objections and requests for hearings must be received by EPA, on or before January 25, 1999.

ADDRESSES: Written objections and hearing requests, identified by the docket control number, [OPP–300752], must be submitted to: Hearing Clerk (1900), Environmental Protection Agency, Rm. M3708, 401 M St., SW., Washington, DC 20460. Fees accompanying objections and hearing requests shall be labeled ''Tolerance Petition Fees'' and forwarded to: EPA Headquarters Accounting Operations Branch, OPP (Tolerance Fees), P.O. Box 360277M, Pittsburgh, PA 15251. A copy of any objections and hearing requests filed with the Hearing Clerk identified by the docket control number, [OPP–300752], must also be submitted to: Public Information and Records Integrity Branch, Information Resources and Services Division (7502C), Office of Pesticide Programs, Environmental Protection Agency, 401 M St., SW., Washington, DC 20460. In person, bring a copy of objections and hearing requests to Rm. 119, Crystal Mall #2, 1921 Jefferson Davis Hwy., Arlington, VA.

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

FOR FURTHER INFORMATION CONTACT: By mail: Libby Pemberton, Registration Division (7505C), Office of Pesticide Programs, Environmental Protection Agency, 401 M St., SW., Washington, DC 20460. Office location, telephone number, and e-mail address: Rm. 272, Crystal Mall #2, 1921 Jefferson Davis Hwy., Arlington, VA 22202, (703)-308–9364; e-mail: pemberton.libby@epamail.epa.gov.

SUPPLEMENTARY INFORMATION: EPA issued a final rule, published in the **Federal Register** of March 4, 1998 (63 FR 10537–10543) (FRL–5767–1), which announced that on its own initiative under section 408(e) of the Federal Food, Drug, and Cosmetic Act (FFDCA), 21 U.S.C. 346a(e) and (l)(6), it established a time-limited tolerance for the residues of hydramethylnon in or on pineapples at 0.05 ppm, with an expiration date of January 31, 1999. EPA established the tolerance because section 408(l)(6) of the FFDCA requires EPA to establish a time-limited tolerance or exemption from the requirement 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 received a request to extend the use of hydramethylnon on pineapples for this year growing season due to continued need to control big-headed and Argentine ants. After having reviewed the submission, EPA concurs that emergency conditions exist for this state. EPA has authorized under FIFRA section 18 the use of hydramethylnon on pineapples for control of big-headed and Argentine ants in pineapples.

EPA assessed the potential risks presented by residues of hydramethylnon in or on pineapples. In doing so, EPA considered the safety standard in FFDCA section 408(b)(2), and decided that the necessary tolerance under FFDCA section 408(l)(6) would be consistent with the safety standard and with FIFRA section 18. The data and other relevant material have been evaluated and discussed in the final rule of March 4, 1998 (63 FR 10537). Based on that data and information considered, the Agency reaffirms that extension of the time-limited tolerance will continue to meet the requirements of section 408(l)(6). Therefore, the time-limited tolerance is extended for an additional one and one-half-year period. Although this tolerance will expire and is revoked on May 30, 2001, under FFDCA section 408(l)(5), residues of the pesticide not in excess of the amounts specified in the tolerance remaining in or on pineapples after that date will not be unlawful, provided the pesticide is applied in a manner that was lawful under FIFRA and the application occurred prior to the revocation of the tolerance. EPA will take action to revoke this tolerance earlier if any experience with, scientific data on, or other relevant information on this pesticide indicate that the residues are not safe.

I. Objections and Hearing Requests

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

Any person may, by January 25, 1999, file written objections to any aspect of this regulation and may also request a hearing on those objections. Objections and hearing requests must be filed with the Hearing Clerk, at the address given above (40 CFR 178.20). A copy of the objections and/or hearing requests filed with the Hearing Clerk should be submitted to the OPP docket for this rulemaking. The objections submitted must specify the provisions of the regulation deemed objectionable and the grounds for the objections (40 CFR 178.25). Each objection must be accompanied by the fee prescribed by 40 CFR 180.33(i). If a hearing is requested, the objections must include a statement of the factual issues on which a hearing is requested, the requestor's contentions on such issues, and a summary of any evidence relied upon by the requestor (40 CFR 178.27). A request for a hearing will be granted if the Administrator determines that the material submitted shows the following:

There is genuine and substantial issue of fact; there is a reasonable possibility that available evidence identified by the requestor would, if established, resolve one or more of such issues in favor of the requestor, taking into account uncontested claims or facts to the contrary; and resolution of the factual issues in the manner sought by the requestor would be adequate to justify the action requested (40 CFR 178.32). Information submitted in connection with an objection or hearing request may be claimed confidential by marking any part or all of that information as CBI. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2. A copy of the information that does not contain CBI must be submitted for inclusion in the public record. Information not marked confidential may be disclosed publicly by EPA without prior notice.

II. Public Record and Electronic Submissions

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

Electronic comments may be sent directly to EPA at:

opp-docket@epamail.epa.gov.

Electronic objections and hearing requests must be submitted as an ASCII file avoiding the use of special characters and any form of encryption. Objections and hearing requests will also be accepted on disks in WordPerfect 5.1/6.1 or ASCII file format. All copies of objections and hearing requests in electronic form must be identified by the docket control number [OPP–300752]. No CBI should be submitted through e-mail. Electronic copies of objections and hearing requests on this rule may be filed online at many Federal Depository Libraries.

III. Regulatory Assessment Requirements

A. Certain Acts and Executive Orders

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

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

B. Executive Order 12875

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

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

C. Executive Order 13084

Under Executive Order 13084, entitled *Consultation and Coordination with Indian Tribal Governments* (63 FR 27655, May 19,1998), EPA may not issue a regulation that is not required by statute, that significantly or uniquely affects the communities of Indian tribal governments, and that imposes substantial direct compliance costs on those communities, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by the tribal governments. If the mandate is unfunded, EPA must provide 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 rule does not significantly or uniquely affect the communities of Indian tribal governments. This action does not involve or impose any requirements that affect Indian tribes. Accordingly, the requirements of section 3(b) of Executive Order 13084 do not apply to this rule.

IV. Submission to Congress and the Comptroller General

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by theSmall Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a

copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. This rule is not a ''major rule'' as defined by 5 U.S.C. 804(2).

List of Subjects in 40 CFR Part 180

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

Dated: October 22, 1998.

James Jones,

Director, Registration Division, Office of Pesticide Programs.

Therefore, 40 CFR chapter I is amended as follows:

PART 180–[AMENDED]

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

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

§ 180.395 [Amended]

2. Section 180.395, by amending paragraph (b) in the table, by changing the date ''1/31/99'' to read ''5/30/01.''

[FR Doc. 98–31389 Filed 11–24–98; 8:45 am]

BILLING CODE 6560–50–F

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 180

[OPP–300751; FRL 6040–7]

RIN 2070–AB78

Carfentrazone-ethyl; Pesticide Tolerances for Emergency Exemptions

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: This regulation establishes time-limited tolerances for combined residues of carfentrazone-ethyl and its chloropropionic acid metabolite in or on rice, grain and rice, straw. This action is in response to EPA's granting of an emergency exemption under section 18 of the Federal Insecticide, Fungicide, and Rodenticide Act authorizing use of the pesticide on rice. This regulation establishes maximum permissible levels for residues of carfentrazone-ethyl in this food commodity pursuant to section 408(l)(6) of the Federal Food, Drug, and Cosmetic Act, as amended by the Food Quality Protection Act of 1996. The tolerances will expire and are revoked on October 31, 1999.

DATES: This regulation is effective November 25, 1998. Objections and requests for hearings must be received by EPA on or before January 25, 1999.

ADDRESSES: Written objections and hearing requests, identified by the docket control number, (OPP–300751), must be submitted to: Hearing Clerk (1900), Environmental Protection Agency, Rm. M3708, 401 M St., SW., Washington, DC 20460. Fees accompanying objections and hearing requests shall be labeled ''Tolerance Petition Fees'' and forwarded to: EPA Headquarters Accounting Operations Branch, OPP (Tolerance Fees), P.O. Box 360277M, Pittsburgh, PA 15251. A copy of any objections and hearing requests filed with the Hearing Clerk identified by the docket control number, OPP–300751, must also be submitted to: Public Information and Records Integrity Branch, Information Resources and Services Division (7502C), Office of Pesticide Programs, Environmental Protection Agency, 401 M St., SW., Washington, DC 20460. In person, bring a copy of objections and hearing requests to Rm. 119, Crystal Mall #2, 1921 Jefferson Davis Hwy., Arlington, VA.

A copy of objections and hearing requests filed with the Hearing Clerk may also be submitted electronically by sending electronic mail (e-mail) to: opp-docket@epamail.epa.gov. Copies of objections and hearing requests must be submitted as an ASCII file avoiding the use of special characters and any form of encryption. Copies of objections and hearing requests will also be accepted on disks in WordPerfect 5.1/6.1 or ASCII file format. All copies of objections and hearing requests in electronic form must be identified by the docket control number (OPP–300751). No Confidential Business Information (CBI) should be submitted through e-mail. Electronic copies of objections and hearing requests on this rule may be filed online at many Federal Depository Libraries.

FOR FURTHER INFORMATION CONTACT: By mail: Stephen Schaible, Registration Division (7505C), Office of Pesticide Programs, Environmental Protection Agency, 401 M St., SW., Washington, DC 20460. Office location, telephone number, and e-mail address: Crystal Mall #2, 1921 Jefferson Davis Hwy., Arlington, VA, (703) 308–9362; e-mail: schaible.stephen@epamail.epa.gov.

SUPPLEMENTARY INFORMATION: EPA, on its own initiative, pursuant to sections 408(e) and (l)(6) of the Federal Food, Drug, and Cosmetic Act (FFDCA), 21 U.S.C. 346a(e) and (l)(6), is establishing tolerances for combined residues of the herbicide carfentrazone-ethyl and its chloropropionic acid metabolite, in or on rice, grain at 0.1 part per million (ppm) and rice, straw at 1.0 ppm. These tolerances will expire and are revoked on October 31, 1999. EPA will publish a document in the **Federal Register** to remove the revoked tolerances from the Code of Federal Regulations.

I. Background and Statutory Authority

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

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

Section 18 of FIFRA authorizes EPA to exempt any Federal or State agency from any provision of FIFRA, if EPA determines that ''emergency conditions exist which require such exemption.'' This provision was not amended by

FQPA. EPA has established regulations governing such emergency exemptions in 40 CFR part 166.

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

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

II. Emergency Exemption for Carfentrazone-ethyl on Rice and FFDCA Tolerances

According to the Applicant, California arrowhead *Sagittaria montevidensis spp. Calcycina* and ricefield bulrush *Scirpus mucronatus* cause economic damage by competing with rice plants for soil, nutrients and sunlight, and by interfering with harvesting equipment to reduce yields. Resistance to the registered alternative herbicide of choice, bensulfuron methyl, has been observed in populations of these weeds. Resistance was first reported in 1992, and a survey conducted in 1995 estimated that 60% of rice fields in California have resistant California arrowhead and 15% have resistant ricefield bulrush. Phenoxy herbicides such as MCPA or 2,4-D may be used on bensulfuron methyl resistant weeds, but are phytotoxic to rice plants. Additionally, manufacturers have announced that they will not supply these products in the Sacramento Valley, due to persistent concerns about off-target applications, drift and damage symptoms on non-target crops, especially cotton. Propanil and triclopyr may offer partial control of these weeds, but neither is labeled for this use. EPA has authorized under FIFRA section 18 the use of carfentrazone-ethyl on rice for control of California arrowhead and ricefield bulrush in California. After having reviewed the submission, EPA concurs that emergency conditions exist for this state.

As part of its assessment of this emergency exemption, EPA assessed the potential risks presented by residues of carfentrazone-ethyl in or on rice, grain and rice, straw. 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 exemption in order to address an urgent non-routine situation and to ensure that the resulting food is safe and lawful, EPA is issuing these tolerances without notice and opportunity for public comment under section 408(e), as provided in section 408(l)(6). Although these tolerances will expire and are revoked on October 31, 1999, under FFDCA section 408(l)(5), residues of the pesticide not in excess of the amounts specified in the tolerances remaining in or on rice, grain and rice, straw 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 the 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 carfentrazone-ethyl meets EPA's registration requirements for use on rice or whether permanent tolerances for this use would be appropriate. Under these circumstances, EPA does not believe that these tolerances serve as a basis for registration of carfentrazone-ethyl 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 California to use this pesticide on this crop 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 exemption for carfentrazone-ethyl, contact the Agency's Registration Division at the address provided above.

III. 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 carfentrazone-ethyl and to make a determination on aggregate exposure, consistent with section 408(b)(2), for time-limited tolerances for combined residues of carfentrazone-ethyl and its chloropropionic acid metabolite on rice, grain and rice, straw at 0.1 ppm and 1.0 ppm, respectively. EPA's assessment of the dietary exposures and risks associated with establishing these 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 carfentrazone-ethyl are discussed below.

1. *Acute toxicity.* For the acute dietary exposure and risk assessment, the acute RfD was established at 5 milligrams/kilogram/day (mg/kg/day). The no observed adverse effect level (NOAEL) of 500 mg/kg/day, taken from the acute neurotoxicity study in rats, was based on clinical observations (i.e., excessive salivation) and motor activity testing at the lowest adverse effect level (LOAEL) of 1,000 mg/kg/day. The acute RfD reflects an uncertainty factor of 100, based on interspecies extrapolation 10x, intraspecies variability 10x, and the Agency determination that the FQPA 10x factor was not required.

2. *Short - and intermediate - term toxicity.* The Agency determined that short- and intermediate-term dermal risk assessments are not required because no systemic toxicity was seen at the limit-dose (1,000 mg/kg/day) in a 21–day dermal toxicity study in rats. In addition, based on the use pattern, long-term dermal exposure is not anticipated, therefore the chronic dermal risk assessment is not required.

Based on the low toxicity and the use pattern (one application at 0.008–0.031 lbs. a.i./acre/season), the Agency also concluded that a risk assessment for inhalation exposure (any time period) is not required.

3. *Chronic toxicity.* EPA has established the RfD for carfentrazone-ethyl at 0.03 (mg/kg/day). This RfD is based on a NOAEL of 3 mg/kg/day taken from the 2–year chronic toxicity study in rats. Effects observed at the LOAEL

of 12 mg/kg/day include histopathology (increases in microscopic red fluorescence of the liver, liver pigment) and total mean urinary porphyrin.

4. *Carcinogenicity*. Carfentrazone-ethyl has been classified by the Agency as a ''not likely'' human carcinogen; there is no evidence of carcinogenicity in reviewed studies.

B. Exposures and Risks

1. *From food and feed uses.* Permanent tolerances for field corn, soybean and wheat commodities were published in the **Federal Register** on September 30, 1998. An amendment to add the remaining commodities in the cereal grain crop group is pending with the Agency. Secondary residues in animal commodities resulting from this section 18 use are expected to be negligible. Risk assessments were conducted by EPA to assess dietary exposures and risks from carfentrazone-ethyl as follows:

i. *Acute exposure and risk.* Acute dietary risk assessments are performed for a food-use pesticide if a toxicological study has indicated the possibility of an effect of concern occurring as a result of a one day or single exposure. Tolerance level residues and 100% crop treated were assumed to derive TMRC exposure values; these values should be viewed as conservative risk estimates; further refinement using anticipated residue values and percent crop-treated data in conjunction with Monte Carlo analysis would result in a lower acute dietary exposure estimate.

The existing and proposed food uses of carfentrazone-ethyl result in an acute dietary exposure of 0.002 mg/kg/day for the U.S. population (0.04% of the acute RfD), 0.003 mg/kg/day for non-nursing infants (< 1 year) (0.06% of the acute RfD), and 0.001 mg/kg/day for females 13+ years (0.02% of the acute RfD).

ii. *Chronic exposure and risk.* In estimating chronic dietary exposure from food uses of carfentrazone-ethyl, it was assumed that 100% of rice and all other commodities having carfentrazone-ethyl tolerances will contain residues and those residues would be at the level of the tolerance; these assumptions lead to overestimation of human dietary exposure. Thus, in making a safety determination for this tolerance, the Agency is taking into account this conservative exposure assessment.

Existing and proposed carfentrazone-ethyl food uses result in a TMRC of 0.0003 mg/kg/day (1% of the RfD) for the U.S. population, and 0.0007 mg/kg/day (2% of the RfD) for both non-nursing infants (< 1 year old) and children (1–6 years old), the two subgroups having the highest exposure.

2. *From drinking water.* The Agency has calculated drinking water levels of concern (DWLOCs) for acute and chronic exposure to carfentrazone-ethyl in surface and groundwater. The DWLOCs are calculated by subtracting from the RfD (acute or chronic) the respective acute or chronic dietary exposure attributable to food to obtain the acceptable exposure to carfentrazone in drinking water; as there are no residential uses of carfentrazone-ethyl at this time, this component is not reflected in the calculation. Default body weights (70 kg for males, 60 kg for females, and 10 kg for non-nursing infants < 1 year old) and default drinking water consumption estimates (2 L/day for adults, 1 L/day for non-nursing infants) are then used to calculate the actual DWLOCs. The DWLOC represents the concentration level in surface water or groundwater at which aggregate exposure to the chemical is not of concern.

Using generic expected environmental concentration (GENEEC) (surface water) and SCI-GROW (groundwater) models, the Agency has calculated acute and chronic Tier I estimated environmental concentrations (EECs) for carfentrazone-ethyl for use in human health risk assessments. These values represent the upper bound estimates of the concentrations of carfentrazone-ethyl that might be found in surface and ground water assuming the maximum application rate allowed on the label. The EECs from these models are compared to the DWLOCs to make the safety determination.

i. *Acute exposure and risk.* Acute DWLOCs were calculated to be 175 ppm for the U.S. population, 150 ppm for females 13+ years, and 50 ppm for non-nursing infants less than 1 year old. Using the GENEEC model, the calculated acute EECs in surface water for carfentrazone-ethyl and its chloropropionic acid degradate were 1.2 parts per billion (ppb) and 2.88 ppb, respectively. Using the SCI-GROW model, the acute EECs in groundwater were calculated to be 0.000181 ppb for carfentrazone-ethyl and 0.016065 ppb for chloropropionic acid.

ii. *Chronic exposure and risk.* Chronic DWLOCs were calculated by the Agency to be 1040 ppb for the U.S. population, 891 ppb for females 13+ years, and 293 ppb for non-nursing infants less than 1 year old. Using the GENEEC model, the calculated chronic EECs in surface water for carfentrazone-ethyl and its chloropropionic acid degradate were 0.02 ppb and 2.46 ppb, respectively. Using the SCI-GROW model, the chronic EECs in groundwater were calculated to be 0.000181 ppb for carfentrazone-ethyl and 0.016065 for chloropropionic acid.

3. *From non-dietary exposure.* Carfentrazone-ethyl is a new chemical with no registered residential uses. There is no concern for non-dietary exposure via the dermal or inhalation routes.

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

EPA does not have, at this time, available data to determine whether carfentrazone-ethyl 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, carfentrazone-ethyl 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 carfentrazone-ethyl 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)(FRL–5754–7).

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

1. *Acute risk.* Using the TMRC assumptions described above, acute dietary exposure from existing and proposed uses of carfentrazone-ethyl was calculated to represent 0.4% of the acute RfD for the U.S. population and 0.02% of the RfD for females 13+ years. Estimated acute or peak EECs in surface water and groundwater of both carfentrazone-ethyl and its chloropropionic acid degradate are well below the acute DWLOCs calculated by the Agency for all population subgroups of concern.

2. *Chronic risk.* Using the TMRC exposure assumptions described above, EPA has concluded that aggregate exposure to carfentrazone-ethyl from food will utilize 1% of the RfD for the U.S. population. The major identifiable subgroup with the highest aggregate

exposure is non-nursing infants less than 1 year old (discussed below). EPA generally has no concern for exposures below 100% of the RfD because the RfD represents the level at or below which daily aggregate dietary exposure over a lifetime will not pose appreciable risks to human health. Estimated chronic EECs in surface water and groundwater of both carfentrazone-ethyl and its chloropropionic acid degradate are well below the chronic DWLOCs calculated by the Agency for all population subgroups of concern.

3. *Aggregate cancer risk for U.S. population*. Carfentrazone-ethyl has been classified by the Agency as a ''not likely'' human carcinogen; there is no evidence of carcinogenicity in reviewed studies. This risk assessment was not required.

4. *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 carfentrazone-ethyl 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 carfentrazone-ethyl, 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 pre-and post-natal toxicity and the completeness of the database unless EPA determines that a different margin of safety will be safe for infants and children. Margins of safety are incorporated into EPA risk assessments either directly through use of a 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 inter- and intra-species 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 rat study, the maternal (systemic) NOAEL was 100 mg/kg/day based on abdominogenital and cage liner staining at the LOAEL of 600 mg/kg/day. The developmental (fetal) NOAEL was 600 mg/kg/day based on wavy or thickened ribs at the LOAEL of 1,250 mg/kg/day. In the rabbit developmental toxicity study, the maternal (systemic) NOAEL was ≥150 mg/kg/day based on unthriftiness and emaciation in two doses in the current study at the LOAEL of 300 mg/kg/day, as well as, dyspnea, decreased locomotion, lacrimation, abdominogenital staining, loss of righting reflex, nasal discharge, unthriftiness, and dehydration reported in pilot studies at 350 and 700 mg/kg/day. The developmental (fetal) NOAEL was ≥300 mg/kg/day, the highest dose tested.

iii. *Reproductive toxicity study*. In the 2-generation rat reproduction study, the maternal (systemic) NOAEL was 127 mg/kg/day in males and 142 mg/kg/day in females based on decreased body weight gains, increased liver weights, liver and bile duct histopathology, and reductions in the mean cell volume, hematocrit, and hemoglobin at the LOAEL of 343 mg/kg/day in males and 387 mg/kg/day in females.

iv. *Pre- and post-natal sensitivity*. Based on the developmental and reproductive toxicity studies for carfentrazone-ethyl there does not appear to be an extra sensitivity for pre- or post-natal effects. Therefore, the Agency has concluded that the 10x safety factor to account for potential sensitivity by infants and children to carfentrazone-ethyl should be removed.

v. *Conclusion*. There is a complete toxicity database for carfentrazone-ethyl and exposure data is complete or is estimated based on data that reasonably accounts for potential exposures.

2. *Acute risk*. Using the TMRC assumptions described above, acute dietary exposure from existing and proposed uses of carfentrazone-ethyl was calculated to represent 0.06% of the RfD for non-nursing infants less than 1 year old, the infant and children subgroup most highly exposed. Estimated acute or peak EECs in surface water and groundwater of both carfentrazone-ethyl and its chloropropionic acid degradate are well below the acute DWLOCs calculated by the Agency for all population subgroups of concern.

3. *Chronic risk*. Using the exposure assumptions described above, EPA has concluded that aggregate exposure to carfentrazone-ethyl from food will utilize 2% of the RfD for infants and children. EPA generally has no concern for exposures below 100% of the RfD because the RfD represents the level at or below which daily aggregate dietary exposure over a lifetime will not pose appreciable risks to human health. Estimated chronic EECs in surface water and groundwater of both carfentrazone-ethyl and its chloropropionic acid degradate are well below the chronic DWLOCs calculated by the Agency for all population subgroups of concern.

4. *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 carfentrazone-ethyl residues.

IV. Other Considerations

A. Metabolism In Plants and Animals

The nature of the residue in plants and animals is adequately understood. The residue of concern is the parent compound carfentrazone-ethyl and its chloropropionic acid metabolite.

B. Analytical Enforcement Methodology

Adequate enforcement methodology is available from the Agency, (associated with PP#7F4795) to enforce the proposed tolerance on rice. This enforcement method is a GC method that uses ECD (electron capture detection), MSD (mass selective detection), ELCD (electrolytic conductivity detection), or MS/NCI (negative ion chemical ionization mass spectrometry). The method may be requested from: Calvin Furlow, PRRIB, IRSD (7502C), Office of Pesticide Programs, Environmental Protection Agency, 401 M St., SW., Washington, DC 20460. Office location and telephone number: Rm. 101FF, Crystal Mall #2, 1921 Jefferson Davis Hwy., Arlington, VA 22202, (703–305–5229).

Data on multi-residue methods has been submitted pertaining multi-residue methods testing for carfentrazone-ethyl. Carfentrazone-ethyl was detected under Protocol C using either an ECD or NPD detector. Better sensitivity was achieved with ECD detection. Carfentrazone-ethyl metabolites were tested using Protocols B and C with ECD detection. These data have been forwarded to FDA to be included in PAM I, Appendix I.

C. Magnitude of Residues

Residues of carfentrazone-ethyl and its chloropropionic acid metabolite are not expected to exceed 0.10 ppm in/on

rice, grain and 1.0 ppm in/on rice, straw as a result of this section 18 use.

D. International Residue Limits

No Codex, Canadian, and Mexican tolerances are established for carfentrazone-ethyl. Therefore, no compatibility problems exist between the proposed U.S. and Codex tolerances.

E. Rotational Crop Restrictions

A 30–day plant-back interval is to be required on the label. The recommended time-limited tolerances reflect this restriction.

V. Conclusion

Therefore, the tolerance is established for combined residues of carfentrazone-ethyl and its chloropropionic acid metabolite in rice, grain at 0.1 ppm and rice, straw at 1.0 ppm.

VI. Objections and Hearing Requests

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

Any person may, by January 25, 1999, file written objections to any aspect of this regulation and may also request a hearing on those objections. Objections and hearing requests must be filed with the Hearing Clerk, at the address given above (40 CFR 178.20). A copy of the objections and/or hearing requests filed with the Hearing Clerk should be submitted to the OPP docket for this rulemaking. The objections submitted must specify the provisions of the regulation deemed objectionable and the grounds for the objections (40 CFR 178.25). Each objection must be accompanied by the fee prescribed by 40 CFR 180.33(i). If a hearing is requested, the objections must include a statement of the factual issues on which a hearing is requested, the requestor's contentions on such issues, and a summary of any evidence relied upon by the requestor (40 CFR 178.27). A request for a hearing will be granted if the Administrator determines that the material submitted shows the following: There is genuine and substantial issue of fact; there is a reasonable possibility that available evidence identified by the requestor would, if established, resolve one or more of such issues in favor of the requestor, taking into account uncontested claims or facts to the contrary; and resolution of the factual issues in the manner sought by the requestor would be adequate to justify the action requested (40 CFR 178.32). Information submitted in connection with an objection or hearing request may be claimed confidential by marking any part or all of that information as CBI. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2. A copy of the information that does not contain CBI must be submitted for inclusion in the public record. Information not marked confidential may be disclosed publicly by EPA without prior notice.

VII. Public Record and Electronic Submissions

EPA has established a record for this rulemaking under docket control number (OPP–300751) (including any comments and data submitted electronically). A public version of this record, including printed, paper versions of electronic comments, which does not include any information claimed as CBI, is available for inspection from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The public record is located in Room 119 of the Public Information and Records Integrity Branch, Information Resources and Services Division (7502C) Office of Pesticide Programs, Environmental Protection Agency, Crystal Mall #2, 1921 Jefferson Davis Highway, Arlington, VA.

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

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

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

VIII. Regulatory Assessment Requirements

A. Certain Acts and Executive Orders

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

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

B. Executive Order 12875

Under Executive Order 12875, entitled *Enhancing the Intergovernmental Partnership* (58 FR 58093, October 28, 1993), EPA may not issue a regulation that is not required by statute and that creates a mandate upon a State, local, or tribal government, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by those governments. If the mandate is

unfunded, EPA must provide to OMB a description of the extent of EPA's prior consultation with representatives of affected State, local, and tribal governments, the nature of their concerns, copies of any written communications from the governments, and a statement supporting the need to issue the regulation. In addition, Executive Order 12875 requires EPA to develop an effective process permitting elected officials and other representatives of State, local, and tribal governments ''to provide meaningful and timely input in the development of regulatory proposals containing significant unfunded mandates.''

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

C. Executive Order 13084

Under Executive Order 13084, entitled *Consultation and Coordination with Indian Tribal Governments* (63 FR 27655, May 19,1998), EPA may not issue a regulation that is not required by statute, that significantly or uniquely affects the communities of Indian tribal governments, and that imposes substantial direct compliance costs on those communities, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by the tribal governments. If the mandate is unfunded, EPA must provide 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 rule does not significantly or uniquely affect the communities of Indian tribal governments. This action does not involve or impose any requirements that affect Indian tribes. Accordingly, the requirements of section 3(b) of Executive Order 13084 do not apply to this rule.

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 the rule in the **Federal Register**. This rule is not a ''major rule'' as defined by 5 U.S.C. 804(2).

List of Subjects in 40 CFR Part 180

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

Dated: October 21, 1998.

James Jones,

Director, Registration Division, Office of Pesticide Programs.

Therefore, 40 CFR chapter I is amended as follows:

PART 180 — [AMENDED]

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

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

2. In §180.515 is amended by revising paragraph (b) to read as follows:

§ 180.515 Carfentrazone-ethyl; tolerances for residues

* * * * *

(b) *Section 18 emergency exemptions.* Time-limited tolerances are established for combined residues of the herbicide carfentrazone-ethyl and its chloropropionic acid metabolite in connection with use of the pesticide under section 18 emergency exemptions granted by EPA. These tolerances will expire and are revoked on the dates specified in the following table.

Commodity	Parts per million	Expiration/Revocation Date
Rice, grain	0.1	10/31/99
Rice, straw	1.0	10/31/99

* * * * *

[FR Doc. 98–31546 Filed 11–24–98; 8:45 am]
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ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 180

[OPP–300759; FRL 6045–4]

RIN 2070–AB78

Azoxystrobin; Pesticide Tolerances for Emergency Exemptions

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: This regulation establishes a time-limited tolerance for combined residues of azoxystrobin or methyl (*E*)-2-(2-[6-(2-cyanophenoxy)pyrimidin-4-yloxy]phenyl)-3-methoxyacrylate) and its *Z isomer* in or on sugar beets and soybeans. This action is in response to EPA's granting of an emergency exemption under section 18 of the Federal Insecticide, Fungicide, and Rodenticide Act authorizing use of the pesticide on sugar beets and soybeans. This regulation establishes maximum permissible levels for residues of azoxystrobin in these food commodities pursuant to section 408(l)(6) of the Federal Food, Drug, and Cosmetic Act, as amended by the Food Quality Protection Act of 1996. The tolerance will expire and will be revoked on June 30, 2000.

DATES: This regulation is effective November 25, 1998. Objections and requests for hearings must be received by EPA on or before January 25, 1999.

ADDRESSES: Written objections and hearing requests, identified by the docket control number, [OPP–300759], must be submitted to: Hearing Clerk (1900), Environmental Protection Agency, Rm. M3708, 401 M St., SW., Washington, DC 20460. Fees accompanying objections and hearing

requests shall be labeled ''Tolerance Petition Fees'' and forwarded to: EPA Headquarters Accounting Operations Branch, OPP (Tolerance Fees), P.O. Box 360277M, Pittsburgh, PA 15251. A copy of any objections and hearing requests filed with the Hearing Clerk identified by the docket control number, [OPP–300759], must also be submitted to: Public Information and Records Integrity Branch, Information Resources and Services Division (7502C), Office of Pesticide Programs, Environmental Protection Agency, 401 M St., SW., Washington, DC 20460. In person, bring a copy of objections and hearing requests to Rm. 119, CM #2, 1921 Jefferson Davis Hwy., Arlington, VA.

A copy of objections and hearing requests filed with the Hearing Clerk may also be submitted electronically by sending electronic mail (e-mail) to: opp-docket@epamail.epa.gov. Copies of objections and hearing requests must be submitted as an ASCII file avoiding the use of special characters and any form of encryption. Copies of objections and hearing requests will also be accepted on disks in WordPerfect 5.1/6.1 or ASCII file format. All copies of objections and hearing requests in electronic form must be identified by the docket control number [OPP–300759]. No Confidential Business Information (CBI) should be submitted through e-mail. Electronic copies of objections and hearing requests on this rule may be filed online at many Federal Depository Libraries.

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

SUPPLEMENTARY INFORMATION: EPA, on its own initiative, pursuant to section 408(e) and (l)(6) of the Federal Food, Drug, and Cosmetic Act (FFDCA), 21 U.S.C. 346a(e) and (l)(6), is establishing a tolerance for combined residues of fungicide azoxystrobin and its *Z isomer*, in or on sugar beets, and soybeans at 0.05 and 1.0 part per million (ppm), respectively. These tolerances will expire and will be revoked on June 30, 2000. EPA will publish a document in the **Federal Register** to remove the revoked tolerance from the Code of Federal Regulations.

I. Background and Statutory Authority

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

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

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

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

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

II. Emergency Exemption for Azoxystrobin on Sugar Beets and Soybeans, and FFDCA Tolerances

The Minnesota Department of Agriculture requested an emergency exemption in April of 1998 for the control of cercospora leafspots on sugar beets. The registered alternative fungicides benomyl, thiabendazole thiophanate methyl, triphenyl tin hydroxide (TPTH), EBDCs (Mancozeb and Maneb), and copper hydroxide for controlling cercospora leaf spots do not control the disease effectively because of resistance and/or tolerance in the pathogen. Moderately resistant cultivars of sugar beet are available, but their yield potentials are lower than the susceptible. Cultural practices are not very effective in managing the disease. During 1998, the disease severity is expected to be higher and yield losses significant due to mild winter temperature (El Nino effects).

Minnesota also claims that TPTH is still used in controlling the disease, but it is significantly less effective than in the past.

In August 1998, the Arkansas Department of Agriculture also requested an emergency exemption for the control of aerial blight on soybeans. The disease is particularly aggressive in years of above-normal night temperatures, high humidity, and frequent rainfall. Conditions in 1998 have been near perfect for development of sheath blight of rice, with night temperatures in the 78–82 degree range and oppressively high relative humidity within crop canopies. Rainfall in northeast Arkansas has also contributed to the problem. Soybean has just entered the most susceptible flowering and early pod formation stages and aerial blight has become exceptionally aggressive as weather conditions continue to favor its development. Damage to soybean yield is through destruction of foliage, and to a greater extent-flowers, pods and seeds. Yield losses in some Arkansas fields in the past have been estimated as high as 50%, however, this is a very rare occurrence most years.

For these reasons, EPA has authorized under FIFRA section 18 the use of azoxystrobin on sugar beets for control of cercospora leafspots in Minnesota, and the use of azoxystrobin on soybeans for control of aerial blight in Arkansas.

As part of its assessment of this emergency exemption, EPA assessed the potential risks presented by residues of azoxystrobin in or on sugar beets and

soybeans. In doing so, EPA considered the new safety standard in FFDCA section 408(b)(2), and EPA decided that the necessary tolerance under FFDCA section 408(l)(6) would be consistent with the new safety standard and with FIFRA section 18. Consistent with the need to move quickly on the emergency exemption in order to address an urgent non-routine situation and to ensure that the resulting food is safe and lawful, EPA is issuing this tolerance without notice and opportunity for public comment under section 408(e), as provided in section 408(l)(6). Although this tolerance will expire and will be revoked on June 30, 2000, under FFDCA section 408(l)(5), residues of the pesticide not in excess of the amounts specified in the tolerance remaining in or on sugar beets and soybeans 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 a level that was authorized by this tolerance at the time of that application. EPA will take action to revoke this tolerance earlier if any experience with, scientific data on, or other relevant information on this pesticide indicate that the residues are not safe.

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

III. Risk Assessment and Statutory Findings

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

A. 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 and The Agency's selection of toxicological endpoints upon which to assess risk caused by azoxystrobin are discussed below.

1. *Acute toxicity*. The Agency evaluated the existing toxicology database for azoxystrobin and did not identify an acute dietary endpoint. Therefore, a risk assessment is not required.

2. *Short - and intermediate - term toxicity.* The Agency evaluated the existing toxicology database for short- and intermediate-term dermal and inhalation exposure and determined that this risk assessment is not required.

3. *Chronic toxicity*. EPA has established the reference dose (RfD) for azoxystrobin at 0.18 milligrams/kilogram/day (mg/kg/day). This RfD is based on a chronic toxicity study in rats with a no observed adverse effect level (NOAEL) of 18.2 mg/kg/day. Reduced body weights and bile duct lesions were observed at the lowest effect level (LEL) of 34 mg/kg/day. An Uncertainty Factor (UF) of 100 was used to account for both the interspecies extrapolation and the intraspecies variability.

4. *Carcinogenicity*. The Agency determined that azoxystrobin should be classified as ''Not Likely'' to be a human carcinogen according to the proposed revised Cancer Guidelines. This classification is based on the lack of evidence of carcinogenicity in long-term rat and mouse feeding studies.

B. Exposures and Risks

1. *From food and feed uses.* Permanent tolerances have been established (40 CFR 180.507(a)) for the combined residues of azoxystrobin and its *Z isomer*, in or on a variety of raw agricultural commodities at levels ranging from 0.01 ppm in pecans to 1.0 ppm in grapes. In addition, time-limited tolerances have been established (40 CFR 180.507(b) at levels ranging from 0.006 ppm in milk to 20 ppm in rice hulls) in conjunction with previous section 18 requests. Risk assessments were conducted by EPA to assess dietary exposures and risks from azoxystrobin as follows:

2. *Acute exposure and risk.* Acute dietary risk assessments are performed for a food-use pesticide if a toxicological study has indicated the possibility of an effect of concern occurring as a result of a one day or single exposure. The Agency did not conduct an acute risk assessment because no toxicological endpoint of concern was identified during review of available data.

3. *Chronic exposure and risk.* In conducting this chronic dietary risk assessment, EPA has made very conservative assumptions -- 100% of all commodities having azoxystrobin tolerances will contain azoxystrobin residues and those residues would be at the level of the tolerance with the exception of raisins and grape juice -- which result in an over estimation of human dietary exposure. Thus, in making a safety determination for this tolerance, The Agency is taking into account this conservative exposure assessment.

The existing azoxystrobin tolerances published, pending, and including the necessary section 18 tolerance(s) result in a Theoretical Maximum Residue Contribution (TMRC) that is equivalent to the following percentages of the RfD:

Population Sub-Group	TMRC (mg/kg/day)	% RFD
U.S. Population (48 States).	0.0026	1.5%
All Infants (<1 year old).	0.0079	4.4%
Nursing Infants (<1 year old).	0.0026	1.5%
Non-Nursing Infants (<1 year old).	0.010	5.6%
Children (1–6 years old).	0.0065	3.6%
Children (7–12 years old).	0.0035	1.9%
U.S. Population (Summer Season).	0.0030	1.7%
Northeast Region ...	0.0029	1.6%
Western Region	0.0029	1.6%
Hispanics	0.0036	2.0%
Non-Hispanics Blacks.	0.0029	1.6%
Non-Hispanics (Other Than Black or White).	0.0045	2.5%

The subgroups listed above are:

i. The U.S. population (48 states).

ii. Those for infants and children.

iii. The other subgroups for which the percentage of the RfD occupied is greater than that occupied by the subgroup U.S. population (48 states).

4. *From drinking water.* There is no established maximum contaminant level for residues of azoxystrobin in drinking water. No health advisory levels for azoxystrobin in drinking water have been established.

5. *Acute exposure and risk.* An assessment was not appropriate since no toxicological endpoint of concern was identified during review of the available data.

6. *Chronic exposure and risk.* Based on the chronic dietary (food) exposure estimates, chronic drinking water levels of concern (DWLOC) for azoxystrobin were calculated and are summarized in the following table. The highest EEC for azoxystrobin in surface water is from the application of azoxystrobin on grapes (39 µg/L) and is substantially lower than the DWLOCs calculated. Therefore, chronic exposure to azoxystrobin residues in drinking water do not exceed EPA level of concern.

	Chronic RfD (mg/kg/day)	TMRC Food Exposure (mg/kg/day)	Max Water Exposure[1] (mg/kg/day)	DWLOC [2,3,4] (µg/L)
US Population (48 States)	0.18	0.0026	0.18	6200
Females (13 + years old, not pregnant or nursing)	0.18	0.0029	0.18	5300
Non-nursing Infants (< 1 year old)	0.18	0.010	0.17	1700

[1] Maximum Water Exposure (mg/kg/day) = Chronic RfD (mg/kg/day) - TMRC from DRES (mg/kg/day)
[2] DWLOC(µg/L) = Max water exposure (mg/kg/day) * body wt (kg) /[(10–3 mg/µg)*water consumed daily (L/day)]
[3] HED Default body wts for males, females, and children are 70 kg, 60 kg, and 10 kg respectively.
[4] HED Default Daily Drinking Rates are 2 L/Day for Adults and 1 L/Day for children

7. *From non-dietary exposure.* Azoxystrobin is not currently registered for any residential uses.

8. *Cumulative exposure to substances with common mechanism of toxicity.* Azoxystrobin is related to the naturally occurring strobilurins. There are no other members of this class of fungicides registered with the Agency. Section 408(b)(2)(D)(v) requires that, when considering whether to establish, modify, or revoke a tolerance, the Agency consider ''available information'' concerning the cumulative effects of a particular pesticide's residues and ''other substances that have a common mechanism of toxicity.'' The Agency believes that ''available information'' in this context might include not only toxicity, chemistry, and exposure data, but also scientific policies and methodologies for understanding common mechanisms of toxicity and conducting cumulative risk assessments. For most pesticides, although the Agency has some information in its files that may turn out to be helpful in eventually determining whether a pesticide shares a common mechanism of toxicity with any other substances, EPA does not at this time have the methodologies to resolve the complex scientific issues concerning common mechanism of toxicity in a meaningful way. EPA has begun a pilot process to study this issue further through the examination of particular classes of pesticides. The Agency hopes that the results of this pilot process will increase the Agency's scientific understanding of this question such that EPA will be able to develop and apply scientific principles for better determining which chemicals have a common mechanism of toxicity and evaluating the cumulative effects of such chemicals. The Agency anticipates, however, that even as its understanding of the science of common mechanisms increases, decisions on specific classes of chemicals will be heavily dependent on chemical specific data, much of which may not be presently available.

Although at present the Agency does not know how to apply the information in its files concerning common mechanism issues to most risk assessments, there are pesticides as to which the common mechanism issues can be resolved. These pesticides include pesticides that are toxicologically dissimilar to existing chemical substances (in which case the Agency can conclude that it is unlikely that a pesticide shares a common mechanism of activity with other substances) and pesticides that produce a common toxic metabolite (in which case common mechanism of activity will be assumed).

EPA does not have, at this time, available data to determine whether azoxystrobin 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, azoxystrobin 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 azoxystrobin has a common mechanism of toxicity with other substances.

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

1. *Chronic risk.* Using the conservative TMRC exposure assumptions described above, and taking into account the completeness and reliability of the toxicity data, EPA has estimated the exposure to azoxystrobin from food will utilize 1.5% of the RfD for the U.S. population. EPA generally has no concern for exposures below 100% of the RfD because the RfD represents the level at or below which daily aggregate dietary exposure over a lifetime will not pose appreciable risks to human health. Despite the potential for exposure to azoxystrobin in drinking water, EPA does not expect the aggregate exposure to exceed 100% of the RfD. Under current EPA guidelines, the registered non-dietary uses of azoxystrobin do not constitute a chronic exposure scenario. EPA concludes that there is a reasonable certainty that no harm will result from chronic aggregate exposure to azoxystrobin residues. EPA concludes that there is a reasonable certainty that no harm will result from aggregate exposure to azoxystrobin residues.

2. *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. This risk assessment is not applicable since no indoor and outdoor residential exposure uses are currently registered for azoxystrobin.

D. Aggregate Cancer Risk for U.S. Population

The Agency determined that azoxystrobin should be classified as

''Not Likely'' to be a human carcinogen according to the proposed revised Cancer Guidelines. The Agency has therefore not conducted a cancer risk assessment.

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 azoxystrobin, 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 pre-and post-natal toxicity and the completeness of the database unless EPA determines that a different margin of safety will be safe for infants and children. Margins of safety are incorporated into EPA risk assessments either directly through use of a MOE analysis or through using uncertainty (safety) factors in calculating a dose level that poses no appreciable risk to humans. EPA believes that reliable data support using the standard MOE and uncertainty factor (usually 100 for combined inter- and intra-species 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* — a. *Rabbit*. In the developmental toxicity study in rabbits, developmental NOAEL was 500 mg/kg/day, at the highest dose tested (HDT). Because there were no treatment-related effects, the developmental LEL was ≧500 mg/kg/day. The maternal NOAEL was 150 mg/kg/day. The maternal LEL of 500 mg/kg/day was based on decreased body weight gain during dosing.

b. *Rat*. In the developmental toxicity study in rats, the maternal (systemic) NOAEL was not established. The maternal LEL of 25 mg/kg/day at the lowest dose tested (LDT) was based on increased salivation. The developmental (fetal) NOAEL was 100 mg/kg/day (HDT).

iii. *Reproductive toxicity study — Rat*. In the reproductive toxicity study in rats, the parental (systemic) NOAEL was 32.3 mg/kg/day. The parental LEL of 165.4 mg/kg/day was based on decreased body weights in males and females, decreased food consumption and increased adjusted liver weights in females, and cholangitis. The reproductive NOAEL was 32.3 mg/kg/day. The reproductive LEL of 165.4 mg/kg/day was based on increased weanling liver weights and decreased body weights for pups of both generations.

iv. *Pre- and post-natal sensitivity*. The pre- and post-natal toxicology data base for azoxystrobin is complete with respect to current toxicological data requirements.

v. *Conclusion*. The results of these studies indicate that infants and children are not more sensitive to exposure, based on the results of the rat and rabbit developmental toxicity studies and the 2-generation reproductive toxicity study in rats. The additional 10x safety factor to account for sensitivity of infants and children was removed by the Agency.

2. *Chronic risk*. Using the conservative exposure assumptions described above, EPA has concluded that aggregate exposure to azoxystrobin from food will utilize 1.9% to 5.6% of the RfD for infants and children. EPA generally has no concern for exposures below 100% of the RfD because the RfD represents the level at or below which daily aggregate dietary exposure over a lifetime will not pose appreciable risks to human health. Despite the potential for exposure to azoxystrobin in drinking water and from non-dietary, non-occupational exposure, EPA does not expect the aggregate exposure to exceed 100% of the RfD. EPA concludes that there is a reasonable certainty that no harm will result to infants and children from aggregate exposure to azoxystrobin residues.

V. Other Considerations

A. Metabolism In Plants and Animals

The nature of the residue in grapes is adequately understood. These data are being translated for sugar beets for this section 18 temporary tolerance.

The qualitative nature of the residue in animals is adequately understood for the purposes of this section 18 request. A ruminant metabolism study has been submitted, however the animal metabolism data have not been reviewed by the Office of Pesticide Program's Metabolism Assessment Review Committee. The residues of concern in ruminants appears to be different from that of plants. Unidentified metabolite compounds, designated metabolites 2, 20, and 28, appear to be the major components of the residue in ruminant tissues. For the purposes of these time-limited tolerances for emergency exemptions only, the residues of concern in animal tissues are azoxystrobin and its *Z-isomer*.

As sugar beet commodities are not considered to be major poultry feed items, the nature and the magnitude of residues in poultry and eggs are not of concern for the this section 18.

B. Analytical Enforcement Methodology

A method (SOP RAM 243/03, GLC/NPD) to determine residues of azoxystrobin and its *Z isomer* in banana, peach, peanut, tomato, and wheat commodities has been submitted. This method has been independently validated as per PR Notice 88–5. An Agency validation of this method is pending. The Agency concludes this method is adequate for enforcement of the requested section 18 tolerances on plant commodities.

GLC/NPD method RAM 255/01 is adequate for collection of residue data for azoxystrobin in animal commodities. Adequate independent method validation and concurrent method recovery data have been submitted. Method SOP RAM 255/01 has been submitted for Agency method validation. RAB2 concludes this method is adequate for enforcement of the necessary section 18 tolerances on livestock commodities.

C. Magnitude of Residues

Residue data for azoxystrobin and its *Z-isomer* in banana pulp and in watercress were translated to sugar beet roots and tops, respectively. Residues are not expected to exceed 0.05 ppm in sugar beet roots and 0.2 ppm in sugar beet tops as a result of this section 18 use.

According to the OPPTS Test Guidelines (860.1520), a maximum theoretical concentration factor of 12.5 is noted for the processing of sugar beet roots to refined sugar. The Agency has applied this factor to the tolerance level of sugar beet roots to determine the tolerance level for refined sugar and molasses. Thus, the tolerance level for azoxystrobin and its *Z-isomer* in beet, sugar, refined sugar and molasses will be set at 0.7 ppm. The Agency applied a factor of 20 to the tolerance level of sugar beet roots to determine the tolerance level for the dried pulp. Therefore, the tolerance level for

azoxystrobin and its *Z-isomer* in beet, sugar, pulp, dried will be set at 1.0 ppm.

The existing ruminant tolerances established in conjunction with a previous section 18 request are adequate to cover the proposed uses. The addition of sugar beet commodities to the diet of ruminants will not significantly increase the dietary burden for azoxystrobin residues. The expiration date of livestock commodity tolerances will be extended to the expiration date of the sugar beet tolerances established with this section 18 request. In addition, EPA will establish tolerances for residues of azoxystrobin and its *Z-isomer* in/on kidney of goats, hogs, horses, and sheep at 0.06 ppm.

D. International Residue Limits

There are no Codex, Canadian, or Mexican Maximum Residue Limits (MRL) for azoxystrobin on sugar beet commodities. Thus, harmonization is not an issue for these section 18 requests.

E. Rotational Crop Restrictions

Rotational crop data were previously submitted. Based on this information, a 45 day plantback interval is appropriate for all crops.

VI. Conclusion

Therefore, tolerances are established for combined residues of azoxystrobin and its *Z isomer* in sugar beets and soybeans at 0.05 ppm, and 1.0 ppm respectively .

VII. Objections and Hearing Requests

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

Any person may, by January 25, 1999, file written objections to any aspect of this regulation and may also request a hearing on those objections. Objections and hearing requests must be filed with the Hearing Clerk, at the address given above (40 CFR 178.20). A copy of the objections and/or hearing requests filed with the Hearing Clerk should be submitted to the OPP docket for this rulemaking. The objections submitted must specify the provisions of the regulation deemed objectionable and the grounds for the objections (40 CFR 178.25). Each objection must be accompanied by the fee prescribed by 40 CFR 180.33(i). If a hearing is requested, the objections must include a statement of the factual issues on which a hearing is requested, the requestor's contentions on such issues, and a summary of any evidence relied upon by the requestor (40 CFR 178.27). A request for a hearing will be granted if the Administrator determines that the material submitted shows the following: There is genuine and substantial issue of fact; there is a reasonable possibility that available evidence identified by the requestor would, if established, resolve one or more of such issues in favor of the requestor, taking into account uncontested claims or facts to the contrary; and resolution of the factual issues in the manner sought by the requestor would be adequate to justify the action requested (40 CFR 178.32). Information submitted in connection with an objection or hearing request may be claimed confidential by marking any part or all of that information as CBI. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2. A copy of the information that does not contain CBI must be submitted for inclusion in the public record. Information not marked confidential may be disclosed publicly by EPA without prior notice.

VIII. Public Record and Electronic Submissions

EPA has established a record for this rulemaking under docket control number [OPP–300759] (including any comments and data submitted electronically). A public version of this record, including printed, paper versions of electronic comments, which does not include any information claimed as CBI, is available for inspection from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The public record is located in Room 119 of the Public Information and Records Integrity Branch, Information Resources and Services Division (7502C), Office of Pesticide Programs, Environmental Protection Agency, Crystal Mall #2, 1921 Jefferson Davis Highway, Arlington, VA.

Electronic comments may be sent directly to EPA at:

opp-docket@epamail.epa.gov.

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

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

IX. Regulatory Assessment Requirements

A. Certain Acts and Executive Orders

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

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

generic certification for tolerance actions published on May 4, 1981 (46 FR 24950), and was provided to the Chief Counsel for Advocacy of the Small Business Administration.

B. Executive Order 12875

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

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

C. Executive Order 13084

Under Executive Order 13084, entitled *Consultation and Coordination with Indian Tribal Governments* (63 FR 27655, May 19,1998), EPA may not issue a regulation that is not required by statute, that significantly or uniquely affects the communities of Indian tribal governments, and that imposes substantial direct compliance costs on those communities, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by the tribal governments. If the mandate is unfunded, EPA must provide 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 rule does not significantly or uniquely affect the communities of Indian tribal governments. This action does not involve or impose any requirements that affect Indian tribes. Accordingly, the requirements of section 3(b) of Executive Order 13084 do not apply to this rule.

X. Submission to Congress and the Comptroller General

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the Agency promulgating the rule must submitted 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 rule in the **Federal Register**. This is not a ''major rule'' as defined by 5 U.S.C. 804(2).

List of Subjects in 40 CFR Part 180

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

Dated: November 10, 1998.

James Jones,

Director, Registration Division, Office of Pesticide Programs.

Therefore, 40 CFR chapter I is amended as follows:

PART 180 — [AMENDED]

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

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

2. In §180.507, by alphabetically adding the following commodities to the table in paragraph (b) to read as follows:

§180.507 Azoxystrobin; tolerances for residues.

* * * * *

(b)* * *

Commodity	Parts per million	Expiration/Revocation Date
Aspirated soybean grain fractions	10.	6/30/00
* * *	* * * *	
Kidney of goats, hogs, and sheep grazed on sugar beets	0.06	6/30/00
* * *	* * * *	
Sugar beet roots	0.05	6/30/00
Sugar beet tops	0.20	6/30/00
Sugar beet, molasses	0.70	6/30/00
Sugar beet, pulp, dried	1.0	6/30/00
Sugar beet, refined sugar	0.70	6/30/00
Soybean hay	1.0	6/30/00
Soybean forage	0.2	6/30/00
Soybean hulls	2.0	6/30/00
Soybean meal	0.3	6/30/00
Soybean oil	2.0	6/30/00

Commodity	Parts per million	Expiration/Revocation Date
Soybean seed	0.1	6/30/00
Soybean silage	2.0	6/30/00
* * *	* * * *	

* * * * *

[FR Doc. 98–31545 Filed 11–24–98; 8:45 am]
BILLING CODE 6560–50–F

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 180

[OPP–300754; FRL 6041–4]

RIN 2070–AB78

Tebufenozide; Extension of Tolerance for Emergency Exemptions

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: This rule extends a time-limited tolerance for residues of the insecticide tebufenozide and its metabolites in or on leafy vegetables (Crop Group 4) and brassica leafy vegetables (Crop Group 5) at 5.0 parts per million (ppm) for an additional 18–month period, to August 31, 2000. This action is in response to EPA's granting of an emergency exemption under section 18 of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) authorizing use of the pesticide on leafy vegetables (Crop Group 4) and brassica leafy vegetables (Crop Group 5). Section 408(l)(6) of the Federal Food, Drug, and Cosmetic Act (FFDCA) requires EPA to establish a time-limited tolerance or exemption from the requirement of a tolerance for pesticide chemical residues in food that will result from the use of a pesticide under an emergency exemption granted by EPA under section 18 of FIFRA.

DATES: This regulation becomes effective November 25, 1998. Objections and requests for hearings must be received by EPA, on or before January 25, 1999.

ADDRESSES: Written objections and hearing requests, identified by the docket control number, [OPP–300754], must be submitted to: Hearing Clerk (1900), Environmental Protection Agency, Rm. M3708, 401 M St., SW., Washington, DC 20460. Fees accompanying objections and hearing requests shall be labeled ''Tolerance Petition Fees'' and forwarded to: EPA Headquarters Accounting Operations Branch, OPP (Tolerance Fees), P.O. Box 360277M, Pittsburgh, PA 15251. A copy of any objections and hearing requests filed with the Hearing Clerk identified by the docket control number, [OPP–300754], must also be submitted to: Public Information and Records Integrity Branch, Information Resources and Services Division (7502C), Office of Pesticide Programs, Environmental Protection Agency, 401 M St., SW., Washington, DC 20460. In person, bring a copy of objections and hearing requests to Rm. 119, Crystal Mall #2, 1921 Jefferson Davis Hwy., Arlington, VA.

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

FOR FURTHER INFORMATION CONTACT: By mail: Andrew Ertman, Registration Division (7505C), Office of Pesticide Programs, Environmental Protection Agency, 401 M St., SW., Washington, DC 20460. Office location, telephone number, and e-mail address: Rm. 272, Crystal Mall #2, 1921 Jefferson Davis Hwy., Arlington, VA 22202, (703) 308–9367; e-mail: ertman.andrew@epamail.epa.gov.

SUPPLEMENTARY INFORMATION: EPA issued a final rule, published in the **Federal Register** of March 18, 1998; (63 FR 13126) (FRL 5773–1), which announced that on its own initiative under section 408(e) of the FFDCA, 21 U.S.C. 346a(e) and (l)(6), it established a time-limited tolerance for the residues of tebufenozide and its metabolites in or on leafy vegetables (except brassica leafy vegetables; Crop Group 4) and brassica leafy vegetables (Crop Group 5) at 5.0 ppm, with an expiration date of February 28, 1999. EPA established the tolerance because section 408(l)(6) of the FFDCA requires EPA to establish a time-limited tolerance or exemption from the requirement of a tolerance for pesticide chemical residues in food that will result from the use of a pesticide under an emergency exemption granted by EPA under section 18 of FIFRA. Such tolerances can be established without providing notice or period for public comment.

EPA received a request to extend the use of tebufenozide on leafy vegetables and brassica leafy vegetables for this year growing season due to the continuing emergencies in both California and Arizona. The beet armyworm (BAW) has been causing crop damage due to infestations all season long because the pest will attack crops at emergence, often causing severe loss. Infestations later in the crop cycle will stunt growth, damage and contaminate the harvestable portion of the crop.

Because of the BAW's ability to feed on such a wide array of plants, it has demonstrated an enormous capacity for detoxifying plant defense chemicals and insecticides. In the leafy vegetable and cole crop groups, there are few efficacious products for BAW control. The last 5 years have seen a marked increase in the amounts of active ingredient necessary to achieve control of the beet armyworm in vegetables with failures being reported with all products and combinations. After having reviewed the submission, EPA concurs that emergency conditions exist for this state. EPA has authorized under FIFRA section 18 the use of tebufenozide on leafy vegetables (except brassica leafy vegetables; Crop Group 4) and brassica leafy vegetables (Crop Group 5) for control of the beet armyworm in Arizona and California.

EPA assessed the potential risks presented by residues of tebufenozide in or on leafy vegetables (except brassica leafy vegetables; Crop Group 4) and brassica leafy vegetables (Crop Group 5). In doing so, EPA considered the safety standard in FFDCA section 408(b)(2), and decided that the necessary tolerance under FFDCA section 408(l)(6) would be consistent with the safety standard and with FIFRA section 18. The data and other relevant material have been evaluated and discussed in the final rule of March 18, 1998. Based on that data and information considered, the Agency reaffirms that extension of the time-limited tolerance will continue to meet

the requirements of section 408(l)(6). Therefore, the time-limited tolerance is extended for an additional 18–month period. Although this tolerance will expire and is revoked on August 31, 2000, under FFDCA section 408(l)(5), residues of the pesticide not in excess of the amounts specified in the tolerance remaining in or on leafy vegetables (except brassica leafy vegetables; Crop Group 4) and brassica leafy vegetables (Crop Group 5) after that date will not be unlawful, provided the pesticide is applied in a manner that was lawful under FIFRA and the application occurred prior to the revocation of the tolerance. EPA will take action to revoke this tolerance earlier if any experience with, scientific data on, or other relevant information on this pesticide indicate that the residues are not safe.

I. Objections and Hearing Requests

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

Any person may, by January 25, 1999, file written objections to any aspect of this regulation and may also request a hearing on those objections. Objections and hearing requests must be filed with the Hearing Clerk, at the address given above (40 CFR 178.20). A copy of the objections and/or hearing requests filed with the Hearing Clerk should be submitted to the OPP docket for this rulemaking. The objections submitted must specify the provisions of the regulation deemed objectionable and the grounds for the objections (40 CFR 178.25). Each objection must be accompanied by the fee prescribed by 40 CFR 180.33(i). If a hearing is requested, the objections must include a statement of the factual issues on which a hearing is requested, the requestor's contentions on such issues, and a summary of any evidence relied upon by the requestor (40 CFR 178.27). A request for a hearing will be granted if the Administrator determines that the material submitted shows the following: There is genuine and substantial issue of fact; there is a reasonable possibility that available evidence identified by the requestor would, if established, resolve one or more of such issues in favor of the requestor, taking into account uncontested claims or facts to the contrary; and resolution of the factual issues in the manner sought by the requestor would be adequate to justify the action requested (40 CFR 178.32). Information submitted in connection with an objection or hearing request may be claimed confidential by marking any part or all of that information as CBI. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2. A copy of the information that does not contain CBI must be submitted for inclusion in the public record. Information not marked confidential may be disclosed publicly by EPA without prior notice.

II. Public Record and Electronic Submissions

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

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

Electronic objections and hearing requests must be submitted as an ASCII file avoiding the use of special characters and any form of encryption. Objections and hearing requests will also be accepted on disks in WordPerfect 5.1/6.1 or ASCII file format. All copies of objections and hearing requests in electronic form must be identified by the docket control number [OPP–300754]. No CBI should be submitted through e-mail. Electronic copies of objections and hearing requests on this rule may be filed online at many Federal Depository Libraries.

III. Regulatory Assessment Requirements

A. Certain Acts and Executive Orders

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

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

B. Executive Order 12875

Under Executive Order 12875, entitled *Enhancing the Intergovernmental Partnership* (58 FR 58093, October 28, 1993), EPA may not issue a regulation that is not required by statute and that creates a mandate upon a State, local, or tribal government, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by those governments. If the mandate is unfunded, EPA must provide to OMB a description of the extent of EPA's prior consultation with representatives of affected State, local, and tribal governments, the nature of their concerns, copies of any written communications from the governments, and a statement supporting the need to

issue the regulation. In addition, Executive Order 12875 requires EPA to develop an effective process permitting elected officials and other representatives of State, local, and tribal governments ''to provide meaningful and timely input in the development of regulatory proposals containing significant unfunded mandates.''

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

C. Executive Order 13084

Under Executive Order 13084, entitled *Consultation and Coordination with Indian Tribal Governments* (63 FR 27655, May 19,1998), EPA may not issue a regulation that is not required by statute, that significantly or uniquely affects the communities of Indian tribal governments, and that imposes substantial direct compliance costs on those communities, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by the tribal governments. If the mandate is unfunded, EPA must provide 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 rule does not significantly or uniquely affect the communities of Indian tribal governments. This action does not involve or impose any requirements that affect Indian tribes. Accordingly, the requirements of section 3(b) of Executive Order 13084 do not apply to this rule.

IV. Submission to Congress and the Comptroller General

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

List of Subjects in 40 CFR Part 180

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

Dated: November 2, 1998.

James Jones,

Director, Registration Division, Office of Pesticide Programs.

Therefore, 40 CFR chapter I is amended as follows:

PART 180 — [AMENDED]

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

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

§180.482 [Amended]

2. In §180.482, by amending the table in paragraph (b) for the following commodities ''Leafy Vegetable (Cole-brassica)'' and ''Leafy Vegetables (non-brassica)'' by revising the date ''2/28/99'' to read ''8/31/00.''

[FR Doc. 98–31544 Filed 11–24–98; 8:45 am]

BILLING CODE 6560–50–F

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Parts 1, 21 and 74

[MM Docket No. 97–217; FCC 98–231]

MDS and ITFS Two-Way Transmissions

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: In this Report and Order (''*Order*''), the Commission adopts amendments to its rules to enable Multipoint Distribution Service (''MDS'') and Instructional Television Fixed Service (''ITFS'') licensees to engage in fixed two-way transmissions. These rule changes enhance the flexibility of MDS and ITFS operations through facilitated use of response stations, use of cellular configurations, use of signal booster stations with program origination capability, and use of variable bandwidth (''subchanneling'' or ''superchanneling''). As a result of these rule changes, any MDS and ITFS frequencies in the 2 GHz band may be used by licensees, or leased to wireless cable operators, for broadband data, video or voice transmissions to and/or from subscribers' premises, promoting the competitive position of the wireless cable industry, augmenting the educational uses of these frequencies by ITFS entities, and increasing services to consumers.

DATES: Effective January 25, 1999.

FOR FURTHER INFORMATION CONTACT: Michael J. Jacobs, (202) 418–7066 or Dave Roberts, (202) 418–1600, Video Services Division, Mass Media Bureau.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's *Report and Order*, MM Docket No. 97–217, adopted September 17, 1998, and released September 25, 1998. The full text of this *Order* is available for inspection and copying during normal business hours in the FCC Reference Center (Room 239), 1919 M Street, N.W., Washington, D.C., and also may be purchased from the Commission's copy contractor, International Transcription Services, Inc., (202) 857–3800, 1231 20th Street, N.W., Washington, D.C. 20036.

Synopsis of Report and Order on MDS and ITFS Two-Way Transmissions.

I. Introduction

1. This *Order* is adopted by the Commission after receiving and evaluating comments and reply comments, including ''permit-but-disclose'' *ex parte* comments, filed in response to the Commission's Notice of Proposed Rulemaking (''*NPRM*'') in this docket. *MDS and ITFS Two-Way Transmissions*, 62 FR 60025, Nov. 6, 1997, *as corrected*, 62 FR 60750, Nov. 12, 1997. The *NPRM* was issued after the Commission initially sought comment on a petition for rulemaking filed by a group of 111 educators and participants in the wireless cable industry (collectively, ''Petitioners''), comprised of MDS and ITFS licensees, wireless cable operators, equipment manufacturers, and industry consultants and associations. Currently, MDS and ITFS licensees are authorized to use digital technology in order to increase the number of usable one-way channels available to them, leased ITFS frequencies and MDS channels may be used for asymmetrical high speed digital data applications so long as such usage complies with the Commission's technical rules and its declaratory ruling on the use of digital modulation by MDS and ITFS stations (''*Digital Declaratory*

Ruling,'' 11 FCC Rcd 18839 (1996)), and MDS licensees have been permitted to provide two-way service on a limited basis. Response channels, which currently are allocated in 125 kHz blocks for use in association with most MDS and ITFS stations, must be individually licensed under the Commission's existing rules. Prompted by the petition for rulemaking, the *NPRM* anticipated that many MDS and ITFS licensees and wireless cable operators engaging in two-way transmissions will require more capacity for return paths than is available through such 125 kHz channels, and recognized that the individual licensing of such channels is too cumbersome and imposes too great a financial burden on licensees seeking to implement two-way wireless services. Instead, the *NPRM* proposed to implement a system under which MDS and ITFS licensees would be permitted to utilize all or part of a 6 MHz channel for return path transmissions from subscriber premises, to cellularize their transmission systems to take advantage of spectrally efficient frequency reuse techniques, and to employ modulation schemes consistent with bandwidths either larger or smaller than 6 MHz, all while providing incumbent MDS and ITFS licensees interference protection equivalent to what they currently receive.

2. The comments and reply comments from wireless cable industry participants generally support the *NPRM*'s proposals, and include a *Joint Statement of Position* (''*Joint Statement*'') supported by several industry participants in an attempt to reach agreement primarily on issues related to leasing of excess spectrum capacity by ITFS licensees. While several commenters express concern over the details of the proposals advanced in the *NPRM* and of the *Joint Statement*, the comments and reply comments reflect unanimous support in the MDS and ITFS communities for rules which would enable MDS and ITFS licensees and wireless cable operators to offer a wide array of new, enhanced services, including new digital and two-way communications services. As a result, in this *Order* we: (1) permit both MDS and ITFS licensees to provide two-way services on a regular basis; (2) permit increased flexibility on permissible modulation types; (3) permit increased flexibility in spectrum use and channelization, including combining multiple channels to accommodate wider bandwidths, dividing 6 MHz channels into smaller bandwidths, and channel swapping; (4) adopt a number of technical parameters to mitigate the potential for interference among service providers and to ensure interference protection to existing MDS and ITFS services; (5) simplify and streamline the licensing process for stations used in cellularized systems; and (6) modify the ITFS programming requirements in a digital environment. We believe that the rules that we adopt in this *Order* will facilitate the most efficient use of the affected spectrum, enhance the competitiveness of the wireless cable industry, and provide benefits to the educational community through the use of two-way services, while still permitting traditional use of the spectrum, thus giving both MDS and ITFS licensees the flexibility they need to serve best the public interest.

II. Technical Changes to Rules

A. Revised Definitions of Service

3. The ITFS/MDS spectrum is used primarily for the provision of either one-way video service to students, in the ITFS context, or, in the MDS context, wireless cable service to subscribers, which likewise historically has constituted primarily the provision of one-way video services. While our Rules already permit MDS licensees to provide non-video services, under our current regulatory scheme, MDS operators typically only provide two-way service to subscribers using telephone return links or individually licensed subscriber premises stations. This is an outgrowth of the basic one-way approach to MDS transmission from which our current rules originated.

4. Changes that we adopt in the *Order* to MDS and ITFS service definitions fully incorporate the concept of two-way transmission and reflect the reorientation of the regulatory approach to a flexible service, from that of an essentially one-way service. A regulatory system is created authorizing the use of response station hubs and the more flexible use of response stations, enabling the two-way operation of wireless cable systems. Specifically, the definition of a ''response station'' is amended to indicate that licensees may use all or part of any of their 6 MHz channels as a response channel. Response stations will be the means of transmission from a subscriber's premises, and can use either separate transmitting antennas for return paths or combined transmitting/receiving antennas. The concept of a response station hub is added, and these hubs will serve as the collection points for signals from the response stations in a multipoint-to-point configuration for upstream signal flow. Thus, response stations would not need to be licensed individually, and they could operate at lower power because the response station hubs would be located closer to subscriber premises than are current transmitter sites. Moreover, the hubs are expected to improve service reliability and permit greater frequency reuse than if each subscriber were required to communicate directly with their associated main transmitter site.

5. We further amend the definition for ''signal booster stations'' to allow such stations to originate transmissions, as well as to relay transmissions from other stations. Booster stations now may be used to cellularize wireless cable operations in areas too large to be served by a single station. High-power boosters are those which operate above −9 dBW EIRP, while low-power boosters may operate at or below the −9 dBW threshold. Permitting boosters to originate as well as relay programming will facilitate frequency reuse, cellular configurations, two-way high speed Internet access and other services. Booster station signals will receive interference protection within the booster's service area, but not at receive sites beyond the booster's service area, and booster stations may not have overlapping service areas. We also agree with the *Joint Statement* and with the comments of several parties that all booster stations should be licensed to the licensee of the channels used by the booster station.

6. After receiving broad support in the comments and reply comments to the *NPRM*, flexible subchannelization (*i.e.*, the division of a channel of a particular bandwidth into multiple, but not necessarily equal, channels of smaller bandwidth) will be permitted to allow more efficient channel reuse within a given service area, and superchannelization (*i.e.*, the combining of more than one channel into a single, wider channel) will be allowed and may be used for the transmission of high data rates and/or the use of spread spectrum emissions. Superchannels also will be licensed to multiple entities in many instances, due to the fact that the interleaved, non-contiguous channels in this band generally are licensed to different entities. Subchannels and superchannels will be limited to digital transmissions with fixed uniform power spectral density across the bandwidth, in order to make possible the use of spectral density analysis as part of the interference analysis process. However, we are permitting the maximum possible flexibility for digital subchannelization and superchannelization. Such flexibility includes: subchannelization and

superchannelization of 6 MHz and 125 kHz channels; permitting such techniques both for point-to-multipoint (downstream) and response channel use; subchannelization of superchannels, *e.g.*, an 18 MHz superchannel could be redivided into two 9 MHz channels or any other combination which sums to 18 MHz; division of superchannels into partially overlapping subchannels which sum to greater than the width of the superchannel, *e.g.*, an 18 MHz channel subdivided into three channels each 8 MHz wide, thus producing two overlapping areas of 3 MHz each; and permitting licensees to use either static (fixed and unchanging) or dynamic (not fixed and changing) bandwidths at their stations, so as to optimize the efficiency and speed of information flow. We will continue to issue individual authorizations to individual licensees for 6 MHz and 125 kHz channels, and we will not issue specific authorizations for superchannels or subchannels.

7. Finally, after receiving support from most commenters, we adopt rules in accordance with the most flexible framework proposed in the *NPRM* for use of the 125 kHz channels. Such flexibility includes: permitting the 125 kHz channels to be used as response channels and/or for point-to-multipoint transmissions, which promotes greater options for two-way system design and more efficient use of the spectrum; allowing licensees to swap 125 kHz channels and removing requirements that each 125 kHz channel be used solely in conjunction with a specifically associated 6 MHz channel, which together present opportunities for licensees to create channels with bandwidths exceeding 125 kHz; and, as suggested by the Instructional Telecommunications Foundation, Inc. (Foundation), allowing the content of those channels to be independent of that transmitted on related 6 MHz channels. For the sake of simplicity and consistency with the MDS/ITFS database, we also redesignate the 125 kHz channels as the I channels. In adopting this flexible approach towards the 125 kHz channels, we deny the request of the Catholic Television Network (CTN) that we reallocate all of the 125 kHz channels to ITFS and use them solely for response transmissions, and we also deny the University of Maryland's request that we mandate that any non-ITFS use of I channels licensed to an ITFS entity be secondary to ITFS use. Where the I channels are used for downstream transmissions, they will be afforded interference protection in the same manner as other point-to-multipoint MDS and ITFS facilities. An MDS or ITFS licensee or applicant wishing to use its I channels for downstream transmissions shall apply for such authority using FCC Form 331, and shall prepare interference showings and serve them on potentially affected parties.

B. Interference Considerations

8. *Spectral Mask*. In the *Digital Declaratory Ruling*, the Commission waived its rules with respect to out-of-band emissions and permitted the use of a somewhat relaxed spectral mask for digital transmission modes. This action was taken because the Commission concluded that the application of the current analog emission mask to digital emissions would be unnecessarily restrictive and could increase the cost of digital equipment while providing no benefit. In addition, the results of laboratory tests submitted in connection with the Commission's consideration of this issue demonstrated that a digital station using the relaxed mask is less likely to cause interference than an analog station using the existing, more restrictive, mask.

9. As proposed in the *NPRM*, and subject to slight modifications based on comments of the General Instrument Corporation (formerly NextLevel Systems, Inc.) which we believe will have no impact on the interference environment, we permanently incorporate into the Rules the digital spectral mask waiver provisions of the *Digital Declaratory Ruling*, specifically for main station, high-power booster and response station transmitters which operate on a single 6 MHz channel; masks also are specified, albeit with certain further modifications, for sub- and superchannels, 125 kHz channel stations, and high-power booster stations transmitting using analog or digital modulation on multiple non-contiguous channels simultaneously carrying separate signals (''broadband boosters''). Furthermore, as in the *Digital Declaratory Ruling*, all spectral mask calculations involving digital emissions will use the average power of the emission across its bandwidth, and steps must be taken to ensure substantially uniform power spectral density across the bandwidth in use, including constant power per unit of bandwidth for sub-and superchannels, with 6 MHz as the reference bandwidth, and continuous energy dispersal during times of no modulation. We also incorporate into the Rules formulas provided by Petitioners for consistent spectral mask measurement and interpretation, and based on comments by CTN and as a result of technological advances over the past year, we eliminate the exception proposed in the *NPRM* to the mask for response stations, which would have allowed for discrete spurious emissions. No spectral mask whatsoever will be applicable to low-power booster stations using analog or digital modulation, but such transmitters will be shut down if it is established that they are causing harmful interference.

10. *Power*. As requested by Petitioners, we will permit response stations to use up to 33 dBW EIRP. While the Commission had proposed in the *NPRM* to place a limit of 18 dBW EIRP on response station transmitters in cellularized systems, and although we continue to be concerned about interference, we concur with the conclusions of Petitioners' propagation analysis that the proposed 18 dBW power limit would adversely impact system range and reliability, thereby increasing the number of stations needed and increasing system costs. As a practical matter, however, we do not expect that all, or even most, response stations will utilize the maximum power permitted. In addition, while current MDS and ITFS rules limit booster power to 18 dBW EIRP, henceforth we allow boosters to operate up to 33 dBW EIRP, the maximum power level for MDS and ITFS. The 33 dBW power limit is predicated on a bandwidth of 6 MHz, and the power limit for stations using lesser bandwidth must be reduced proportional to that bandwidth. We also retain frequency tolerance requirements for digital and analog main station and high-power booster station transmitters, while declining to impose such requirements for low-power booster and response station transmitters; retain rules requiring type certification of main and booster transmitters, and adopt rules requiring type certification of response station transmitters, subject to exceptions set forth in the *Digital Declaratory Ruling* regarding the use of existing analog equipment for digital emissions; and adopt rules protecting against excessive radio frequency (''RF'') emissions exposure from MDS/ITFS return path transmissions, in a manner similar to the approach that we adopted for LMDS.

11. *Interference Protection Criteria*. The Commission's current regulations in ITFS and MDS for interference protection were designed to minimize the potential for destructive cochannel and adjacent channel interference between systems located in proximity to each other. The specific criteria for protection are of two forms, namely, (1) cochannel and adjacent channel

desired-to-undesired signal (D/U) ratios and (2) limits on the magnitude of a station's free space field as measured at the edge of the station's protected service area. For cochannel interference protection, an applicant must configure its system so that the signals from each of its transmitters are at least 45 dB weaker than the signals of the existing licensee's transmitters within the licensee's protected service area and/or, in the case of ITFS licensees, at the licensee's protected receiver sites. For adjacent channel protection, the ratio must be at least 0 dB. In order to meet the second form of protection, an applicant generally must be able to demonstrate that the magnitude of the free space radiated field from each transmitter does not exceed a particular limit (*i.e.*, a power flux density −73 dBW/m^2) at the boundary of the applicant's service area.

12. As proposed in the *NPRM*, and as supported by all parties commenting on this issue, we will apply the existing interference criteria in essentially unchanged form, and supplement them with similar new criteria to be applied to hub, booster, and response stations. Furthermore, because two-way systems will involve large numbers of transmitters with heavy frequency reuse and simultaneous operation, a calculation of the combined field produced by the main station transmitter, all cochannel boosters, and the aggregated power from cochannel response stations within a system will be utilized to determine compliance with the interference criteria where these stations partially or completely share spectrum. These criteria shall be adjusted to account for the particular bandwidths involved in the calculations. We also emphasize that where an interfered-with receive antenna meets the antenna characteristics set forth in our MDS and ITFS rules, the station causing the harmful interference is responsible for curing it.

13. *Interference Prediction Methodology*. In order to predict the interference potential of response stations in cellularized systems, we will implement a modified version of the three-step process proposed in the *NPRM*, which uses statistical analysis and worst-case assumptions in deriving theoretical estimations of the locations and characteristics of individual response stations, because these response stations will be licensed under blanket authorizations which specify only the locations of the associated hubs to which the response stations transmit. This methodology is found in Appendix D to the *Order,* and is captioned ''Methods for Predicting Interference from Response Station Transmitters and to Response Station Hubs and for Supplying Data on Response Station Systems.'' This sequence of system design, development and authorization necessitates a radical departure from the customary process whereby interference calculations are made based on specific information concerning specific stations at specific locations with specific operating parameters.

14. In step one, the hub station response service area (''RSA'') is defined and a grid of points is located within this area representative of the expected actual distribution of response station transmitters within the area. Regions within the area are defined so that an adequate population uniformity exists for purposes of predicting interference from a distribution of response station transmitters. While the methodology originally proposed in the *NPRM* would have determined population uniformity using a complex formula involving evaluation of the population density within each ZIP Code within the planned boundaries of a region, in response to comments filed by Spike Technologies, Inc. (Spike) and others that this procedure would not produce results representative of the actual distribution of response stations, the methodology has been corrected so that interference analyses will be conducted from the grid points which have the greatest interference potential, taking into account, both for TDMA and CDMA systems, all potential victim sites both inside and outside the RSA. In step two, the technical characteristics of response stations which will be associated with each point in the RSA grid are identified. One or more classes of response stations are identified within the RSA and its regions, with each class being a function of several variables, such as transmitted power (EIRP), antenna height, frequency, bandwidth, and maximum number of assumed simultaneously operated response stations in the regional class; these characteristics and others will be specified in the response hub application. In response to comments of EDX Engineering, Inc. (EDX) and others that the originally-proposed methodology ignored terrain data, each grid point now will be assigned the highest elevation AMSL of all the geographic area surrounding that grid point, thus making the theoretical stations assigned to each grid point much more likely to be representative of the actual interference potential.

15. The final step in calculating response station interference would require combining the radiated fields of all response stations of all classes, regions and RSAs within the primary station's protected service area. In order to simplify this calculation, the statistical population uniformity within each region will be used as a basis for grouping response stations of all classes in proximity at the grid points laid out within each RSA; multiple classes could share the same grid points. For each class of response stations assigned to a grid point, a set of worst-case assumptions will be made concerning the transmitting antenna radiation pattern, transmitter power (EIRP) and antenna height. Several complex calculations, including procedures for checking the initial calculations, combining the radiated field for all of the transmitters for each class of response station at each grid point from all RSAs will then be used to evaluate compliance with the interference criteria. Subsequently, licensees are free, upon notification to the Commission, to continue adding response station transmitters within their systems until calculations indicate that permissible interference values would be exceeded.

16. We also have considered other proposed modifications to the proposals in the *NPRM* for predicting interference from response stations and to hubs, which we believe render the methodology sufficiently comprehensive and conservative without being overly protective or stifling of growth. For instance, we agree with CTN and others who argue that the ''minimum receivable signal'' hub protection standard proposed in the *NPRM* would have, in some instances, overprotected the hub and thus potentially precluded construction of other stations. Instead, we adopt Petitioners' amended proposal to protect the hub's noise floor, and to take into account the actual antenna(s) in use at the hub. However, in adopting the methodology as modified, we decline to adopt several other proposed modifications, including: EDX's proposed alternate methodology, in which all response station transmitters within a defined area would be represented by a single hypothetical aggregate response station located at the hub site, and which likely would give erroneous interference calculations for many two-way system configurations; Spike's suggestion that applicants should be free to choose any methodology they wish for making interference calculations, which would have promoted uncertainty and slowed the evaluation of applications; and Spike's recommendation that hubs be

redefined to include transmitting capability, which would add unnecessary complexity to the interference protection rules and which is further unnecessary in light of the ability of licensees to collocate hubs with boosters and main stations.

17. We also decline to adopt the guardband proposal for interference protection advanced by CTN. CTN contends that interference could be caused to ITFS receive sites by nearby response stations which are neither cochannel nor adjacent channel to the channels in use at the ITFS receive sites, as a result of brute force overload (''BFO'') to broadband downconverters used at these sites. As a solution to the potential problem of interference from response stations, including BFO, CTN proposes that a guardband be used as a buffer between downstream ITFS operations and upstream operations, with downstream MDS operations occupying the guardband. CTN argues that a guardband would have several benefits, such as mooting the need for calculating response station interference into ITFS receive sites, and confining the risk of BFO, as well as cochannel and adjacent channel interference, solely to MDS licensees. While we find CTN's guardband proposal unduly limiting of system design flexibility, and we also at this time reject as unduly restrictive CTN's proposal of on-air testing of response stations within a certain proximity of ITFS receive sites prior to activation of those response stations, we adopt a slightly modified version of CTN's proposal that no response station may be installed until a notification is sent to each ITFS licensee with any registered receive site within a distance of 1960 feet of the location of the proposed response station. Moreover, because we agree with CTN that BFO is a possibility in certain limited circumstances, we will require that licensees of stations causing interference immediately commence a full cooperative effort with licensees receiving interference, to solve the problem as quickly as possible at the expense of the offending licensee. We emphasize that we will order the immediate deactivation of part or all of a system if that system is causing any interference—whether cochannel, adjacent channel or BFO—and the licensee has not cooperated fully and in a timely manner to eliminate the interference.

C. Modulation Methods

18. In the *Digital Declaratory Ruling*, the Commission authorized the use of QAM and VSB modulation. While the Commission declined to consider the use of other digital modulation methods in the context of that proceeding, it stated that it would consider future requests for declaratory rulings where the requesters submit appropriate data to demonstrate that other modulation techniques could be used in a manner that would not interfere with MDS and ITFS analog and digital operations.

19. As in the *Digital Declaratory Ruling*, and as supported by the commenters on this issue, we decline to adopt one or more ''standard'' digital technologies. We retain and add provisions for accommodating the use of different modulation types. In the *NPRM*, the Commission solicited comment on whether there is a basis for concluding that use of particular digital modulation types by MDS and ITFS stations other than VSB and QAM would not be prone to interference, based on the current 45 dB/0 dB protection ratios for cochannel and adjacent channel interference respectively, *i.e.* that such modulation formats should be permitted without requiring test data. For example, one modulation type may be a subset of VSB and QAM and, therefore, is covered under the industry tests used to support the *Digital Declaratory Ruling*. In response, four parties filed a joint request for declaratory ruling asking that the Commission permit the use of two additional forms of digital modulation, CDMA and QPSK, and we are persuaded to permit use of those modulations on a regular basis at all MDS and ITFS stations. In addition, because we wish to encourage parties to continue to identify different digital modulation schemes that could be useful in MDS and ITFS, we emphasize that we remain open to considering future requests for declaratory rulings in accordance with the *Digital Declaratory Ruling*, upon submission of appropriate data. Finally, in order to facilitate testing and use of different digital modulations where possible, we will permit licensees and system operators to use any digital emission in limited circumstances which we set forth where interference is unlikely or where all parties potentially affected by interference have consented to such use, and so long as such emissions meet spectral mask and uniform power spectral density requirements.

III. Application Processing Issues

20. We set forth a scheme governing the filing and processing of applications for new or modified response station hubs, boosters or downstream I Channel operations, that will substantially shift review of such applications from Commission staff and leave much of the interference environment to be worked out among licensees. As proposed in the *NPRM*, we adopt a rolling, one-day filing window system. While each applicant will be required to demonstrate protection of existing or previously proposed facilities, applications filed on the same day will be granted and the filers left to resolve incompatibilities amongst themselves with little or no intervention by Commission staff. Because parties will be unable to offer reliable service without resolving such conflicts, we believe that the incentive to reach a resolution will be so great that Commission involvement will be unnecessary to resolve disputes.

21. Specifically, applications first will be placed on public notice without prior staff review of interference studies. While the Commission tentatively rejected in the *NPRM* Petitioners' proposal that the applications then would be granted automatically on the 61st day after that notice, unless a petition to deny was filed or the Commission notified the applicant prior to that date that a grant would not be made, the majority of commenters on the subject supported some type of streamlined process, especially when coupled with a complete guarantee of protection against interference. Upon review of these comments, we have been persuaded that failure to adopt an expedited processing system would be seriously detrimental to the provision of two-way service, despite the increased burden that such a system places on licensees to track and monitor applications. Thus, we adopt a modification of the automatic grant proposal, a certification procedure, whereby an applicant must certify in its application that it has completed, served upon potentially affected parties, and submitted to the Commission's copy contractor all required interference studies (or consent letters) and engineering showings demonstrating no interference. Before placing an application on public notice, Commission staff will review it to ensure that all required certifications are included, and any application that does not contain the proper certifications will be dismissed. The application will be granted in reliance on the certifications on the 61st day after public notice, unless a petition to deny is filed against it or the Commission finds in a random audit that the applicant certified falsely. A false certification also could be grounds for revocation of a license. Though consistent with similar certification procedures that have been adopted for other communications

services, this approach is particularly appropriate for MDS and ITFS, because the interdependence of those two services in most cases relies on the parties working together. And, as a safeguard, systems causing interference must cure it immediately or face shut-down, even if the station applications had been unopposed.

22. A large number of applications are likely to be filed once the new rules become effective, and many of the applications submitted at that time may conflict with others filed simultaneously. Therefore, as proposed in the *NPRM*, in order to smooth the transition to the rolling one-day filing window application processing system, we adopt a special one-week initial filing window, the opening of which will be announced by public notice, where all applications filed during this window will be deemed to have been filed as of the same day. Following the publication of a public notice announcing the tendering for filing of applications submitted during that window, applicants will have a period of 60 days to amend their applications to resolve conflicts. During this 60-day period, no additional applications may be filed, affording those who filed during the one-week window an opportunity to resolve any conflicts without fear that, during the pendency of settlement discussions, third parties will propose facilities that will have to be protected if the original applicants amend their applications. After this initial 60 day period, public notice and application grant procedures akin to those that we adopt for the rolling one-day filing windows will be implemented. On the 61st day after the publication of the second public notice, the rolling one-day filing window will go into effect. We believe that our adoption of the one-week initial filing window will lessen the burden on all affected parties, including the Commission's staff, during the first round of application filing. We also believe that providing parties with an initial 60-day period during which they can resolve any apparent conflicts and then amend their applications without prejudice will serve to expedite service to the public by allowing parties to resolve their differences without the need to seek Commission review through the petition to deny process.

23. In the *NPRM*, the Commission solicited comment on whether to adopt a system whereby an applicant, once authorization for service has been granted, may switch from common carrier to non-common carrier service and back without seeking subsequent authorization. The Commission also sought comment on whether operators should be required to give the Commission notice when they are switching back and forth between common carrier and non-common carrier service, even if prior approval is not required. What little comment we received on this subject was supportive of providing the requested flexibility, and we adopt rules implementing it, subject to a requirement that licensees provide the Commission with 30-days advance notice of such changes.

IV. Proposals and Issues Primarily Involving ITFS

24. Under § 74.931 of the Commission's Rules, ITFS stations are operated by educational organizations and are ''intended primarily to provide a formal educational and cultural development in aural and visual form,'' to students enrolled for credit in accredited secondary schools, colleges and universities. Currently, § 74.931(e)(9) specifies that an ITFS licensee who leases excess channel capacity to a wireless cable operator must provide a total average of at least 20 hours per channel per week of ITFS programming on its authorized channels. ITFS licensees in such lease arrangements also retain the right to recapture ''an average of an additional 20 hours per channel per week for simultaneous programming on the number of channels for which it is authorized.'' In addition, an ITFS licensee may shift its required educational programming onto fewer than its authorized number of channels via channel loading or channel mapping. The licensee may further agree to transmission of recapture time on channels not authorized to it but which are included in the wireless cable system of which it is a part.

A. ITFS Programming Requirements

25. In the *NPRM*, the Commission sought comment on several issues related to the question of whether to change our ITFS programming requirements in light of the use of digital technology by ITFS licensees. It asked whether there should be different rules depending on whether the wireless cable system employs digital or analog transmissions, or some combination of both. It further asked whether our existing program content requirements should be retained or whether they should be modified. Specifically, the Commission sought comment on whether data transmission and voice transmission should count toward the fulfillment of minimum programming requirements, and if they were to count, how they would be measured. The Commission also welcomed suggestions on whether education-related upstream transmissions should be applied towards satisfaction of minimum ITFS programming requirements, and, if so, how they should be measured for that purpose. The *Joint Statement* takes positions on many of these issues. To the extent that it and its supporters represent an agreement by most of the parties in the wireless cable industry and MDS and ITFS services, we have accorded it deference in formulating our policies. Nonetheless, while we find some its approaches sound, we find some if its provisions unworthy of adoption.

26. *Redefinition of Eligible Content.* Commenters unanimously support the proposal that spectrum usage beyond video programming be eligible to satisfy ITFS educational usage requirements. We agree that availability of advanced technologies dictates that it is now time to accord ITFS licensees increased flexibility in determining which transmissions qualify as satisfying educational usage requirements, so long as such transmissions are in furtherance of the educational mission of an accredited public or private school, college or university, or other eligible institution (such as certain uses by health care facilities), offering courses to enrolled students. Such uses may include downstream or upstream video, data and voice transmissions. In addition, while heretofore not qualifying to satisfy educational usage requirements, qualifying uses now may include, but are not limited to, teacher conferencing, remote test administration, distribution of reports and assignments, research towards and sharing works of progress in projects for courses, professional training, continuing education, and other similar uses. Furthermore, in light of the myriad of possible uses of the spectrum for courses by accredited schools, we no longer need a separate rule pertaining to where transmissions are not to on-campus receive sites.

27. We also will subject ITFS signal booster stations to educational usage requirements, in conjunction with those to which main ITFS stations are subject, and unless otherwise specified in the Rules, a ''channel'' henceforth shall refer to any of the 6 MHz frequency blocks assigned pursuant to §§ 21.901(b) and 74.902(a) of the Commission's Rules. We amend § 74.931 and other pertinent rules to reflect all of these changes. However, while Hispanic Information and Telecommunications Network contends that qualifying educational service should not be

limited to that offered by accredited institutions, we disagree, because requiring that a qualified licensee be an accredited institution provides greater certainty of the integrity of the licensee's educational function. Thus, we will keep intact our eligibility requirements of § 74.932(a).

28. *Analog Programming Requirements.* Commenters who address this subject unanimously believe that the current programming requirements should be retained for ITFS licensees solely engaged in transmission of downstream analog programming. We agree, and we will impose no changes to programming requirements where licensees solely use analog transmissions. However, for some commenters there is still discord over what the extent is of the recapture time requirement. In the *NPRM*, the Commission rejected Petitioners' proposed changes to § 74.931(e) that sought to revise the absolute 20 hours per channel per week recapture time requirement to provide that the ITFS programming requirements constitute a total of 40 hours per channel per week, including both actual programming and recapture time. While Petitioners and some other commenters argue that the Commission's stance in the *NPRM* will deter investment, we believe that the Commission's rejection in the *NPRM* of Petitioners' proposed changes to our recapture time requirements was correct. However, in response to concerns expressed by BellSouth, we clarify that the Rules do not require that 20 hours always be reserved without accounting for the amount of recapture already exercised.

29. *Digital Educational Usage Requirements.* While CTN insists that educational usage requirements must be modified to reflect increased capacity arising from use of digital technology, and argues that a proportionate increase in instructional usage is needed to prevent the dilution of the instructional nature of ITFS channels, the overwhelming majority of commenters on these issues favors retaining the current minimum educational usage requirements in a digital environment. Some of these commenters, such as BellSouth, argue that ''there is no direct correlation between technological advancements and the need for ITFS programming''; others, such as Wireless One of North Carolina, L.L.C., observe that many ITFS licensees are finding it difficult even to satisfy the existing ITFS minimum educational usage requirements; several others assume the posture reflected in the *Joint Statement*, that while the educational usage requirements should not be changed, 25% of an ITFS licensee's capacity should be immediately available to the ITFS licensee or subject to recapture (with a minimum of 5% of the licensee's capacity immediately available); and some others, such as the San Francisco-San Jose Educator/Operator Consortium, contend that recapture requirements are inefficient and urge that the Commission abolish them.

30. Because we seek to maximize the flexibility of educators and wireless cable operators to design systems which best meet their varied needs, we will adopt ITFS excess capacity leasing rules which best promote this flexibility while at the same time safeguarding the primary educational purpose of the ITFS spectrum allocation. After a careful review of the comments in this proceeding, we decide that these goals are best harmonized where digital transmissions are used by retaining the current 20 hours per channel per week educational usage requirements, adopting the *Joint Statement*'s proposed absolute reservation of a minimum of 5% of an ITFS station's licensed capacity for instructional purposes only, and eliminating requirements setting aside capacity for ready recapture by ITFS licensees. We emphasize that the 20 hours per channel per week minimum educational usage requirement is independent from, but concurrent with, the minimum 5% capacity reservation; further, the reserved capacity can be devoted to satisfying minimum educational usage requirements. These complementary standards are in the public interest because they insure the immediate devotion of ITFS spectrum to formal educational usage, and the provision by ITFS licensees of at least as much educational usage as they provide under the current rules, while providing for expansion of ITFS service offerings and maximization of spectrum available for leasing to wireless cable operators. Thus, these standards also serve the same purposes as the recapture provisions that they supplant.

31. Whether a reservation of 5% of the licensee's capacity is sufficient to meet the minimum educational usage requirements, let alone provide for future expansion of service, will depend both on the digital compression ratio employed by the licensee, and on the particular form of transmissions utilized by the licensee to meet its usage requirements; in some cases, an ITFS licensee may need to reserve more than 5% of its capacity in order to satisfy its educational usage requirements or to provide room for future expansion of services. We also emphasize that an ITFS licensee may reserve for itself in excess capacity lease negotiations more than the minimum required reservation of capacity, and is free not to lease its excess capacity at all if it does not wish to do so.

32. *Measurement of Educational Usage.* In recognition of the difficulty of measuring compliance with the requirements of 20 hours per channel per week of educational usage and the 5% minimum capacity reservation, and in light of the varied forms that ITFS spectral usage can take, we agree with those parties commenting on this issue that at least for now, the best course is to rely on the good faith efforts of ITFS licensees to meet these requirements, subject to potential Commission audits with the licensee bearing the burden of proof of compliance. We decline to adopt time-of-day requirements for measuring educational usage, and in light of changed content requirements and available service options as a result of this proceeding, we grant relevant portions of pending petitions for reconsideration of a 1994 Commission decision that only programming transmitted for ''real time'' viewing by students counts towards minimum educational usage requirements.

B. Channel Loading, Shifting and Swapping

33. It is anticipated that system developers will attempt to utilize contiguous 6 MHz channels for two-way services in order to minimize the amount of spectrum that would be lost to the spectral mask whenever a return path is adjacent to a downlink channel. Furthermore, entire ITFS channel groups may need to be devoted for return paths. Thus, in the *NPRM*, the Commission advanced Petitioners' proposal that we allow ITFS licensees to satisfy their educational usage requirements on other channels within the wireless cable system (''channel loading''), and not mandate that licensees meet these requirements using at least one of their own channels (''channel shifting''). The Commission also proposed to allow the trading of channels between licensees (''channel swapping''), and solicited comment on whether ITFS licensees should be required to retain one or more channels for downstream transmissions. The general concepts of channel loading, shifting and swapping are endorsed by the *Joint Statement* and supported by almost all of the commenting parties. With the exception of our channel loading rules and intra-ITFS channel swaps between licensees using analog transmissions only, the concepts which we permanently adopt in the *Order* apply only to licensees using digital

transmissions, leasing excess capacity to an operator which uses digital transmissions, or swapping channels with a licensee which uses digital transmissions.

34. *Channel Loading.* The parties commenting on our channel loading rules unanimously support their retention, and we shall do so. In response to comments of Petitioners and of BellSouth, we also modify these rules to eliminate the requirement that each ITFS licensee engaged in channel mapping or channel loading preserve the ability to transmit all of its ready recapture time simultaneously on the number of channels for which it is licensed.

35. *Channel Shifting.* The overwhelming majority of commenters on this proposal wholeheartedly support it. While the *Joint Statement* supports the proposal so long as the usage is shifted onto channels licensed to other ITFS entities, we are amending our Rules to permit maximum flexibility in voluntary channel shifting for an ITFS licensee which itself uses, or leases excess capacity to a wireless cable operator which uses, digital transmissions. Such flexibility encompasses the right of an eligible ITFS licensee to shift its required educational usage onto any other channel(s) within the same wireless cable system, regardless of whether licensed to an MDS or ITFS entity. We hope that the flexibility we accord to ITFS licensees to lease their channel capacity, along with the maintenance of minimum ITFS educational usage requirements, also encourages educators to apply for new ITFS stations and leads to more educational usage.

36. *Downstream Channel Reservation.* Of the few comments that we received on this issue, the majority favors a mandatory preservation of one downstream channel. We are adopting the *Joint Statement's* proposal, as modified by comments of Alliance for Higher Education, *et al.* (Higher Education Alliance): that each ITFS licensee leasing channels to be used for return paths shall be required to maintain at least 25% of its capacity to be used for downstream transmissions both during the term of the lease and following termination of its leasing arrangement; and that this preservation need not be over the licensee's own licensed channels. In order to provide additional safeguards of the ITFS spectrum allocation, we stipulate further that in the event the leasing arrangement ends, the wireless cable operator must return to the ITFS licensee unfettered use of as many 6 MHz channels as are authorized to the licensee; only 25% of these channels, however, must be devoted to downstream transmissions.

37. *Channel Swapping.* The comments that we received unanimously are in favor of the concept, and most commenters on these issues indicate full support both for swaps between ITFS channels, as well as between ITFS and MDS channels. The rules that we adopt allow nearly maximum flexibility in the types of swaps that may take place. We decline to adopt proposals limiting the location of response channels, such as a proposal which the Commission tentatively rejected in the *NPRM* as unduly restrictive, which sought to convert MDS channels 1, 2 and 2A to upstream use only, leaving the rest of the MDS and ITFS spectrum solely for downstream use. Moreover, because channel swapping is voluntary and its terms negotiable, we see no need to adopt the proposal of Schwartz, Woods & Miller (SWM) to require that the wireless cable operator cover all of the costs of channel swaps. We implement simple procedures for channel swap applications: Each licensee seeking to swap channels shall file a *pro forma* assignment application with the Commission, attaching an exhibit which clearly specifies that the application is filed pursuant to a channel swap agreement.

38. *Effects on ITFS License Renewal.* Several commenters urge that it is important that we clarify that channel shifting, in particular, will not constitute a basis for, or be a factor in, a license renewal proceeding; the *Joint Statement* also contains a provision to this effect. This concern arises over possible effects of an ITFS licensee not providing any educational usage over its own licensed channels, even if it satisfies its educational usage requirements on other channels in the same wireless cable system. Because we recognize that two-way system design may be based largely on the implementation of channel shifting, and that wireless cable operators and their ITFS lessors may be deterred from utilizing these efficiencies without assurances that doing so will not have an adverse effect at the time the ITFS licensee seeks renewal, we amend § 74.931 to reflect that the fact that an ITFS licensee utilizes channel shifting, channel loading or channel mapping will not itself be considered adversely to the licensee in seeking a license renewal.

C. Autonomy of ITFS Licensees and Agency Role

39. When the Commission solicited comments in preparation for the *NPRM,* several of the ITFS parties who commented at that time expressed concern that the proposed two-way scheme presents threats to the independence of ITFS licensees and their future ability to use spectrum capacity for instructional purposes. Some of those concerned commenters focused on the effect that the proposed rules may have on the engineering autonomy of ITFS licensees. Concerned commenters also identified issues relating to possible encroachment upon the financial autonomy of ITFS licensees by implementation of the proposed two-way framework. While the Commission, in the *NPRM,* sought comment on the effects that cellularization would have on the engineering and financial autonomy of ITFS licensees, it also acknowledged that any proposed solutions inherently would implicate the fundamental question of what degree of oversight the Commission should maintain in regulating the wireless cable industry and ITFS. The Commission solicited views on this fundamental question, and on one of its principal offshoots, the question of what impact the proposed two-way rules should have on the Commission's requirements regarding excess capacity lease agreements.

40. The comments that we received in response to the *NPRM* evince many of the same concerns expressed by some of the ITFS commenting parties in earlier rounds of comment, and likewise are met with opposing comments conveying responses comparable to those previously conveyed. Some of our decisions in the *Order,* such as generally prohibiting involuntary modifications to ITFS stations in a two-way environment, should help address some of the concerns of ITFS licensees regarding their autonomy and ability to continue providing service should they no longer be in a relationship with a wireless cable operator. However, while we will continue to require certain provisions in excess capacity leases between ITFS licensees and wireless cable operators, and likewise will continue to prohibit certain provisions, we believe generally that ITFS licensees can—and should—in their negotiations with wireless cable operators arrange for lease terms that best protect their own individual interests and needs.

41. As a starting point, we reemphasize the Commission's declaration in the *NPRM* that cellularization by ITFS licensees is

permissive only, and not mandatory. In addition, we have decided to grant all ITFS licensees protected service area (psa) protection, in response to concerns over coercion such as those expressed by the Foundation, that otherwise there would be a disparity in interference protection between ITFS licensees that offer high-speed Internet service pursuant to a lease with a wireless cable operator, and ITFS licensees that provide exactly the same service on their own. We also reaffirm the ability of stand-alone ITFS licensees to provide communications services that are not specifically educational over their frequencies, so long as they meet the educational usage requirements set forth in our Rules.

42. *Engineering Autonomy.* We agree with the commenters who recognize that our requirement that each ITFS licensee retain 25% of its capacity for downstream transmissions will present significant assistance to ITFS licensees in continuing to provide downstream educational services. Nevertheless, we believe generally that post-relationship configuration issues should be arranged by the ITFS licensee in the course of negotiating the terms of its excess capacity lease with the wireless cable operator. We further conclude that, particularly in light of the primary educational function of ITFS licensees, where an ITFS licensee is not the source of transmissions over its licensed bandwidth, we will not regard the ITFS licensee as having legal control over the content of such transmissions. At most, an ITFS licensee's legal control over content transmitted over its authorized bandwidth is a contractual matter between the leasing parties.

43. *Financial Autonomy.* In the *NPRM,* the Commission sought comment on the concerns of several commenters at that stage of the proceeding that ITFS licensees will be unable to sever their relationship with the wireless cable operator and acquire the equipment to either continue cellular operations or return to non-two-way transmissions. While some commenters such as CTN, the Foundation, and SWM propose various regulatory solutions to these concerns, we agree with the commenters who argue that the ITFS licensee should address these concerns itself in its lease negotiations. Thus, we decline to adopt proposals to require that two-way wireless cable operators establish a performance bond or escrow account, with sufficient funds to ensure the uninterrupted operation of participating ITFS stations for a given period; or to have transmission systems transfer automatically to the ownership and control of the ITFS licensee upon termination of the lease, or upon commencement of a lease term. However, consistent with current policy, we will require that each excess capacity lease contain a provision assuring the ITFS licensee's right to purchase the actual equipment, or equipment comparable to that, used by the ITFS licensee during the lease for educational purposes. This means, for example, that if the ITFS licensee was providing educational services during the lease period utilizing digital transmissions, the wireless cable operator is not obligated to retain analog transmission equipment for ITFS licensees seeking to return to traditional downstream analog transmissions. In addition, as requested by CTN, this required lease provision applies to dedicated or common equipment used for educational purposes. Nonetheless, as further indicated by CTN, negotiations between the parties to the lease still will be required to spell out the appropriate specific equipment that must be made available.

44. *Commission Role.* In the *NPRM,* the Commission described how in the past, it has adopted rules and procedures to accommodate and protect what has been viewed as the special needs of educational institutions and organizations, believing that educational institutions should be treated differently from commercial entities in many situations due to limited financial and staff resources. One of these protections has been required review by the staff of ITFS excess capacity lease agreements, for overly restrictive provisions affecting the licensee's rights and obligations and for compliance with the Commission's leasing policies. The Commission requested comment on whether parties should continue to be required to file written agreements governing the ITFS licensee's lease of excess capacity on its channels.

45. The comments that we received on this issue generally are split between those who believe that many ITFS licensees are well-funded, and those who believe that many still have very limited resources. Because we believe that many examples supporting both viewpoints exist, we find it still appropriate for us to maintain some degree of oversight regarding the relations between the wireless cable industry and ITFS, albeit a limited role which allows for maximum possible flexibility of the parties in establishing excess capacity lease provisions, while at the same time ensuring educational use of ITFS and a licensee's ability to continue uninterrupted in that use should its relationship with the wireless cable operator terminate. In this regard, we will heed the prescriptions of the numerous commenters who request that we continue to review excess capacity leases for provisions overly restrictive of ITFS licensees and in order to police established safeguards, and require amendment of noncompliant leases. However, consistent with many of our decisions in the *Order* regarding the substance of such leases, we intend this review to be on a lesser scale than previously, and to be more deferential to the burdens and benefits which constitute the agreement between the parties to the leases, and to allowing flexibility in implementation of two-way services.

46. In the *NPRM,* the Commission tentatively rejected, but nonetheless sought comment on, a proposal, advanced by the Foundation, that the Commission require that two-way digital applications and interference consents be reviewed by legal and engineering counsel that do not represent commercial interests, and that these independent advisors certify that in their professional opinion the submission will not harm future instructional service. The Commission noted that past attempts to require all leasing parties to hire separate counsel have been declined by the Commission, having found this safeguard unnecessary and relying instead on the staff's review and monitoring of leases. After reviewing the comments on this issue, we continue to see no reason to change our position on this issue, and we decline to adopt the Foundation's proposal.

47. *Grandfathering of Excess Capacity Lease Provisions.* The *Joint Statement* recommends that excess capacity lease agreements that provide for digital usage and were entered into prior to release of the *Order* be ''grandfathered for their duration.'' We seek to ensure a transition as smooth as possible to two-way operations, and we are persuaded by commenters such as Higher Education Alliance who describe how effectively requiring amendment of numerous existing leases could prove unduly burdensome to ITFS licensees and wireless cable operators who did not anticipate such changes. However, since the March 31, 1997 release of our Public Notice announcing the filing of the petition for rulemaking which initiated this proceeding, no party can be heard to argue that it did not have notice that ITFS/MDS two-operations were anticipated in the not-too-distant future. Thus, any excess capacity lease entered into, renewed, or extended after March 31, 1997 is expected to be brought into compliance immediately

with all of the rule changes and policies that are adopted here, as is each new such lease, renewal, or term extension from here onward. Finally, we emphasize that we will not adjudicate whether the provisions of any specific lease contemplated digital operations as a general matter. In the absence of resolution between the parties to the lease, we believe this issue to be a matter of contract law properly heard before a state tribunal. In framing our policies towards grandfathering of certain excess capacity leases, we have considered, and rejected, SWM's proposal that in order to protect the rights of incumbent ITFS licenses, the Commission require that leases approved or submitted under the previous rules ''be amended to make clear that the wireless cable lessee and the ITFS licensee have together considered the rule changes adopted and made any appropriate changes to lease terms, prior to the commencement of commercial operations on the frequencies using cellularization, sectorization or differing channelization plans.''

48. *Length of Leases.* The *Joint Statement* urges that the Commission allow excess capacity leases of up to 15 years duration, provided that any lease extending beyond the term of a licensee's authorization provides for termination of the lease in the event the Commission denies the subject station's application for renewal. Virtually all of the commenters who address this proposal support it, and we are adopting it. In doing so, we decline to adopt the Foundation's suggestion of maintaining the 10 year lease limit for downstream-only digital and analog systems, while allowing a 15 year limit for two-way systems.

49. *Other Lease Requirements.* Petitioners urge that the Commission reverse two policies which, Petitioners assert, were not formed in rulemaking proceedings: (1) Barring lease provisions that require an ITFS licensee to assign its remaining obligations under an excess capacity lease if it chooses to assign its underlying license; and (2) Rejecting lease provisions which require that an ITFS licensee, seeking to cease operating its facility during the excess capacity lease term, provide the wireless cable operator a reasonable opportunity to secure an eligible ITFS assignee before the license is returned to the Commission for cancellation. We believe that it is appropriate to continue our ban of provisions that would require an ITFS licensee to assign its remaining obligations under an excess capacity lease. However, henceforth we will allow provisions that would permit a wireless cable operator to find a qualified ITFS assignee to assume the license prior to its cancellation, and we set forth guidelines to govern what constitutes acceptable such provisions.

50. The *Joint Statement* contains provisions which call for all excess capacity leases to state that the ITFS licensee ''shall have the right to use any Internet services offered over the system at no greater than the lowest prevailing commercial rate and shall have reasonable access, at rates to be negotiated between the parties, to other services offered over the system (such as addressability and two-way capability).'' Because we believe that these are best private contractual matters between the parties, we decline to implement these provisions of the *Joint Statement*.

D. ITFS Call Sign Transmission

51. In the *NPRM*, the Commission presented Petitioners' arguments that the burdens of continued enforcement of the ITFS call sign transmission requirement in a two-way environment will far outweigh the benefits. The Commission sought comment on the proposed elimination of § 74.982, and solicited alternative solutions for maintaining the accountability of ITFS licensees. The few commenters which addressed this proposal unanimously favored eliminating the call sign transmission requirement where digital transmissions are utilized. In a two-way environment, alleviation of interference problems primarily will be left to the wireless cable operator, because of all the coordination it must do to make a two-way system function properly. In recognition of this and the greater efficiency of digital transmissions, we believe that the burdens embedded in § 74.982, such as costs, outweigh the benefits of applying the rule to any ITFS station using any digital transmissions. Thus, any ITFS station using digital modulation, whether or not in a lease agreement with a wireless cable operator and whether or not in a two-way system, will be exempt from the requirements of § 74.982. However, because these costs would not be prohibitive to ITFS stations using only analog transmissions, and because the benefits of interference identification can still be realized economically where transmissions are in analog, we will retain § 74.982 and apply it to ITFS stations which transmit only in analog.

V. Final Regulatory Flexibility Analysis (FRFA)

52. As required by the Regulatory Flexibility Act (RFA), 5 U.S.C. § 603, an Initial Regulatory Flexibility Analysis (IRFA) was incorporated in the *NPRM* in this proceeding. The Commission sought written public comment on the proposals in the *NPRM*, including on the IRFA. The Commission's Final Regulatory Flexibility Analysis (FRFA) in this *Order* conforms to the RFA, as amended by the Contract With America Advancement Act of 1996.[1]

A. Need for and Objectives of Action

53. In the *Order*, we amend parts 1, 21 and 74 of our Rules to enable MDS and ITFS licensees to provide two-way communication services. These services will be enhanced through the use of two-way audio, video and data communications from ''response'' stations, the use of booster stations with program origination capability in a cellular configuration designed to create spectrum flexibility through frequency reuse, and the use of variable bandwidth (''subchanneling'' and ''superchanneling'') to create additional flexibility. We believe the final rule amendments will facilitate two-way transmission and other improvements to the MDS and ITFS services.

B. Significant Issues Raised by the Public in Response to the Initial Analysis

54. No comments were received specifically in response to the IRFA contained in the *NPRM*. However, some commenters did raise arguments concerning the effect that certain of our proposals may have on small entities.

55. As to whether we should increase educational usage requirements when ITFS licensees employ digital transmissions, Region IV argued that greater educational usage requirements would particularly burden small ITFS entities, by indirectly imposing financial and administrative burdens before these licensees are in a posture to assume such responsibilities.

56. With respect to whether we should adopt a rolling one-day filing window for the submission of two-way MDS and ITFS applications, the Alliance of MDS Licensees argued that such a system would place an unbearable burden on the limited resources of incumbents, resulting in large operators having an advantage over small operators.

C. Description and Number of Small Entities Involved

57. The RFA generally defines ''small entity'' as having the same meaning as the terms ''small business,'' ''small organization,'' and ''small business

[1] Public Law 104–121, 110 Stat. 847 (1996) (CWAAA); *see generally* 5 U.S.C. §§ 601 *et seq.* Title II of the CWAAA is the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA).

concern.'' 5 U.S.C. § 601(6). In addition, the term ''small business'' has the same meaning as the term ''small business concern'' under the Small Business Act.[2] A small business concern is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the SBA. Small Business Act, 15 U.S.C. § 632.

58. *MDS*: The Commission has defined ''small entity'' for the auction of MDS as an entity that, together with its affiliates, has average gross annual revenues that are not more than $40 million for the preceding three calendar years. 47 CFR 21.961(b)(1). This definition of a small entity in the context of MDS auctions has been approved by the SBA. *See Amendment of Parts 21 and 74 of the Commission's Rules With Regard to Filing Procedures in the Multipoint Distribution Service and in the Instructional Television Fixed Service and Implementation of Section 309(j) of the Communications Act—Competitive Bidding*, MM Docket No. 94–31 and PP Docket No. 93–253, Report and Order, 10 FCC Rcd 9589 (1995), 60 FR 36524, Jul. 17, 1995. The Commission completed its MDS auction in March 1996 for authorizations in 493 basic trading areas (BTAs). Of 67 winning bidders, 61 qualified as small entities.[3]

59. MDS is also heavily encumbered with licensees of stations authorized prior to the auction. The SBA has developed a definition of small entities for pay television services, which includes all such companies generating $11 million or less in annual receipts. 13 CFR 121.201. This definition includes multipoint distribution systems, and thus applies to MDS licensees and wireless cable operators which did not participate in the MDS auction. Information available to us indicates that there are 832 of these licensees and operators that do not generate revenue in excess of $11 million annually. Therefore, for purposes of this FRFA, we find that there are approximately 892 small MDS providers as defined by the SBA and the Commission's auction rules, and some of these providers may take advantage of our amended rules to provide two-way MDS.

60. *ITFS*: There are presently 2032 ITFS licensees. All but 100 of these licenses are held by educational institutions (these 100 fall in the MDS category, above). Educational institutions may be included in the definition of a small entity. *See* 5 U.S.C. §§ 601 (3)–(5). ITFS is a non-pay, non-commercial broadcast service that, depending on SBA categorization, has, as small entities, entities generating either $10.5 million or less, or $11.0 million or less, in annual receipts. *See* 13 CFR 121.210 (SIC 4833, 4841, and 4899). However, we do not collect, nor are we aware of other collections of, annual revenue data for ITFS licensees. Thus, we find that up to 1932 of these educational institutions are small entities that may take advantage of our amended rules to provide two-way ITFS.

D. Summary of Projected Reporting, Recordkeeping and Other Compliance Requirements

61. The *Order* adopts the following proposals that include reporting, recordkeeping, and compliance requirements:

62. We required MDS and ITFS licensees employing two-way technology to attach labels to every subscriber transceiver in a conspicuous fashion. In addition, MDS and ITFS licensees employing two-way technology will be required to include a full explanation of the labels that appear on their transceivers, as well as reference to the applicable Commission guidelines, in the instruction manuals and other information accompanying their subscriber transceivers.

63. We required a hub station licensee to formally notify an ITFS licensee when a response station is being located in the vicinity of any of the ITFS licensee's receive sites. Specifically, we created a notification zone with a radius of 1960 feet around each registered ITFS receive site and we required that, at least 20 days prior to the activation of any response station within such a zone, the hub station licensee notify, by certified mail, the appropriate ITFS licensee.

64. In addition to required information contained on new FCC Form 331, we required applicants to submit additional data in specified formats and on diskettes accompanying the application forms.

65. While we do not ordinarily require applicants for minor changes to ITFS facilities to prepare interference showings or serve them on potentially affected parties, we required the preparation and service of interference analyses by ITFS licensees who seek to use their associated I channels for downstream transmissions.

66. We will accept applications for MDS and ITFS response stations hubs or boosters via a rolling, one-day filing window. Each applicant will have to provide interference protection to all facilities existing or proposed prior to the filing of its application, but its application will take precedence over all subsequently filed applications. Applicants will be required to file their applications with all of their interference analyses, in both hard copy and on disk.

67. Applicants for two-way facilities will be required to certify that they have met all requirements regarding interference protection to existing and prior proposed facilities. The applicant will also be required to certify that it has served all potentially affected parties with copies of its application, and with its engineering analysis supporting its interference compliance claim.

E. Steps Taken to Minimize Significant Economic Impact on Small Entities, and Significant Alternatives Considered

68. The following steps were taken in the *Order* to minimize the significant economic impact on small entities:

69. The rule changes adopted in the *Order* to allow two-way operations for MDS and ITFS will simplify our licensing system and provide greater flexibility in the use of the allotted spectrum to licensees. It is expected that such changes will further eliminate market entry barriers for small entities.

70. By allowing for subchannelization, small entity licensees will be able to respond to the demands of the market and create an unlimited number of channels to carry their current and future communications needs. Allowing superchannelization will permit small entity licensees to combine their spectrum with other small entity licensees and create larger systems to meet their particular operations and to operate at greater speeds.

71. To permit small entity ITFS licensees with limited resources adequate time to evaluate a two-way applicant's proposed service plan, we adopted a certification procedure whereby applicants are required to certify that they have met all requirements regarding interference protection to existing and prior proposed facilities. The applicant will also be required to certify that it has served all potentially affected parties

[2] 5 U.S.C. § 601(3) (incorporating by reference the definition of ''small business concern'' in 15 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of small business applies unless an agency after consultation with the Office of Advocacy of the Small Business Administration and after an opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes definitions in the **Federal Register**.

[3] One of these small entities, O'ahu Wireless Cable, Inc., was subsequently acquired by GTE Media Ventures, Inc., which did not qualify as a small entity for purposes of the MDS auction.

with copies of its application and with its engineering analysis supporting its interference compliance claim.

72. In an effort to minimize the impact of our new rules on educational ITFS licensees, many of whom are small entities, we determined that restricting ITFS eligible use to the downstream video/audio paradigm would preclude flexibility in service offerings for an ITFS licensee which leases excess channel capacity. We provided educational entities with additional flexibility to define what ITFS usage they regard as educational, in an effort to permit such entities to further their educational mission. We did not expand our minimum educational usage requirement for digital ITFS transmissions, and we added a requirement that 5 percent of an ITFS station's capacity be set aside for instructional purposes only.

73. The following significant alternatives were considered in the *Order*:

74. We declined to adopt CTN's suggestion that greater suppression of spurious emissions is needed on the order of −60 dB for response stations operating at +48 dBm, up to −75 dB for response stations operating at +63 dBm. We found that modifications made to the spectral mask for response stations would completely eliminate the requirements that were proposed for such emissions.

75. We did not adopt NextLevel's suggestion that a maximum suppression limit be placed on digital emitters, which would effectively remove the out-of-band attenuation requirements for power levels below a certain minimum. We found that such a relaxation of out-of-band limits, in the context of a cellularized CDMA system, could result in an adverse impact on the interference environment because, unlike other services, hundreds or thousands of low power emitters may be transmitting simultaneously and the combined effects of their out-of-band emissions could be significant.

76. In the *Order*, we adopted a Methodology for calculating the interference potential of response stations. We rejected CTN's request to protect hub receivers only to a distance of 35 miles and make them secondary beyond that distance. We concluded that such a step would render hubs extremely susceptible to interference and seriously degrade the communications capabilities and reliabilities within the hub's RSA. We did not adopt EDX Engineering's alternative to Petitioners' response station interference Methodology because, for many two-way system configurations, EDX's interference calculations will inevitably give erroneous results, a shortcoming that was conceded by EDX itself. We also did not permit applicants to choose any methodology they wish for making interference calculations, as we found that this would drastically slow the evaluation of applications and almost certainly result in many Petitions to Deny, as licensees and applicants struggled to understand the differing and potentially incompatible assumptions and calculations incorporated into the various methodologies.

77. We also declined to adopt Spike's recommendation that hub stations be redefined to include transmitting capability. We found that this was not necessary because booster and primary stations may be co-located with hub stations to provide transmission capability, and permitting hubs to also transmit would simply add redundancy and unnecessary complexity to the interference protection requirements of the rules.

78. We denied CTN's request that guardbands be established separating upstream (response station) transmissions from downstream ITFS transmissions. We determined that CTN's first proposal, involving the creation of 24 MHz-wide guardbands, could result in partially or completely eliminating many MHz of potentially useful upstream spectrum on the speculative assumption that such action was necessary to protect ITFS receive sites from interference. We also declined to adopt CTN's subsequent proposals, involving 6 MHz guardbands, believing that it was not the case that the proposed response station interference Methodology is ''unduly complex'' and will be ineffective in determining interference when the potential victim ITFS receive site is within a hub station's RSA.

79. We did not adopt CTN's request for mandatory response station testing, as we found that it would impose an unnecessary burden on two-way licensees.

80. We denied CTN's request to reallocate all of the 125 kHz channels to ITFS and to use them solely for response transmissions. We found that reallocation and the complications associated with that is not necessary, and that allowing the I channels to be used for point-to-multipoint transmissions promotes greater options for two-way system design and more efficient use of the spectrum. For the same reasons, we declined to adopt CTN's suggestion that we render low power boosters secondary, and we also declined to adopt Maryland's request that we mandate that any non-ITFS use of I channels licensed to an ITFS entity be secondary to ITFS use.

81. We rejected the automatic grant proposal made by the Petitioners for granting without review any unopposed two-way license application after a 60-day comment period. We also did not adopt the proposal specified in the *NPRM* to set up a system whereby the staff would fully review the filed applications and issue a grant or denial. Instead, we adopted a certification procedure whereby applicants certify that they have met the requirements regarding interference protection to existing and prior proposed facilities and have served copies of their applications on all affected parties. We determined that this approach was needed to facilitate two-way service to the public, and that without it, two-way service by MDS operators and/or ITFS licensees may not become a reality. The certification requirement would also protect the interests of ITFS licensees, many of whom do not have the time or resources to evaluate a two-way applicant's proposed service plan.

82. In the *Order*, we determined that parties will have 60 days from the date of the public notice to file petitions to deny against two-way applications. We decided that, due to the complex nature of the engineering to be filed, a 60 day petition to deny period is more reasonable that the usual 30 day period.

83. We did not adopt HITN's suggestion that we eliminate our rule that limits eligible ITFS educational service providers to accredited institutions. We found that the primary purpose of ITFS is, and always has been, to meet the needs of students enrolled in courses of formal instruction. Furthermore, we found that accredited schools have been the intended users of ITFS since the origin of the service.

84. We decided to subject ITFS high power booster stations to educational usage requirements, separate from those to which main ITFS stations are subject. We determined, however, not to subject ITFS response stations or response station hubs to educational usage requirements, because the ITFS licensee has no control over which upstream transmissions would qualify to satisfy the requirements.

85. We declined to adopt time-of-day requirements for measuring educational usage, in order to provide ITFS licensees with the maximum flexibility to determine which uses of their spectrum enhance their formal educational mission.

86. In the *Order*, we retained two different but complementary requirements of ITFS spectral usage: a minimum of 20 hours per channel per week for educational usage, and a minimum reservation of 5% of a licensee's capacity that it may not lease. We determined that both would be difficult to measure in light of the varied forms that such usage can take. We decided that the best course would be to rely on the good faith efforts of ITFS licensees to meet these requirements, and we did not institute any new, formal proof of compliance reporting submissions in this area.

F. Report to Congress

87. The Commission will send a copy of the *Order*, including this FRFA, in a report to be sent to Congress pursuant to the Small Business Regulatory Enforcement Fairness Act of 1996. *See* 5 USC § 801(a)(1)(A). In addition, the Commission will send a copy of the *Order*, including the FRFA, to the Chief Counsel for Advocacy of the Small Business Administration. A copy of the *Order* and FRFA (or summaries thereof) will also be published in the **Federal Register**. *See* 5 USC § 604(b).

VI. Procedural Matters

88. Accordingly, *it is ordered* that, pursuant to the authority contained in Sections 4(i) and (j), 301, 303(f), 303(g), 303(h), 303(j), 303(r), and 308(b) of the Communications Act of 1934, as amended, 47 USC §§ 154(i), 154(j), 301, 303(f), 303(g), 303(h), 303(j), 303(r), and 308(b), this *Order is adopted*, and parts 1, 21, and 74 of the Commission's Rules, 47 CFR 1, 21, and 74, *are amended* as set forth below.

89. *It is further ordered* that the Petition of Wireless Cable Ass'n Int'l for Reconsideration and Clarification, MM Docket No. 93–106 (filed August 12, 1994), and Petition of Alliance for Higher Education, *et al.*, MM Docket No. 93–106 (filed August 5, 1994), are granted to the extent described in the *Order* at note 230.

90. The action contained in the *Order* has been analyzed with respect to the Paperwork Reduction Act of 1995 and found to impose new or modified reporting and recordkeeping requirements or burdens on the public. Implementation of these new or modified reporting and recordkeeping requirements will be subject to approval by the Office of Management and Budget as prescribed by the Act. The new or modified paperwork requirements contained in this *Order* (which are subject to approval by the Office of Management and Budget) will go into effect upon OMB approval.

List of Subjects

47 CFR Part 1

Environmental impact statements.

47 CFR Part 21

Communications common carriers, Communications equipment, Reporting and recordkeeping requirements, Television.

47 CFR Part 74

Communications equipment, Education, Reporting and recordkeeping requirements, Television.

Federal Communications Commission.

Magalie Román Salas,

Secretary.

Rule Changes

Parts 1, 21 and 74 of Title 47 of the Code of Federal Regulations are amended as follows:

PART 1—PRACTICE AND PROCEDURE

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

Authority: 15 U.S.C. 79 *et seq.*; 47 U.S.C. 151, 154(i), 154(j), 155, 225, and 303(r).

2. In § 1.1307, paragraph (b)(1), Table 1, right column is amended by adding the entry regarding MDS licensees directly following the existing reference to Multipoint Distribution Service building-mounted antennas, and by adding the entry regarding ITFS licensees directly following the existing reference to part 74, subpart I stations, to read as follows:

§ 1.1307 Actions that may have a significant environmental effect, for which Environmental Assessments (EAs) must be prepared.

* * * * *

(b) * * *

(1) * * *

TABLE 1.—TRANSMITTERS, FACILITIES AND OPERATIONS SUBJECT TO ROUTINE ENVIRONMENTAL EVALUATION

Service (title 47 CFR rule part)	Evaluation required if—
* * * * * * *	
Multipoint Distribution Service (subpart K of part 21). * * *	MDS licensees are required to attach a label to subscriber transceiver or transverter antennas that: (1) provides adequate notice regarding potential radiofrequency safety hazards, e.g., information regarding the safe minimum separation distance required between users and transceiver antennas; and (2) references the applicable FCC-adopted limits for radiofrequency exposure specified in § 1.1310.
* * * * * * *	
Experimental, auxiliary, and special broadcast and other program distributional services (part 74). * * *	ITFS licensees are required to attach a label to subscriber transceiver or transverter antennas that: (1) provides adequate notice regarding potential radiofrequency safety hazards, e.g., information regarding the safe minimum separation distance required between users and transceiver antennas; and (2) references the applicable FCC-adopted limits for radiofrequency exposure specified in § 1.1310.
* * * * * * *	

PART 21—DOMESTIC PUBLIC FIXED RADIO SERVICES

3. The authority for part 21 continues to read as follows:

Authority: Secs. 1, 2, 4, 201–205, 208, 215, 218, 303, 307, 313, 403, 404, 410, 602, 48 Stat. as amended, 1064, 1066, 1070–1073, 1076, 1077, 1080, 1082, 1083, 1087, 1094, 1098, 1102; 47 U.S.C. 151, 154, 201–205, 208, 215, 218, 303, 307, 313, 314, 403, 404, 602; 47 U.S.C. 552, 554.

4. In § 21.2, the following definitions are added in alphabetical order, to read as follows:

§ 21.2 Definitions.

* * * * *

Booster service area. A geographic area to be designated by an applicant for a booster station, within which the booster station shall be entitled to protection against interference as set forth in this part. The booster service area must be specified by the applicant so as to not overlap the booster service area of any other booster authorized to or proposed by the applicant. However, a booster station may provide service to receive sites outside of its booster service area, at the licensee's risk of interference.

* * * * *

Channel. Unless otherwise specified, a channel under this part shall refer to a 6 MHz frequency block assigned pursuant to §§ 21.901(b) or 74.902(a) of this chapter.

* * * * *

Response station hub. A fixed facility licensed to an MDS licensee, and operated by an MDS licensee or the lessee of an MDS facility, for the reception of information transmitted by one or more MDS response stations that utilize digital modulation with uniform power spectral density. A response station hub licensed under this part may share facilities with other MDS response station hubs, ITFS response station hubs authorized pursuant to § 74.939 of this chapter, MDS signal booster stations, ITFS signal booster stations, MDS stations, and/or ITFS stations.

Response station hub license. A blanket license authorizing the operation of a single response station hub at a specific location and the operation of a specified number of associated digital response stations of one or more classes at unspecified locations within one or more regions of the response service area.

Sectorization. The use of an antenna system at an MDS station, booster station and/or response station hub that is capable of simultaneously transmitting multiple signals over the same frequencies to different portions of the service area and/or simultaneously receiving multiple signals over the same frequencies from different portions of the service area.

* * * * *

4a. In § 21.2, the following definitions, in alphabetical order, are revised to read as follows:

Multichannel Multipoint Distribution Service (MMDS). Those Multipoint Distribution Service Channels that use the frequency band 2596 MHz to 2644 MHz and associated 125 kHz channels.

Multipoint Distribution Service (MDS). A domestic public radio service rendered on microwave frequencies from one or more fixed stations transmitting to multiple receiving facilities located at fixed points. MDS also may encompass transmissions from response stations to response station hubs or associated fixed stations.

Multipoint Distribution Service response station. A fixed station operated by an MDS licensee, the lessee of MDS channel capacity or a subscriber of either to communicate with a response station hub or associated MDS station. A response station under this part may share facilities with other MDS response stations and/or one or more Instructional Television Fixed Service (ITFS) response stations authorized pursuant to § 74.939 of this chapter or § 74.940 of this chapter.

* * * * *

Signal Booster Station. An MDS station licensed for use in accordance with § 21.913 that operates on one or more MDS channels. Signal booster stations are intended to augment service as part of a distributed transmission system where signal booster stations retransmit the signals of one or more MDS stations and/or originate transmissions on MDS channels. A signal booster station licensed under this part may share facilities with other MDS signal booster stations, ITFS signal booster stations authorized pursuant to § 74.985 of this chapter, MDS response station hubs and/or ITFS response station hubs.

* * * * *

5. In § 21.11, paragraphs (f) and (g) are redesignated as paragraphs (e) and (f), respectively, and the section heading, paragraphs (a) and (d), and newly redesignated paragraph (e) are revised, to read as follows:

§ 21.11 Miscellaneous forms.

(a) *Licensee qualifications.* FCC Form 430 (''Licensee Qualification Report'') must be filed annually, no later than March 31 for the end of the preceding calendar year, unless the licensee operates solely on a common carrier basis and service was not offered at any time during the preceding year. Each annual filing must include all changes of information required by FCC Form 430 that occurred during the preceding year. In those cases in which there has been no change in any of the required information, the applicant or licensee, in lieu of submitting a new form, may so notify the Commission by letter.

* * * * *

(d) *Assignment of license.* FCC Form 702 (''Application for Consent to Assignment of Radio Station Construction Authorization or License (for Stations in Services Other than Broadcast)'') must be submitted to assign voluntarily (as by, for example, contract or other agreement) or involuntarily (as by, for example, death, bankruptcy, or legal disability) the station license or conditional license. In the case of involuntary assignment, the application must be filed within 30 days of the event causing the assignment. FCC Form 702 also must be used for nonsubstantial (*pro forma*) assignments. In addition, FCC Form 430 must be submitted by the proposed assignee unless such assignee has a current and substantially accurate report on file with the Commission. Whenever a group of station licenses or conditional licenses in the same radio service is to be assigned to a single assignee, a single ''blanket'' application may be filed to cover the entire group, if the application identifies each station by call sign and station location and if two copies are provided for each station affected. The assignment must be completed within 45 days from the date of authorization. Upon consummation of an approved assignment, the Commission must be notified by letter of the date of consummation within 10 days of its occurrence.

(e) *Transfer of control of corporation holding a conditional license or license.* FCC Form 704 (''Application for Consent to Transfer of Control'') must be submitted in order to voluntarily or involuntarily transfer control (de jure or de facto) of a corporation holding any conditional licenses or licenses. In the case of involuntary transfer of control, the application must be filed within 30 days of the event causing the transfer of control. FCC Form 704 also must be used for nonsubstantial (*pro forma*) transfers of control. In addition, FCC Form 430 must be submitted by the proposed transferee unless such transferee has a current and substantially accurate report on file with the Commission. Whenever control of a corporation holding a group of station licenses or conditional licenses in the

same radio service is to be transferred to a single transferee, a single ''blanket'' application may be filed to cover the entire transfer, if the application identifies each station by call sign and station location and if two copies are provided for each station affected. The transfer must be completed within 45 days from the date of authorization. Upon consummation of an approved transfer, the Commission must be notified by letter of the date of consummation within 10 days of its occurrence.

* * * * *

6. In § 21.27, paragraph (d) is added, to read as follows:

§ 21.27 Public notice period.

* * * * *

(d) Notwithstanding any other provisions of this part, effective as of September 17, 1998, there shall be one one-week window, at such time as the Commission shall announce by public notice, for the filing of applications for high-power signal booster station, response station hub and I channels point-to-multipoint transmissions licenses, during which all applications shall be deemed to have been filed as of the same day for purposes of §§ 21.909, 21.913 and 74.939(l) of this chapter. Following the publication of a public notice announcing the tendering for filing of applications submitted during that window, applicants shall have a period of sixty (60) days to amend their applications, provided such amendments do not result in any increase in interference to any previously proposed or authorized station, or to facilities proposed during the window, absent consent of the applicant for or conditional licensee or licensee of the station that would receive such interference. At the conclusion of that sixty (60) day period, the Commission shall publish a public notice announcing the acceptance for filing of all applications submitted during the initial window, as amended during the sixty (60) day period. All petitions to deny such applications must be filed within sixty (60) days of such second public notice. On the sixty-first (61st) day after the publication of such second public notice, applications for new or modified response station hub, booster station and I channels point-to-multipoint transmissions licenses may be filed and will be processed in accordance with the provisions of §§ 21.909, 21.913 and 74.939(l) of this chapter. Notwithstanding § 21.31, each application submitted during the initial window shall be granted on the sixty-first (61st) day after the Commission shall have given such public notice of its acceptance for filing, unless prior to such date either a party in interest timely files a formal petition to deny or for other relief pursuant to § 21.30(a), or the Commission notifies the applicant that its application will not be granted. Where an application is granted pursuant to the provisions of this paragraph, the conditional licensee or licensee shall maintain a copy of the application at the transmitter site or response station hub until such time as the Commission issues a license.

7. In § 21.30, paragraph (a)(4) is revised to read as follows:

§ 21.30 Opposition to applications.

(a) * * *

(4) Except as provided in § 21.902(i)(6) regarding Instructional Television Fixed Service licensees and conditional licensees, in § 21.909 regarding MDS response station hubs and in § 21.913 regarding MDS booster stations, be filed within thirty (30) days after the date of public notice announcing the acceptance for filing of any such application or major amendment thereto, or identifying the tentative selectee of a random selection proceeding in the Multichannel Multipoint Distribution Service or for Multipoint Distribution Service H-channel stations (unless the Commission otherwise extends the filing deadline); and

* * * * *

8. In § 21.31, paragraph (e)(6)(iv) is revised to read as follows:

§ 21.31 Mutually exclusive applications.

* * * * *

(e) * * *

(6) * * *

(iv) The change of status by an MDS applicant from common carrier to non-common carrier, from non-common carrier to common carrier, or from common carrier or non-common carrier to flexibility to alternate between common carrier and non-common carrier service.

9. In § 21.42, paragraph (b)(3) is revised, and paragraph (c)(8) is added, to read as follows:

§ 21.42 Certain modifications not requiring prior authorization.

* * * * *

(b) * * *

(3) The Commission is notified of changes made to facilities by the submission of a completed FCC Form 304 within thirty (30) days after the changes are made.

* * * * *

(c) * * *

(8) A change to a sectorized antenna system comprising an array of directional antennas, provided that such system does not change polarization or result in an increase in radiated power by more than one dB in any direction; provided, however, that notice of such change is provided to the Commission on FCC Form 331 within ten (10) days of installation.

* * * * *

10. In § 21.101, paragraph (a), footnote 2 is revised to read as follows:

§ 21.101 Frequency tolerance.

(a) * * *

---

[2] Beginning November 1, 1991, equipment authorized to be operated in the frequency bands 2150–2162 MHz, 2596–2644 MHz, 2650–2656 MHz, 2662–2668 MHz, and 2674–2680 MHz for use in the Multipoint Distribution Service shall maintain a frequency tolerance within ±1 kHz of the assigned frequency. MDS booster stations authorized pursuant to § 21.913(b) shall maintain a frequency tolerance within ±1 kHz of the assigned frequencies. MDS booster stations authorized pursuant to § 21.913(e) and MDS response stations authorized pursuant to § 21.909 shall employ transmitters with sufficient frequency stability to ensure that the emission stays within the authorized bandwidth.

* * * * *

11. In § 21.118, paragraph (c) is revised to read as follows:

§ 21.118 Transmitter construction and installation.

* * * * *

(c) Each transmitter employed in these services shall be equipped with an appropriately labeled pilot lamp or meter which will provide continuous visual indication at the transmitter when its control circuits have been placed in a condition to activate the transmitter. Such requirement will not be applicable to MDS response stations or MDS booster stations authorized pursuant to § 21.913(e). In addition, facilities shall be provided at each transmitter to permit the transmitter to be turned on and off independently of any remote control circuits associated therewith.

* * * * *

12. Section 21.201 is revised to read as follows:

§ 21.201 Posting of station license.

Each licensee shall post at the station, the booster station authorized pursuant to § 21.913(b) or the MDS response station hub the name, address and telephone number of the custodian of the station license or other instrument of authorization if such license or instrument of authorization, or a clearly legible photocopy thereof, is not maintained at the station, booster

station or response station hub. Each operator of an MDS booster station authorized pursuant to § 21.913(e) shall post at the booster station the name, address and telephone number of the custodian of the notification filed pursuant to § 21.913(e) if such notification is not maintained at the station.

13. Section 21.304 is revised to read as follows:

§ 21.304 Tariffs, reports, and other material required to be submitted to the Commission.

Sections 1.771 through 1.815 of this chapter contain summaries of certain materials and reports, including schedule of charges and accounting and financial reports, which, when applicable, must be filed with the Commission. These requirements likewise shall apply to licensees which alternate between rendering service on a common carrier and non-common carrier basis.

14. Section 21.900 is revised to read as follows:

§ 21.900 Eligibility.

(a) Authorizations for stations in this service will be granted to existing and proposed communications common carriers and non-common carriers. An application will be granted only in cases where it can be shown that:

(1) The applicant is legally, financially, technically, and otherwise qualified to render the proposed service; and

(2) There are frequencies available to enable the applicant to render a satisfactory service; and

(3) The public interest, convenience and necessity would be served by a grant thereof.

(b) The applicant shall state whether service will be provided on a common carrier basis, a non-common carrier basis, or alternating between a common carrier and non-common carrier basis. In addition, an applicant proposing to provide any common carrier service whatsoever shall state whether there is any affiliation or relationship to any intended or likely subscriber or program originator.

15. In § 21.901, paragraphs (a), (b), and (d) and note 1 are revised, and new paragraph (g) is added, to read as follows:

§ 21.901 Frequencies.

(a) Frequencies in the bands 2150–2162 MHz, 2596–2644 MHz, 2650–2656 MHz, 2662–2668 MHz, 2674–2680 MHz and 2686–2690 MHz are available for assignment to fixed stations in this service. Frequencies in the band 2150–2160 MHz are shared with nonbroadcast omnidirectional radio systems licensed under other parts of the Commission's Rules, and frequencies in the band 2160–2162 MHz are shared with directional radio systems authorized in other common carrier services. Frequencies in the 2596–2644 MHz band are shared with Instructional Television Fixed Service stations licensed under part 74 of the Commission's Rules. Channels I5, I13, I6 and I14, listed in § 74.939(j) of this chapter, are assigned to fixed stations in the 2596–2620 band, and are shared with Instructional Television Fixed Service Stations licensed under part 74 of the Commission's Rules to operate in this band; grandfathered channels I21, I29, I22 and I30, listed in § 74.939(j) of this chapter, are licensed under part 21 or part 74 of the Commission's Rules, as applicable.

(b) Applicants may be assigned a channel(s) according to one of the following frequency plans:

(1) At 2150–2156 MHz (designated as Channel 1), or

(2) At 2156–2162 MHz (designated as Channel 2), or

(3) At 2156–2160 MHz (designated as Channel 2A), or

(4) At 2596–2602 MHz, 2608–2614 MHz, 2620–2626 MHz, and 2632–2638 MHz (designated as Channels E1, E2, E3 and E4, respectively, with the four channels to be designated the E-group channels), and Channels I5 and I13 listed in § 74.939(j) of this chapter,[1] or

(5) At 2602–2608 MHz, 2614–2620 MHz, 2626–2632 MHz and 2638–2644 MHz (designated as Channels F1, F2, F3 and F4, respectively, with the four channels to be designated the F-group channels), and Channels I6 and I14, listed in § 74.939(j) of this chapter,[1] or

(6) At 2650–2656 MHz, 2662–2668 MHz and 2674–2680 MHz (designated as Channels H1, H2 and H3, respectively, with the three channels to be designated the H-group channels).[1]

* * * * *

(d) An MDS licensee or conditional licensee may apply to exchange evenly one or more of its assigned channels with another MDS licensee or conditional licensee in the same system, or with an ITFS licensee or conditional licensee in the same system where one or both parties utilizes digital transmissions or leases capacity to an operator which utilizes digital transmissions. The licensees or conditional licensees seeking to exchange channels shall file in tandem with the Commission separate pro forma assignment of license applications, each attaching an exhibit which clearly specifies that the application is filed pursuant to a channel exchange agreement. The exchanged channel(s) shall be regulated according to the requirements applicable to the assignee.

* * * * *

(g) Frequencies in the bands 2150–2162 MHz, 2596–2644 MHz, 2650–2656 MHz, 2662–2668 MHz and 2674–2680 MHz are available for point-to-multipoint use and/or for communications between MDS response stations and response station hubs when authorized in accordance with the provisions of § 21.909, provided that such frequencies may be employed for MDS response stations only when transmitting using digital modulation.

---

[1] No 125 kHz channels are provided for Channels E3, E4, F3, F4, H1, H2 and H3, except for those grandfathered for Channels E3, E4, F3 and F4. The 125 kHz channels associated with Channels E3, E4, F3, F4, H1, H2 and H3 are allocated to the Private Operational Fixed Point-to-Point Microwave Service, pursuant to § 101.147(g) of this chapter.

16. In § 21.902, the section heading, paragraphs (b)(3), (b)(4) (b)(5)(i), (f)(1) and (f)(2) are revised, and new paragraphs (b)(7) and (l) are added, to read as follows:

§ 21.902 Interference.

* * * * *

(b) * * *

(3) Engineer the system to provide at least 45 dB of cochannel interference protection within the 56.33 km (35 mile) protected service area of any authorized or previously-proposed ITFS or incumbent MDS station, and at each previously-registered ITFS receive site (both stations utilizing 6 MHz bandwidths).

(4) Engineer the station to provide at least 0 dB of adjacent channel interference protection within the 56.33 km (35 mile) protected service area of any authorized or previously-proposed ITFS or incumbent MDS station, and at each previously-registered ITFS receive site (both stations utilizing 6 MHz bandwidths).

(5) (i) Engineer the station to limit the calculated free space power flux density to -73 dBW/m^2 (or the appropriate value for bandwidth other than 6 MHz) at the boundary of a 56.33 km (35 mile) protected service area, where there is an unobstructed signal path from the transmitting antenna to the boundary; or alternatively, obtain the written consent of the entity authorized for the adjoining area to exceed the -73 dBW/m^2 limiting signal strength at the common boundary.

* * * * *

(7) Notwithstanding the above, main, booster and response stations shall use the following formulas, as applicable, for determining compliance with: (1) Radiated field contour limits where bandwidths other than 6 MHz are employed at stations utilizing digital modulation with uniform power spectral density; and (2) Cochannel and adjacent channel D/U ratios where the bandwidths in use at the interfering and protected stations are unequal and both stations are utilizing digital modulation with uniform power spectral density or one station is utilizing such modulation and the other station is utilizing either 6 MHz NTSC analog modulation or 125 kHz analog modulation (I channels only).

(i) Contour limit: −73 dBW + 10 log (X/6), where X is the bandwidth in MHz of the digital channel.

(ii) Cochannel D/U: 45 dB + 10 log (X1/X2), where X1 is the bandwidth in MHz of the protected channel and X2 is the bandwidth in MHz of the interfering channel.

(iii) Adjacent channel D/U: 0 dB + 10 log (X1/X2), where X1 is the bandwidth in MHz of the protected channel and X2 is the bandwidth in MHz of the interfering channel.

* * * * *

(f) * * *

(1) Cochannel interference is defined as the ratio of the desired signal to the undesired signal present in the desired channel, at the output of a reference receiving antenna oriented to receive the maximum desired signal. Harmful interference will be considered present when a free space calculation for an unobstructed signal path determines that this ratio is less than 45 dB (both stations utilizing 6 MHz bandwidths).

(2) Adjacent channel interference is defined as the ratio of the desired signal to undesired signal present in an adjacent channel, at the output of a reference receiving antenna oriented to receive the maximum desired signal level.

(i) Harmful interference will be considered present when a free space calculation for an unobstructed signal path determines that this ratio is less than 0 dB (both stations utilizing 6 MHz bandwidths).

(ii) In the alternative, harmful interference will be considered present for an ITFS station constructed before May 26, 1983, when a free space calculation determines that this ratio is less than 10 dB (both stations utilizing 6 MHz bandwidths), unless:

(A) The individual receive site under consideration has been subsequently upgraded with up-to-date reception equipment, in which case the ratio shall be less than 0 dB. Absent information presented to the contrary, however, the Commission will assume that reception equipment installation occurred simultaneously with original station equipment; or

(B) The license for an MDS station is conditioned on the proffer to the affected ITFS station licensee of equipment capable of providing a ratio of 0 dB or more at no expense to the ITFS station licensee, and also conditioned, if necessary, on the proffer of installation of such equipment; and there has been no showing by the affected ITFS station licensee demonstrating good cause and that the proposed equipment will not provide a ratio of 0 dB or more, or that installation of such equipment, at no expense to the ITFS station licensee, is not possible or has not been proffered.

* * * * *

(l) Specific rules relating to response station hubs, booster stations, and 125 kHz channels are set forth in §§ 21.909, 21.913, 21.940, 74.939 of this chapter, 74.940 of this chapter and 74.985 of this chapter. To the extent those specific rules are inconsistent with any rules set forth above, those specific rules shall control.

17. In § 21.903, paragraphs (a) and (b)(1) are revised, and new paragraph (d) is added, to read as follows:

§ 21.903 Purpose and permissible service.

(a) Multipoint Distribution Service channels are available for transmissions from MDS stations and associated MDS signal booster stations to receive locations, and from MDS response stations to response station hubs. When service is provided on a common carrier basis, subscriber supplied information is transmitted to points designated by the subscriber. When service is provided on a non-common carrier basis, transmissions may include information originated by persons other than the licensee, licensee-manipulated information supplied by other persons, or information originated by the licensee. Point-to-point radio return links from a subscriber's location to a MDS operator's facilities may also be authorized in the 18,580 through 18,820 MHz and 18,920 through 19,160 MHz bands. Rules governing such operation are contained in subpart I of part 101 of this chapter, the Point-to-Point Microwave Radio Service.

(b) * * *

(1) Unless service is rendered on a non-common carrier basis, the common carrier controls the operation of all receiving facilities (e.g., including any equipment necessary to convert the signal to a standard television channel, but excluding the television receiver); and

* * * * *

(d) An MDS licensee also may apply for authorization by the Commission to alternate, without further authorization required, between rendering service on a common carrier and non-common carrier basis, provided that the licensee notify the Commission of any service status changes at least 30 days in advance of such changes.

18. Section 21.904 is revised to read as follows:

§ 21.904 Transmitter power.

(a) The maximum EIRP of an MDS main or booster station shall not exceed 33 dBW (or, when digital modulation with uniform power spectral density and subchannels or superchannels, or 125 kHz channels, are used, the appropriately adjusted value based upon the ratio of 6 MHz to the subchannel or superchannel, or 125 kHz, bandwidth), except as provided in paragraph (b) of this section.

(b) If a main or booster station sectorizes or otherwise uses one or more transmitting antennas with a non-omnidirectional horizontal plane radiation pattern, the maximum EIRP over a 6 MHz channel in dBW in a given direction shall be determined by the following formula:

EIRP = 33 dBW + 10 log (360/beamwidth) [where 10 log (360/beamwidth) ≤ 6 dB]. Beamwidth is the total horizontal plane beamwidth of the individual transmitting antenna for the station or any sector measured at the half-power points. The first term of the equation above, 33 dBW, must be adjusted appropriately based upon the ratio of 6 MHz to the subchannel or superchannel, or 125 kHz, bandwidth.

(c) An increase in station transmitter power, above currently authorized or previously-proposed values, to the maximum values provided in paragraphs (a) and (b) of this section, may be authorized, if the requested power increase would not cause harmful interference to any authorized or previously-proposed, cochannel or adjacent channel station entitled to interference protection under the Commission's rules, or if an applicant demonstrates that:

(1) A station that must be protected from interference could eliminate that interference by increasing its power; and

(2) The interfered-with station may increase its own power consistent with

the rules and without causing interference to any MDS booster station or response station hub which operates as part of the same coordinated system as the interfered-with station; and

(3) The applicant requesting authorization of a power increase agrees to pay all expenses associated with the increase in power by the interfered-with station.

19. In § 21.905, paragraph (b) is revised, and new paragraph (d) is added, to read as follows:

§ 21.905 Emissions and bandwidth.

* * * * *

(b) Quadrature amplitude modulation, digital vestigial sideband modulation, quadrature phase shift key modulation and code division multiple access emissions may be employed, subject to compliance with the policies set forth in the *Declaratory Ruling and Order,* 11 FCC Rcd 18839 (1996). Different types of emissions may be authorized if the applicant describes fully the modulation and bandwidth desired and demonstrates that operation of the station will not cause impermissible interference. The licensee may subchannelize its authorized bandwidth, provided that digital modulation is employed and the aggregate power does not exceed the authorized power for the channel, and may utilize all or a portion of its authorized bandwidth for MDS response stations authorized pursuant to § 21.909. The licensee may also, jointly with affected adjacent channel licensees, transmit utilizing bandwidth in excess of its authorized frequencies, provided that digital modulation is employed, all power spectral density requirements set forth in this part are met and the out-of-band emissions restrictions set forth in § 21.908 are met at and beyond the edges of the channels employed. The wider channels thus created may be redivided to create narrower channels.

* * * * *

(d) Notwithstanding the above, any digital emission which meets the uniform power spectral density requirements of the *Declaratory Ruling and Order* may be used in the following circumstances:

(1) At any MDS main or booster station transmitter which is located more than 160.94 km (100 miles) from the nearest boundary of all cochannel and adjacent channel ITFS and MDS protected service areas, including Basic Trading Areas and Partitioned Service Areas; and

(2) At all MDS response station transmitters within a response service area if all points along the response service area boundary line are more than 160.94 km (100 miles) from the nearest boundary of all cochannel and adjacent channel ITFS and MDS protected service areas, including Basic Trading Areas and Partitioned Service Areas; and

(3) At any MDS transmitter where all parties entitled by this part to interference protection from that transmitter have mutually consented to the use at that transmitter of such emissions.

20. In § 21.906, paragraphs (a) and (d) are revised to read as follows:

§ 21.906 Antennas.

(a) Transmitting antennas shall be omnidirectional, except that a directional antenna with a main beam sufficiently broad to provide adequate service may be used either to avoid possible interference with other users in the frequency band, or to provide coverage more consistent with distribution of potential receiving points. In lieu of an omnidirectional antenna, a station may employ an array of directional antennas in order to reuse spectrum efficiently. When an applicant proposes to employ a directional antenna, or a licensee notifies the Commission pursuant to § 21.42 of the installation of a sectorized antenna system, the applicant shall provide the Commission with information regarding the orientation of the directional antenna(s), expressed in degree of azimuth, with respect to true north, and the make and model of such antenna(s).

* * * * *

(d) Directive receiving antennas shall be used at all points other than response station hubs and shall be elevated no higher than necessary to assure adequate service. Receiving antenna height shall not exceed the height criteria of part 17 of this chapter, unless authorization for use of a specific maximum antenna height (above ground and above mean sea level) for each location has been obtained from the Commission prior to the erection of the antenna. Requests for such authorization shall show the inclusive dates of the proposed operation. (See part 17 of this chapter concerning the construction, marking and lighting of antenna structures.)

§ 21.907 [Removed]

21. Section 21.907 is removed.

22. In § 21.908, paragraph (b) is redesignated as paragraph (a), the section heading and newly redesignated paragraph (a) are revised, paragraphs (c) through (e) are removed, and new paragraphs (b) through (e) are added, to read as follows:

§ 21.908 Transmitting equipment.

(a) The maximum out-of-band power of an MDS station transmitter or booster transmitting on a single 6 MHz channel with an EIRP in excess of −9 dBW employing analog modulation shall be attenuated at the channel edges by at least 38 dB relative to the peak visual carrier, then linearly sloping from that level to at least 60 dB of attenuation at 1 MHz below the lower band edge and 0.5 MHz above the upper band edge, and attenuated at least 60 dB at all other frequencies. The maximum out-of-band power of an MDS station transmitter or booster transmitting on a single 6 MHz channel or a portion thereof with an EIRP in excess of −9 dBW (or, when subchannels are used, the appropriately adjusted value based upon the ratio of the channel-to-subchannel bandwidths) employing digital modulation shall be attenuated at the 6 MHz channel edges at least 25 dB relative to the licensed average 6 MHz channel power level, then attenuated along a linear slope to at least 40 dB at 250 kHz beyond the nearest channel edge, then attenuated along a linear slope from that level to at least 60 dB at 3 MHz above the upper and below the lower licensed channel edges, and attenuated at least 60 dB at all other frequencies. Notwithstanding the foregoing, in situations where an MDS station or booster station transmits, or where adjacent channel licensees jointly transmit, a single signal over more than one contiguous 6 MHz channel utilizing digital modulation with an EIRP in excess of −9 dBW (or, when subchannels or superchannels are used, the appropriately adjusted value based upon the ratio of 6 MHz to the subchannel or superchannel bandwidth), the maximum out-of-band power shall be attenuated at the channel edges of those combined channels at least 25 dB relative to the power level of each channel, then attenuated along a linear slope from that level to at least 40 dB at 250 kHz above or below the channel edges of those combined channels, then attenuated along a linear slope from that level to at least 60 dB at 3 MHz above the upper and below the lower edges of those combined channels, and attenuated at least 60 dB at all other frequencies. However, should harmful interference occur as a result of emissions outside the assigned channel, additional attenuation may be required. A transmitter licensed prior to November 1, 1991, that remains at the station site initially licensed, and does not comply with this paragraph, may continue to be used for its life if it does not cause harmful interference to the operation of any other licensee. Any

non-conforming transmitter replaced after November 1, 1991, must be replaced by a transmitter meeting the requirements of this paragraph.

(b) A booster transmitting on multiple contiguous or non-contiguous channels carrying separate signals (a ''broadband'' booster) with an EIRP in excess of −9 dBW per 6 MHz channel and employing analog, digital or a combination of these modulations shall have the following characteristics:

(1) For broadband boosters operating in the frequency range of 2.150–2.160/2 GHz, the maximum out-of-band power shall be attenuated at the upper and lower channel edges forming the band edges by at least 25 dB relative to the licensed analog peak visual carrier or digital average power level (or, when subchannels are used, the appropriately adjusted value based on upon the ratio of the channel-to-subchannel bandwidths), then linearly sloping from that level to at least 40 dB of attenuation at 0.25 MHz above and below the band edges, then linearly sloping from that level to at least 60 dB of attenuation at 3.0 MHz above and below the band edges, and attenuated at least 60 dB at all other frequencies.

(2) For broadband boosters operating in the frequency range of 2.500–2.690 GHz, the maximum out-of-band power shall be attenuated at the upper and lower channel edges forming the band edges by at least 25 dB relative to the licensed analog peak visual carrier or digital average power level (or, when subchannels are used, the appropriately adjusted value based on upon the ratio of the channel-to-subchannel bandwidths), then linearly sloping from that level to at least 40 dB of attenuation at 0.25 MHz above and below the band edges, then linearly sloping from that level to at least 50 dB of attenuation at 3.0 MHz above and below the band edges, then linearly sloping from that level to at least 60 dB of attenuation at 20 MHz above and below the band edges, and attenuated at least 60 dB at all other frequencies.

(3) Within unoccupied channels in the frequency range of 2.500–2.690 GHz, the maximum out-of-band power shall be attenuated at the upper and lower channel edges of an unoccupied channel by at least 25 dB relative to the licensed analog peak visual carrier power level or digital average power level of the occupied channels (or, when subchannels or 125 kHz channels are used, the appropriately adjusted value based upon the ratio of the channel-to-subchannel bandwidths), then linearly sloping from that level to at least 40 dB of attenuation at 0.25 MHz above and below the occupied channel edges, then linearly sloping from that level to at least 50 dB of attenuation at 3.0 MHz above and below the occupied channel edges, and attenuated at least 50 dB at all other unoccupied frequencies.

(c) Boosters operating with an EIRP less than -9 dBW per 6 MHz channel shall have no particular out-of-band power attenuation requirement, except that if they cause harmful interference, their operation shall be terminated within 2 hours of notification by the Commission until the interference can be cured.

(d) The maximum out-of-band power of an MDS response station using all or part of a 6 MHz channel and employing digital modulation shall be attenuated at the 6 MHz channel edges at least 25 dB relative to the licensed average 6 MHz channel power level, then attenuated along a linear slope to at least 40 dB at 250 kHz beyond the nearest channel edge, then attenuated along a linear slope from that level to at least 60 dB at 3 MHz above the upper and below the lower licensed channel edges, and attenuated at least 60 dB at all other frequencies. Where MDS response stations with digital modulation utilize all or part of more than one contiguous 6 MHz channel to form a larger channel (*e.g.*, a channel of width 12 MHz), the above-specified attenuations shall be applied only at the upper and lower edges of the overall combined channel. Notwithstanding these provisions, should harmful interference occur as a result of emissions outside the assigned channel(s), additional attenuation may be required by the Commission.

(e) In measuring compliance with the out-of-band emissions limitations, the licensee shall employ one of two methods in each instance: (1) absolute power measurement of the average signal power with one instrument, with measurement of the spectral attenuation on a separate instrument; or (2) relative measurement of both the average power and the spectral attenuation on a single instrument. The formula for absolute power measurements is to be used when the average signal power is found using a separate instrument, such as a power meter; the formula gives the amount by which the measured power value is to be attenuated to find the absolute power value to be used on the spectrum analyzer or equivalent instrument at the spectral point of concern. The formula for relative power measurements is to be used when the average signal power is found using the same instrument as used to measure the attenuation at the specified spectral points, and allows different resolution bandwidths to be applied to the two parts of the measurement; the formula gives the required amplitude separation (in dB) between the flat top of the (digital) signal and the point of concern.

For absolute power measurements:

Attenuation in dB (below channel power) = $A + 10_{log} (C_{BW} / R_{Bw})$

For relative power measurements:

Attenuation in dB (below flat top) = $A + 10_{log} (R_{BW1} / R_{BW2})$

Where:

A= Attenuation specified for spectral point (e.g., 25, 35, 40, 60 dB)

C_{BW} *= Channel bandwidth (for absolute power measurements)*

R_{BW} *= Resolution bandwidth (for absolute power measurements)*

R_{BW1} *= Resolution bandwidth for flat top measurement (relative)*

R_{BW2} *= Resolution bandwidth for spectral point measurement (relative)*

23. Section 21.909 is revised to read as follows:

§ 21.909 MDS response stations.

(a) An MDS response station is authorized to provide communication by voice, video and/or data signals with its associated MDS response station hub or MDS station. An MDS response station may be operated only by the licensee of an MDS station, by any lessee of the MDS station or response station hub, or by a subscriber of either. The authorized channel may be divided to provide distinct subchannels for each of more than one response station, provided that digital modulation is employed and the aggregate power does not exceed the authorized power for the channel. An MDS response station may also, jointly with other licensees, transmit utilizing bandwidth in excess of that authorized to the station, provided that digital modulation is employed, all power spectral density requirements set forth in this part are met, and the out-of-band emissions restrictions set forth in § 21.908(b) or paragraph (j) of this section are complied with. When a 125 kHz channel is employed for response communications, the specific channel which may be used by the response station is determined in accordance with §§ 21.901 and 74.939(j) of this chapter.

(b) MDS response stations that utilize the 2150–2162 MHz band, the 2500–2686 MHz band, and/or the 125 kHz channels may be installed and operated without an individual license, to communicate with a response station hub authorized under a response station hub license, provided that the conditions set forth in paragraph (g) of this section are complied with and that MDS response stations operating in the

2150–2162 MHz and/or 2500–2686 MHz band(s) employ only digital modulation with uniform power spectral density in accordance with the Commission's *Declaratory Ruling and Order,* 11 FCC Rcd 18839 (1996).

(c) An applicant for a response station hub license shall:

(1) File FCC Form 331 with Mellon Bank, and certify on that form that it has complied with the requirements of paragraphs (c)(2) and (d) of this section. Failure to certify compliance and to comply completely with the requirements of paragraphs (c)(2) and (d) of this section shall result in dismissal of the application or revocation of the response station hub license, and may result in imposition of a monetary forfeiture; and

(2) Submit to International Transcription Services, Inc. (''ITS''), 1231 20th Street, N.W., Washington, DC 20036, both in hard copy, and on a 3.5″ computer diskette in ASCII, the following:

(i) Duplicates of the Form 331 filed with Mellon Bank; and

(ii) The data required by Appendix D to the *Report and Order* in MM Docket No. 97–217, FCC 98–231, ''Methods for Predicting Interference from Response Station Transmitters and to Response Station Hubs and for Supplying Data on Response Station Systems''; and

(iii) The information, showings and certifications required by paragraph (d) of this section; and

(3) Submit to the Commission, only upon Commission staff request, duplicates of the submissions required by paragraph (c)(2) of this section.

(d) An applicant for a response station hub license shall, pursuant to paragraph (c)(2)(iii) of this section, submit to ITS the following:

(1) The geographic coordinates, street address, and the height of the center line of the reception antenna(s) above mean sea level for the proposed response station hub; and

(2) A specification of:

(i) the response service area in which the applicant or its lessee proposes to install MDS response stations to communicate with the response station hub, any regions into which the response service area will be subdivided for purposes of interference analysis, and any regional classes of response station characteristics which will be used to define the operating parameters of groups of response stations within each region for purposes of interference analysis, including:

(A) the maximum height above ground level of the transmission antenna that will be employed by any response station in the regional class and that will be used in interference analyses; and

(B) the maximum equivalent isotropic radiated power (EIRP) that will be employed by any response station in the regional class and that will be used in interference analyses; and

(C) any sectorization that will be employed, including the polarization to be employed by response stations in each sector and the geographic orientation of the sector boundaries, and that will be used in interference analyses; and

(D) the combined worst-case outer envelope plot of the patterns of all models of response station transmission antennas that will be employed by any response station in the regional class to be used in interference analyses; and

(E) the maximum number of response stations that will be operated simultaneously in each region using the characteristics of each regional class applicable to each region.

(ii) the channel plan (including any guardbands at the edges of the channel) to be used by MDS response stations in communicating with each response station hub, including a statement as to whether the applicant will employ the same frequencies on which response stations will transmit to also transmit on a point-to-multipoint basis from an MDS station or MDS booster station; and

(3) A demonstration that:

(i) The proposed response station hub is within a protected service area, as defined in § 21.902(d) or § 21.933, to which the applicant is entitled either

(A) by virtue of its being the licensee of an incumbent MDS station whose channels are being converted for MDS response station use; or

(B) by virtue of its holding a Basic Trading Area or Partitioned Service Area authorization. In the case of an application for response stations to utilize one or more of the 125 kHz response channels, such demonstration shall establish that the response station hub is within the protected service area of the station authorized to utilize the associated E-Group or F-Group channel(s); and

(ii) The entire proposed response service area is within a protected service area to which the applicant is entitled either (A) by virtue of its being the licensee of an incumbent MDS station whose channels are being converted for MDS response station use; or (B) by virtue of its holding a Basic Trading Area or Partitioned Service Area authorization. In the alternative, the applicant may demonstrate that the licensee entitled to any cochannel protected service area which is overlapped by the proposed response service area has consented to such overlap. In the case of an application for response stations to utilize one or more of the 125 kHz response channels, such demonstration shall establish that the response service area is entirely within the protected service area of the station authorized to utilize the associated E-Group or F-Group channel(s), or, in the alternative, that the licensee entitled to any cochannel protected service area which is overlapped by the proposed response service area has consented to such overlap; and

(iii) The combined signals of all simultaneously operating MDS response stations within all response service areas and oriented to transmit towards their respective response station hubs, and all cochannel MDS stations and booster stations licensed to or applied for by the applicant will not generate a power flux density in excess of –73 dBW/m^2 (or the pro rata power spectral density equivalent based on the bandwidth actually employed in those cases where less than a 6 MHz channel is to be employed) outside the boundaries of the applicant's protected service area, as measured at locations for which there is an unobstructed signal path, except to the extent that consent of affected licensees has been obtained or consents have been granted pursuant to paragraph (d)(3)(ii) of this section to an extension of the response service area beyond the boundaries of the protected service area; and

(iv) The combined signals of all simultaneously operating MDS response stations within all response service areas and oriented to transmit towards their respective response station hubs, and all cochannel MDS stations and booster stations licensed to or applied for by the applicant, will result in a desired to undesired signal ratio of at least 45 dB (or the appropriately adjusted value based upon the ratio of the channel-to-subchannel bandwidths):

(A) within the protected service area of any authorized or previously-proposed cochannel incumbent MDS or ITFS station with a 56.33 km (35 miles) protected service area with center coordinates located within 160.94 km (100 miles) of the proposed response station hub; and

(B) within the booster service area of any cochannel booster station entitled to such protection pursuant to §§ 21.913(f) or 74.985(f) of this chapter and located within 160.94 km (100 miles) of the proposed response station hub; and

(C) at any registered receive site of any authorized or previously-proposed cochannel ITFS station or booster station located within 160.94 km (100 miles) of the proposed response station

hub, or, in the alternative, that the licensee of or applicant for such cochannel station or hub consents to the application; and

(v) The combined signals of all simultaneously operating MDS response stations within all response service areas and oriented to transmit towards their respective response station hubs, and all cochannel MDS stations and booster stations licensed to or applied for by the applicant, will result in a desired to undesired signal ratio of at least 0 dB (or the appropriately adjusted value based upon the ratio of the channel to subchannel bandwidths):

(A) within the protected service area of any authorized or previously-proposed adjacent channel incumbent MDS or ITFS station with a 56.33 km (35 miles) protected service area with center coordinates located within 160.94 km (100 miles) of the proposed response station hub; and

(B) within the booster service area of any adjacent channel booster station entitled to such protection pursuant to §§ 21.913(f) or 74.985(f) of this chapter and located within 160.94 km (100 miles) of the proposed response station hub; and

(C) at any registered receive site of any authorized or previously-proposed adjacent channel ITFS station or booster station located within 160.94 km (100 miles) of the proposed response station hub, or, in the alternative, that the licensee of or applicant for such adjacent channel station or hub consents to the application; and

(vi) The combined signals of all simultaneously operating MDS response stations within all response service areas and oriented to transmit towards their respective response station hubs and all cochannel MDS stations and booster stations licensed to or applied for by the applicant will comply with the requirements of paragraph (i) of this section and § 74.939(i) of this chapter.

(4) A certification that the application has been served upon.

(i) The holder of any cochannel or adjacent channel authorization with a protected service area which is overlapped by the proposed response service area;

(ii) The holder of any cochannel or adjacent channel authorization with a protected service area that adjoins the applicant's protected service area;

(iii) The holder of a cochannel or adjacent channel authorization for any BTA or PSA inside whose boundaries are locations for which there is an unobstructed signal path for combined signals from within the response station hub applicant's protected service area; and

(iv) Every licensee of, or applicant for, any cochannel or adjacent channel, authorized or previously-proposed, incumbent MDS station with a 56.33 km (35 mile) protected service area with center coordinates located within 160.94 km (100 miles) of the proposed response station hub; and

(v) Every licensee of, or applicant for, any cochannel or adjacent channel, authorized or previously-proposed ITFS station (including any booster station or response station hub) located within 160.94 km (100 miles) of the proposed response station hub.

(e) Except as set forth in § 21.27(d), applications for response station hub licenses may be filed at any time. Notwithstanding any other provision of part 21 (including § 21.31), applications for response station hub licenses meeting the requirements of paragraph (c) of this section shall cut-off applications that are filed on a subsequent day for facilities that would cause harmful electromagnetic interference to the proposed response station hubs. A response station hub shall not be entitled to protection from interference caused by facilities proposed on or prior to the day the application for the response station hub license is filed. Response stations shall not be required to protect from interference facilities proposed on or after the day the application for the response station hub license is filed.

(f) Notwithstanding the provisions of § 21.30(b)(4) and except as set forth in § 21.27(d), any petition to deny an application for a response station hub license shall be filed no later than the sixtieth (60th) day after the date of public notice announcing the filing of such application or major amendment thereto. Notwithstanding § 21.31 and except as provided in § 21.27(d), an application for a response station hub license that meets the requirements of this section shall be granted on the sixty-first (61st) day after the Commission shall have given public notice of the acceptance for filing of it, or of a major amendment to it if such major amendment has been filed, unless prior to such date either a party in interest timely files a formal petition to deny or for other relief pursuant to § 21.30(a), or the Commission notifies the applicant that its application will not be granted. Where an application is granted pursuant to the provisions of this paragraph, the conditional licensee or licensee shall maintain a copy of the application at the response station hub until such time as the Commission issues a response station hub license.

(g) An MDS response station hub license shall be conditioned upon compliance with the following:

(1) No MDS response station shall be located beyond the response service area of the response station hub with which it communicates; and

(2) No MDS response station shall operate with a transmitter output power in excess of 2 watts; and

(3) No MDS response station shall operate with an EIRP in excess of that specified in the application for the response station hub pursuant to paragraph (d)(2)(i)(B) of this section for the particular regional class of characteristics with which the response station is associated, and such response station shall not operate at an excess of 33 dBW EIRP (or, when subchannels or superchannels, or 125 kHz channels, are used, the appropriately adjusted value based upon the ratio of 6 MHz to the subchannel or superchannel, or 125 kHz, bandwidth); and

(4) Each MDS response station shall employ a transmission antenna oriented towards the response station hub with which the MDS response station communicates, and such antenna shall be no less directional than the worst case outer envelope pattern specified in the application for the response station hub pursuant to paragraph (d)(2)(i)(D) of this section for the regional class of characteristics with which the response station is associated; and

(5) The combined out-of-band emissions of all response stations using all or part of one or multiple contiguous 6 MHz channels and employing digital modulation shall comply with § 21.908(d). The combined out-of-band emissions of all response stations using all or part of one or multiple contiguous 125 kHz channels shall comply with paragraph (j) of this section. However, should harmful interference occur as a result of emissions outside the assigned channel, additional attenuation may be required; and

(6) The response stations transmitting simultaneously at any time within any given region of the response service area utilized for purposes of analyzing the potential for interference by response stations shall conform to the numerical limits for each class of response station proposed in the application for the response station hub license. Notwithstanding the foregoing, the licensee of a response station hub license may alter the number of response stations of any class operated simultaneously in a given region, without prior Commission authorization, provided that the licensee:

(i) First notifies the Commission of the altered number of response stations of such class(es) to be operated simultaneously in such region, and certifies in that notification that it has complied with the requirements of paragraphs (g)(6)(ii) and (iii) of this section; and

(ii) Provides ITS with a copy of such notification and with an analysis establishing that such alteration will not result in any increase in interference to the protected service area or protected receive sites of any existing or previously-proposed, cochannel or adjacent channel MDS or ITFS station or booster station, to the protected service area of any MDS Basic Trading Area or Partitioned Service Area licensee entitled to protection pursuant to paragraph (d)(3) of this section, or to any existing or previously-proposed, cochannel or adjacent channel response station hub, or response station under § 21.940 or § 74.940 of this chapter; or that the applicant for or licensee of such facility has consented to such interference; and

(iii) Serves a copy of such notification and analysis upon each party entitled to be served pursuant to paragraph (d)(4) of this section; and

(iv) Submits to the Commission, only upon Commission staff request, duplicates of the submissions required by paragraph (g)(6)(ii) of this section; and

(7) Where an application is granted under this section, if a facility operated pursuant to that grant causes harmful, unauthorized interference to any cochannel or adjacent channel facility, it must promptly remedy the interference or immediately cease operations of the interfering facility, regardless of whether any petitions to deny or for other relief were filed against the application during the application process. The burden of proving that a facility operated under this section is not causing harmful, unauthorized interference lies on the licensee of the alleged interfering facility, following the filing of a documented complaint of interference by an affected party; and

(8) In the event any MDS or ITFS receive site suffers interference due to block downconverter overload, the licensee of each response station hub with a response service area within five miles of such receive site shall cooperate in good faith to expeditiously identify the source of the interference. Each licensee of a response station hub with an associated response station contributing to such interference shall bear the joint and several obligation to promptly remedy all interference resulting from block downconverter overload at any ITFS receive site registered prior to the submission of the application for the response station hub license or at any receive site within an MDS or ITFS protected service area applied for prior to the submission of the application for the response station hub license, regardless of whether the receive site suffering the interference was constructed prior to or after the construction of the response station(s) causing the downconverter overload; provided, however, that the licensee of the registered ITFS receive site or the MDS or ITFS protected service area must cooperate fully and in good faith with efforts by the response station hub licensee to prevent interference before constructing response stations and/or to remedy interference that may occur. In the event that more than one response station hub licensee contributes to block downconverter interference at a MDS or ITFS receive site, the licensees of the contributing response station hubs shall cooperate in good faith to remedy promptly the interference.

(h) Applicants must comply with part 17 of this chapter concerning notification to the Federal Aviation Administration of proposed antenna construction or alteration.

(i) Response station hubs shall be protected from cochannel and adjacent channel interference in accordance with the following criteria:

(1) An applicant for any new or modified MDS or ITFS station (including any high-power booster station or response station hub) shall be required to demonstrate interference protection to a response station hub within 160.94 km (100 miles) of the proposed facilities. In lieu of the interference protection requirements set forth in §§ 21.902(b)(3) through (b)(5), 21.938(b)(1) and (2) and (c), and 74.903 of this chapter, such demonstration shall establish that the proposed facility will not increase the effective power flux density of the undesired signals generated by the proposed facility and any associated main stations, booster stations or response stations at the response station hub antenna for any sector. In lieu of the foregoing, an applicant for a new MDS or ITFS main station license or for a new or modified response station hub or booster license may demonstrate that the facility will not increase the noise floor at a reception antenna of the response station hub by more than 1 dB for cochannel signals and 45 dB for adjacent channel signals, provided that:

(i) The entity submitting the application may only invoke this alternative once per response station hub reception sector; or

(ii) The licensee of the affected response station hub may consent to receive a certain amount of interference at its hub.

(2) Commencing upon the filing of an application for an MDS response station hub license and until such time as the application is dismissed or denied or, if the application is granted, a certification of completion of construction is filed, the MDS station whose channels are being utilized shall be entitled both to interference protection pursuant to §§ 21.902(b)(3) through (b)(5), 21.938(b)(1) and (2) and (c), and 74.903 of this chapter, and to protection of the response station hub pursuant to the preceding paragraph. Unless the application for the response station hub license specifies that the same frequencies also will be employed for digital and/or analog point-to-multipoint transmissions by MDS stations and/or MDS booster stations, upon the filing of a certification of completion of construction of an MDS response station hub where the channels of an MDS station are being utilized as response station transmit frequencies, the MDS station whose channels are being utilized for response station transmissions shall no longer be entitled to interference protection pursuant to §§ 21.902(b)(3) through (b)(5), 21.938(b)(1) and (2) and (c), and 74.903 of this chapter within the response service area with regard to any portion of any 6 MHz channel employed solely for response station communications. Upon the certification of completion of construction of an MDS response station hub where the channels of an MDS station are being utilized for response station transmissions and the application for the response station hub license specifies that the same frequencies will be employed for point-to-multipoint transmissions, the MDS station whose channels are being utilized shall be entitled both to interference protection pursuant to §§ 21.902(b)(3) through (b)(5), 21.938(b)(1) and (2) and (c), and 74.903 of this chapter, and to protection of the response station hub pursuant to the preceding provisions of this paragraph.

(j) 125 kHz wide response channels shall be subject to the following requirements: The 125 kHz wide channel shall be centered at the assigned frequency. If amplitude modulation is used, the carrier shall not be modulated in excess of 100%. If frequency modulation is used, the deviation shall not exceed ±25 kHz. Any emissions outside the channel shall be

attenuated at the channel edges at least 35 dB below peak output power when analog modulation is employed or 35 dB below licensed average output power when digital modulation is employed (or, when subchannels are used, the appropriately adjusted value based upon the ratio of the channel-to-subchannel bandwidths). Any emissions more than 125 kHz from either channel edge, including harmonics, shall be attenuated at least 60 dB below peak output power when analog modulation is employed, or at least 60 dB below licensed average output power when digital modulation is employed (or, when subchannels are used, the appropriately adjusted value based upon the ratio of the channel-to-subchannel bandwidths). Notwithstanding the foregoing, in situations where adjacent channel licensees jointly transmit over more than one contiguous channel utilizing digital modulation, the maximum out-of-band power shall be attenuated at the edges of those combined channels at least 35 dB relative to the licensed average power level of each channel. Emissions more than 125 kHz from either edge of the combined channels, including harmonics, shall be attenuated at least 60 dB below peak analog power or average digital power of each channel, as appropriate.

(k) A response station may be operated unattended. The overall performance of the response station transmitter shall be checked by the hub licensee as often as necessary to ensure that it is functioning in accordance with the requirements of the Commission's rules. The licensee of a response station hub is responsible for the proper operation of all associated response stations and must have reasonable and timely access to all associated response station transmitters. Response stations shall be installed and maintained by the licensee of the associated hub station, or the licensee's employees or agents, and protected in such manner as to prevent tampering or operation by unauthorized persons. No response hub may lawfully communicate with any response station which has not been installed by an authorized person, and each response station hub licensee is responsible for maintaining, and making available to the Commission upon request, a list containing the customer name and site location (street address and latitude/longitude to the nearest second) of each associated response station, plus the technical parameters (e.g., EIRP, emission, bandwidth, and antenna pattern, height, orientation and polarization) pertinent to each specific response station.

(l) The transmitting apparatus employed at MDS response stations shall have received type certification.

(m) An MDS response station shall be operated only when engaged in communication with its associated MDS response station hub or MDS station, or for necessary equipment or system tests and adjustments. Radiation of an unmodulated carrier and other unnecessary transmissions are forbidden.

(n) At least 20 days prior to the activation of a response station transmitter located within a radius of 1960 feet of a registered or previously-applied-for ITFS receive site, the response station hub licensee must notify, by certified mail, the licensee of the ITFS site of the intention to activate the response station. The notification must contain the street address and geographic coordinates (to the nearest second) of the response station, a specification of the station's EIRP, antenna pattern/orientation/height AMSL, channel(s) to be used, as well as the name and telephone number of a contact person who will be responsible for coordinating the resolution of any interference problems.

(o) Interference calculations shall be performed in accordance with Appendix D to the *Report and Order* in MM Docket No. 97–217, FCC 98–231, ''Methods for Predicting Interference From Response Station Transmitters and To Response Station Hubs and for Supplying Data on Response Station Systems.'' Compliance with the out-of-band emissions limitations shall be established in accordance with § 21.908(e).

24. In § 21.910, the section heading and introductory text, paragraph (a), and the introductory text of paragraph (b) are revised, and new paragraph (d) is added, to read as follows:

§ 21.910 Special procedures for discontinuance, reduction or impairment of service by common carrier licensees.

Any licensee who has elected common carrier status and who seeks to discontinue service on a common carrier basis and instead provide service on a non-common carrier basis, or who otherwise intends to reduce or impair service, shall be subject to the following procedures:

(a) The carrier shall notify all affected customers of the planned discontinuance, reduction or impairment. Notice shall be in writing to each affected customer unless the Commission authorizes in advance, for good cause shown, another form of notice. Notice shall include the following:

(1) Name and address of carrier; and

(2) Date of planned service discontinuance, reduction or impairment; and

(3) Points or geographic areas of service affected; and

(4) How many and which channels are affected; and

(5) The following statement:

The FCC normally will authorize this proposed discontinuance of service (or reduction or impairment) unless it is shown that end-users will be affected adversely thereby. Affected customers wishing to object should file objections within 45 days after receipt of this notification, and address them to the Video Services Division, Federal Communications Commission, Washington, DC 20554, referencing the § 21.910 Application of (carrier's name). Comments should include specific information about the impact of this proposed discontinuance (or reduction or impairment) upon end-users, including any inability by the customer to acquire reasonable substitute service from another provider. The affected customer must state that it has provided a copy of the objection to the carrier seeking discontinuance.

(b) The carrier shall file with this Commission, on or after the date on which notice has been given to all affected customers, an application which shall contain the following:

* * * * *

(d) The provisions of this section shall not apply to licensees authorized by the Commission to alternate, without further authorization required, between rendering service on a common carrier and non-common carrier basis.

25. Section 21.913 is revised to read as follows:

§ 21.913 Signal booster stations.

(a) An MDS booster station may reuse channels to repeat the signals of MDS stations or to originate signals on MDS channels. The aggregate power flux density generated by an MDS station and all associated signal booster stations and all simultaneously operating cochannel response stations may not exceed -73 dBW/m^2 (or, when subchannels or 125 kHz channels are used, the appropriately adjusted value based upon the ratio of the channel-to-subchannel or 125 kHz bandwidths) at or beyond the boundary of the protected service area, as defined in §§ 21.902(d) and 21.933, of the main MDS station whose channels are being reused, as measured at locations for which there is an unobstructed signal path, unless the consent of the affected cochannel licensee is obtained.

(b) An MDS licensee or conditional licensee who is a response station hub

licensee, conditional licensee or applicant may secure a license for an MDS signal booster station that has a maximum power level in excess of −9 dBW EIRP (or, when subchannels or superchannels, or 125 kHz channels, are used, the appropriately adjusted value based upon the ratio of 6 MHz to the subchannel or superchannel, or 125 kHz, bandwidth) and that employs only digital modulation with uniform power spectral density in accordance with the Commission's *Declaratory Ruling and Order*, 11 FCC Rcd 18839 (1996) (a ''high-power MDS signal booster station''). The applicant for a high-power MDS signal booster station shall file FCC Form 331 with Mellon Bank, and certify on that form that the applicant has complied with the additional requirements of paragraph (b) of this section. Failure to certify compliance and to comply completely with the following requirements of paragraph (b) of this section shall result in dismissal of the application or revocation of the high-power MDS signal booster station license, and may result in imposition of a monetary forfeiture. The applicant for a high-power MDS signal booster station additionally is required to submit to International Transcription Services, Inc., 1231 20th Street, N.W., Washington, DC 20036, both in hard copy, and on a 3.5″ computer diskette in ASCII, and likewise to submit to the Commission, only upon Commission staff request, duplicates of the Form 331 filed with Mellon Bank, and the following information:

(1) A demonstration that the proposed signal booster station site is within the protected service area, as defined in §§ 21.902(d) and 21.933, of the MDS station whose channels are to be reused; and

(2) A study which demonstrates that the aggregate power flux density of the MDS station and all associated booster stations and simultaneously operating cochannel response stations licensed to or applied for by the applicant, measured at or beyond the boundary of the protected service area of the MDS station whose channels are to be reused, does not exceed −73 dBW/m^2 (or, when subchannels or 125 kHz channels are used, the appropriately adjusted value based upon the ratio of the channel-to-subchannel or 125 kHz bandwidths) at locations for which there is an unobstructed signal path, unless the consent of the affected licensees has been obtained; and

(3) In lieu of the requirements of § 21.902(c) and (i), a study which demonstrates that the proposed booster station will cause no harmful interference (as defined in § 21.902(f)) to cochannel and adjacent channel, authorized or previously-proposed ITFS and MDS stations with protected service area center coordinates as specified in § 21.902(d), to any authorized or previously-proposed response station hubs, booster stations or I channel stations associated with such ITFS and MDS stations, or to any previously-registered ITFS receive sites, within 160.94 kilometers (100 miles) of the proposed booster station's transmitter site. Such study shall consider the undesired signal levels generated by the proposed signal booster station, the main station, all other licensed or previously-proposed associated booster stations, and all simultaneously operating cochannel response stations licensed to or applied for by the applicant. In the alternative, a statement from the affected MDS or ITFS licensee or conditional licensee stating that it does not object to operation of the high-power MDS signal booster station may be submitted; and

(4) A description of the booster service area; and

(5) A demonstration either

(i) That the booster service area is entirely within the protected service area to which the licensee of a station whose channels are being reused is entitled by virtue of its being the licensee of an incumbent MDS station, or by virtue of its holding a Basic Trading Area or Partitioned Service Area authorization; or

(ii) That the licensee entitled to any cochannel protected service area which is overlapped by the proposed booster service area has consented to such overlap; and

(6) A demonstration that the proposed booster service area can be served by the proposed booster without interference; and

(7) A certification that copies of the materials set forth in paragraph (b) of this section have been served upon the licensee or conditional licensee of each station (including each response station hub and booster station) required to be studied pursuant to paragraph (b)(3) of this section, and upon any affected holder of a Basic Trading Area or Partitioned Service Area authorization pursuant to paragraph (b)(2) of this section.

(c) Except as provided in § 21.27(d), applications for high-power MDS signal booster station licenses may be filed at any time. Notwithstanding any other provision of part 21 (including § 21.31), applications for high-power MDS signal booster station licenses meeting the requirements of paragraph (b) of this section shall cut-off applications that are filed on a subsequent day for facilities that would cause harmful electromagnetic interference to the proposed booster stations.

(d) Notwithstanding the provisions of § 21.30(a)(4) and except as provided in § 21.27(d), any petition to deny an application for a high-power MDS signal booster station license shall be filed no later than the sixtieth (60th) day after the date of public notice announcing the filing of such application or major amendment thereto. Notwithstanding § 21.31 and except as provided in § 21.27(d), an application for a high-power MDS signal booster station license that meets the requirements of paragraph (b) of this section shall be granted on the sixty-first (61st) day after the Commission shall have given public notice of the acceptance for filing of it, or of a major amendment to it if such major amendment has been filed, unless prior to such date either a party in interest timely files a formal petition to deny or for other relief pursuant to § 21.30(a), or the Commission notifies the applicant that its application will not be granted. Where an application is granted pursuant to the provisions of this paragraph, the conditional licensee or licensee shall maintain a copy of the application at the MDS booster station until such time as the Commission issues a high-power MDS signal booster station license.

(e) Eligibility for a license for an MDS signal booster station that has a maximum power level of −9 dBW EIRP (or, when subchannels or superchannels, or 125 kHz channels, are used, the appropriately adjusted value based upon the ratio of 6 MHz to the subchannel or superchannel, or 125 kHz, bandwidth) (a ''low-power MDS signal booster station'') shall be restricted to an MDS licensee or conditional licensee. A low-power MDS signal booster station may operate only on one or more MDS channels that are licensed to the licensee of the MDS booster station, but may be operated by a third party with a fully-executed lease or consent agreement with the MDS conditional licensee or licensee. An MDS licensee or conditional licensee may install and commence operation of a low-power MDS signal booster station for the purpose of retransmitting the signals of the MDS station or for originating signals. Such installation and operation shall be subject to the condition that for sixty (60) days after installation and commencement of operation, no objection or petition to deny is filed by an authorized cochannel or adjacent channel ITFS or MDS station with a transmitter within 8.0 kilometers (5 miles) of the

coordinates of the low-power MDS signal booster station. An MDS licensee or conditional licensee seeking to install a low-power MDS signal booster station under this rule must, within 48 hours after installation, submit FCC Form 331 to the Commission in Washington, DC, and submit to International Transcription Services, Inc., 1231 20th Street, N.W., Washington, DC 20036, both in hard copy, and on a 3.5″ computer diskette in ASCII, duplicates of the Form 331 filed with the Commission, and the following (which also shall be submitted to the Commission only upon Commission staff request at any time):

(1) A description of the signal booster technical specifications (including an antenna envelope plot or, if the envelope plot is on file with the Commission, the make and model of the antenna, antenna gain and azimuth), the coordinates of the booster, the height of the center of radiation above mean sea level, the street address of the signal booster and a description of the booster service area; and

(2) A demonstration either

(i) That the booster service area is entirely within the protected service area to which each licensee of a station whose channels are being reused is entitled by virtue of its being the licensee of an incumbent MDS station, or by virtue of its holding a Basic Trading Area or Partitioned Service Area authorization; or

(ii) That the licensee entitled to any cochannel protected service area which is overlapped by the proposed booster service area has consented to such overlap; and

(3) A demonstration that the proposed booster service area can be served by the proposed booster without interference; and

(4) A certification that no Federal Aviation Administration determination of No Hazard to Air Navigation is required under part 17 of this chapter or, if such determination is required, either:

(i) A statement of the FCC Antenna Structure Registration Number; or

(ii) If an FCC Antenna Structure Registration Number has not been assigned for the antenna structure, the filer must indicate the date the application by the antenna structure owner to register the antenna structure was filed with the FCC in accordance with part 17 of this chapter; and

(5) A certification that:

(i) The maximum power level of the signal booster transmitter does not exceed −9 dBW EIRP (or, when subchannels or superchannels, or 125 kHz channels, are used, the appropriately adjusted value based upon the ratio of 6 MHz to the subchannel or superchannel, or 125 kHz, bandwidth); and

(ii) Where the booster is operating on channel D4, E1, F1, E2, F2, E3, F3, E4, F4 and/or G1, no registered receiver of an ITFS E or F channel station, constructed prior to May 26, 1983, is located within a 1.61 km (1 mile) radius of the coordinates of the booster, or in the alternative, that a consent statement has been obtained from the affected ITFS licensee; and

(iii) The applicant has complied with § 1.1307 of this chapter; and

(iv) Each MDS and/or ITFS station licensee (including the licensees of booster stations and response station hubs) with protected service areas and/or registered receivers within a 8 km (5 mile) radius of the coordinates of the booster has been given notice of its installation; and

(v) The signal booster site is within the protected service area of the MDS station whose channels are to be reused; and

(vi) The aggregate power flux density of the MDS station and all associated booster stations and simultaneously operating cochannel response stations licensed to or applied for by the applicant, measured at or beyond the boundary of the protected service areas of the MDS stations whose channels are to be reused, does not exceed −73 dBW/m^2 (or, when subchannels or 125 kHz channels are used, the appropriately adjusted value based upon the ratio of the channel-to-subchannel or 125 kHz bandwidths) at locations for which there is an unobstructed signal path, unless the consent of the affected licensees has been obtained; and

(vii) The antenna structure will extend less than 6.10 meters (20 feet) above the ground or natural formation or less than 6.10 meters (20 feet) above an existing manmade structure (other than an antenna structure); and

(viii) The MDS conditional licensee or licensee understands and agrees that, in the event harmful interference is claimed by the filing of an objection or petition to deny, the conditional licensee or licensee must terminate operation within two (2) hours of notification by the Commission, and must not recommence operation until receipt of written authorization to do so by the Commission.

(f) Commencing upon the filing of an application for a high-power MDS signal booster station license and until such time as the application is dismissed or denied or, if the application is granted, a certification of completion of construction is filed, an applicant for any new or modified MDS or ITFS station (including a response station hub, high-power booster station, or I Channels station) shall demonstrate compliance with the interference protection requirements set forth in §§ 21.902 (b)(3) through (b)(5), 21.938 (b) (1) and (2) and (c), or 74.903 of this chapter with respect to any previously-proposed or authorized booster service area both using the transmission parameters of the high-power MDS signal booster station (e.g., EIRP, polarization(s) and antenna height) and the transmission parameters of the MDS station whose channels are to be reused by the high-power MDS signal booster station. Upon the filing of a certification of completion of construction of an MDS booster station applied for pursuant to paragraph (b) of this section, or upon the submission of an MDS booster station notification pursuant to paragraph (e) of this section, the MDS station whose channels are being reused by the MDS signal booster shall no longer be entitled to interference protection pursuant to §§ 21.902 (b)(3) through (b)(5), 21.938 (b) (1) and (2) and (c), and 74.903 of this chapter within the booster service area based on the transmission parameters of the MDS station whose channels are being reused. A booster station shall not be entitled to protection from interference caused by facilities proposed on or prior to the day the application or notification for the booster station is filed. A booster station shall not be required to protect from interference facilities proposed on or after the day the application or notification for the booster station is filed.

(g) Where an application is granted under paragraph (d) of this section, if a facility operated pursuant to that grant causes harmful, unauthorized interference to any cochannel or adjacent channel facility, it must promptly remedy the interference or immediately cease operations of the interfering facility, regardless of whether any petitions to deny or for other relief were filed against the application during the application process. The burden of proving that a high-power MDS signal booster station is not causing harmful, unauthorized interference lies on the licensee of the alleged interfering facility, following the filing of a documented complaint of interference by an affected party.

(h) In the event any MDS or ITFS receive site suffers interference due to block downconverter overload, the licensee of each signal booster station within five miles of such receive site shall cooperate in good faith to

expeditiously identify the source of the interference. Each licensee of a signal booster station contributing to such interference shall bear the joint and several obligation to promptly remedy all interference resulting from block downconverter overload at any ITFS receive site registered prior to the submission of the application or notification for the signal booster station or at any receive site within an MDS or ITFS protected service area applied for prior to the submission of the application or notification for the signal booster station, regardless of whether the receive site suffering the interference was constructed prior to or after the construction of the signal booster station(s) causing the downconverter overload; provided, however, that the licensee of the registered ITFS receive site or the MDS or ITFS protected service area must cooperate fully and in good faith with efforts by the signal booster station licensee to prevent interference before constructing the signal booster station and/or to remedy interference that may occur. In the event that more than one signal booster station licensee contributes to block downconverter interference at a MDS or ITFS receive site, the licensees of the contributing signal booster stations shall cooperate in good faith to remedy promptly the interference.

26. In § 21.925, paragraph (b) is revised to read as follows:

§ 21.925 Applications for BTA authorizations and MDS station licenses.

* * * * *

(b) Separate long-form applications must be filed for each individual MDS station license sought within the protected service area of a BTA or PSA, including:

(1) An application for each E-channel group, F-channel group, and single H, 1, and 2A channel station license sought;

(2) An application for each site where one or more MDS response station hub license(s) is/are sought, provided that the technical parameters of each MDS response station hub are the same;

(3) An application for each site where one or more MDS booster station(s) will operate with an EIRP in excess of −9 dBW (or, when subchannels or superchannels, or 125 kHz channels, are used, the appropriately adjusted value based upon the ratio of 6 MHz to the subchannel or superchannel, or 125 kHz, bandwidth);

(4) An application for authority to operate at an MDS station in the area vacated by an MDS station incumbent that has forfeited its station license; and

(5) An application for each ITFS-channel group station license sought in accordance with §§ 74.990 and 74.991 of this chapter.

* * * * *

27. In § 21.938, paragraph (b) introductory text, and paragraphs (c)(4), (e) and (f), are revised to read as follows:

§ 21.938 BTA and PSA technical and interference provisions.

* * * * *

(b) Unless the affected parties have executed a written interference agreement in accordance with § 21.937, and subject to the provisions of §§ 21.909, 21.913, 21.940, 74.939 of this chapter, 74.940 of this chapter and 74.985 of this chapter regarding the protection of response station hubs, booster service areas and 125 kHz channels from harmful electromagnetic interference, stations licensed to a BTA or PSA authorization holder must not cause harmful electromagnetic interference to the following:

* * *

(c) * * *

(4) An ITFS station authorized before September 15, 1995 may be modified, provided the power flux density of that station does not exceed −73 dBW/m^2 (or the appropriate value for bandwidth other than 6 MHz) at locations along the 56.33 km (35 mile) circle centered on the then-existing transmitting antenna site or service area of a collocated incumbent MDS station, as applicable.

* * * * *

(e) Unless specifically excepted, BTA or PSA authorization holders are governed by the interference protection and other technical provisions applicable to MDS.

(f) The calculated free space power flux density from an MDS station, other than an incumbent MDS station, may not exceed −73 dBW/m^2 (or the appropriate value for bandwidth other than 6 MHz) at locations on BTA or PSA boundaries for which there is an unobstructed signal path from the transmitting antenna to the boundary, unless the applicant has obtained the written consent of the authorization holder for the affected BTA or PSA.

* * * * *

28. New § 21.940 is added, to read as follows:

§ 21.940 Individually licensed 125 kHz channel MDS response stations.

(a) The provisions of § 21.909(a), (e), (h), (j), (l) and (m), and § 74.939(j) of this chapter, also shall apply with respect to authorization of a 125 kHz channel(s) MDS response station not under a response station hub license. The applicant shall comply with the requirements of § 21.902, and § 21.938 where appropriate, including the provisions of §§ 21.909, 21.913, 74.939 of this chapter and 74.985 of this chapter regarding the protection of response station hubs and booster service areas from harmful electromagnetic interference, using the appropriately adjusted interference protection values based upon the ratio of the bandwidths in use, where the authorized or previously-proposed cochannel or adjacent channel station is operated or to be operated in a system with one or more response station hub(s).

(b) An application for a license to operate a new or modified 125 kHz channel(s) MDS response station not under a response station hub license shall be filed with Mellon Bank on FCC Form 304. The applicant shall supply the following information on that form for each response station:

(1) The geographic coordinates and street address of the MDS response station transmitting antenna; and

(2) The manufacturer's name, type number, operating frequency, and power output of the proposed MDS response station transmitter; and

(3) The type of transmitting antenna, power gain, azimuthal orientation and polarization of the major lobe of radiation in degrees measured clockwise from True North; and

(4) A sketch giving pertinent details of the MDS response station transmitting antenna installation including ground elevation of the transmitter site above mean sea level; overall height above ground, including appurtenances, of any ground-mounted tower or mast on which the transmitting antenna will be mounted or, if the tower or mast is or will be located on an existing building or other manmade structure, the separate heights above ground of the building and the tower or mast including appurtenances; the location of the tower or mast on the building; the location of the transmitting antenna on the tower or mast; and the overall height of the transmitting antenna above ground.

(c) Each MDS response station licensed under this section shall comply with the following:

(1) No MDS response station shall be located beyond the protected service area of the MDS station with which it communicates; and

(2) No MDS response station shall operate with a transmitter output power in excess of 2 watts; and

(3) No MDS response station shall operate at an excess of 16 dBW EIRP.

(d) During breaks in communications, the unmodulated carrier frequency shall

be maintained within 35 kHz of the assigned frequency at all times. Adequate means shall be provided to insure compliance with this rule.

(e) Each MDS response station shall employ a directive transmitting antenna oriented towards the transmitter site of the associated MDS station or towards the response station hub with which the MDS response station communicates. The beamwidth between half power points shall not exceed 15° and radiation in any minor lobe of the antenna radiation pattern shall be at least 20 dB below the power in the main lobe of radiation.

(f) A response station may be operated unattended. The overall performance of the response station transmitter shall be checked by the licensee of the station or hub receiving the response signal, or by the licensee's employees or agents, as often as necessary to ensure that the transmitter is functioning in accordance with the requirements of the Commission's rules. The licensee of the station or hub receiving the response signal is responsible for the proper operation of the response station and must have reasonable and timely access to the response station transmitter. The response station shall be installed and maintained by the licensee of the associated station or hub, or the licensee's employees or agents, and protected in such manner as to prevent tampering or operation by unauthorized persons. No response station which has not been installed by an authorized person may lawfully communicate with any station or hub.

PART 74—EXPERIMENTAL RADIO, AUXILIARY, SPECIAL BROADCAST AND OTHER PROGRAM DISTRIBUTIONAL SERVICES

29. The authority for part 74 continues to read as follows:

Authority: 47 U.S.C. 154, 303, 307, and 554.

30. In § 74.901, the following definitions are added in alphabetical order, to read as follows:

§ 74.901 Definitions.

* * * * *

Booster service area. A geographic area to be designated by an applicant for a booster station, within which the booster station shall be entitled to protection against interference as set forth in this part. The booster service area must be specified by the applicant so as to not overlap the booster service area of any other booster authorized to or proposed by the applicant. However, a booster station may provide service to receive sites outside of its booster service area, at the licensee's risk of interference. The booster station must be capable of providing substantial service within the designated booster service area.

Channel. Unless otherwise specified, a channel under this part shall refer to a 6 MHz frequency block assigned pursuant to §§ 21.901(b) of this chapter or 74.902(a).

* * * * *

Response station hub. A fixed facility licensed to an ITFS licensee, and operated by an ITFS licensee or the lessee of an ITFS channel, for the reception of information transmitted by one or more ITFS response stations that utilize digital modulation with uniform power spectral density. A response station hub licensed under this part may share facilities with other ITFS response station hubs, MDS response station hubs authorized pursuant to § 21.909 of this chapter, MDS signal booster stations, ITFS signal booster stations, MDS stations, and/or ITFS stations.

Response station hub license. A blanket license authorizing the operation of a single response station hub at a specific location and the operation of a specified number of associated digital response stations of one or more classes at unspecified locations within one or more regions of the response service area.

Sectorization. The use of an antenna system at an ITFS station, booster station and/or response station hub that is capable of simultaneously transmitting multiple signals over the same frequencies to different portions of the service area and/or simultaneously receiving multiple signals over the same frequencies from different portions of the service area.

Signal booster station. An ITFS station licensed for use in accordance with § 74.985 that operates on one or more ITFS channels. Signal booster stations are intended to augment service as part of a distributed transmission system where signal booster stations retransmit the signal of an ITFS station and/or originate information. A signal booster station licensed under this part may share facilities with other ITFS signal booster stations, MDS signal booster stations authorized pursuant to § 21.913 of this chapter, MDS response stations and/or ITFS response stations.

* * * * *

30a. In § 74.901, the following definitions, in alphabetical order, are revised to read as follows:

Instructional television fixed station. A fixed station licensed to an educational organization and intended primarily for video, data, or voice transmissions of instructional, cultural, and other types of educational material to one or more fixed receiving locations.

ITFS response station. A fixed station operated by an ITFS licensee, the lessee of ITFS channel capacity or a subscriber of either to communicate with a response station hub or associated ITFS station. A response station under this part may share facilities with other ITFS response stations and/or one or more Multipoint Distribution Service (MDS) response stations authorized pursuant to § 21.909 of this chapter or § 21.940 of this chapter.

* * * * *

31. In § 74.902, paragraphs (f) through (j) are redesignated as paragraphs (g) through (k), respectively, paragraphs (c) through (e) are revised, and new paragraph (f) and a new note to paragraph (c) are added, to read as follows:

§ 74.902 Frequency assignments.

* * * * *

(c) Channels 2596–2602, 2602–2608, 2608–2614, 2614–2620, 2620–2626, 2626–2632, 2632–2638, and 2638–2644 MHz and the corresponding 125 kHz channels listed in § 74.939(j) are shared with the Multipoint Distribution Service. No new Instructional Television Fixed Service applications for these channels filed after May 25, 1983 will be accepted, except in accordance with paragraph (f) of this section. In those areas where Multipoint Distribution Service use of these channels is allowed, Instructional Television Fixed Service users of these channels will continue to be afforded protection from harmful cochannel and adjacent channel interference from Multipoint Distribution Service stations, pursuant to § 21.902 of this chapter.

Note to Paragraph (C):

No 125 kHz channels are provided for Channels E3, E4, F3 and F4, except for those grandfathered. The 125 kHz channels associated with Channels E3, E4, F3 and F4 are allocated to the Private Operational Fixed Point-to-Point Microwave Service, pursuant to § 101.147(g) of this chapter.

(d) Frequencies will be assigned as follows:

(1) A licensee is limited to the assignment of no more than four 6 MHz and four 125 kHz channels for use in a single area of operation, all of which 6 MHz channels initially should be selected from the same Group listed in paragraph (a) of this section, but which later may come from different Groups as a result of authorized channel swaps pursuant to paragraph (f) of this section. An area of operation is defined as the area 35 miles or less from the ITFS main

station transmitter. Applicants shall not apply for more channels than they intend to construct within a reasonable time, simply for the purpose of reserving additional channels. The number of channels authorized to an applicant will be based on the demonstration of need for the number of channels requested. The Commission will take into consideration such factors as the amount of use of any currently assigned channels and the amount of proposed use of each channel requested, the amount of, and justification for, any repetition in the schedules, and the overall demand and availability of ITFS channels in the community. For those applicant organizations formed for the purpose of serving accredited institutional or governmental organizations, evaluation of the need will only consider service to those specified receive sites which submitted supporting documentation pursuant to § 74.932(a)(4).

(2) An applicant leasing excess capacity and proposing a schedule which complies in all respects with the requirements of § 74.931 (c) or (d) will have presumptively demonstrated need, in accordance with paragraph (d)(1) of this section, for no more than four channels. This presumption is rebuttable by demonstrating that the application does not propose to comport with our educational usage requirements, that is, to transmit some formal educational usage, as defined in § 74.931(a), and to transmit the requisite minimum educational usage of § 74.931 (c) or (d) for genuinely educational purposes.

(e) Frequencies in the bands 2500–2650 MHz, 2656–2662 MHz, 2668–2674 MHz, and 2680–2686 MHz are available for point-to-multipoint use and/or for communications between ITFS response stations and response station hubs when authorized in accordance with the provisions of § 74.939, provided that such frequencies may be employed for ITFS response stations only when transmitting using digital modulation.

(f) An ITFS licensee or conditional licensee may apply to exchange evenly one or more of its assigned channels with another ITFS licensee or conditional licensee in the same system, or with an MDS licensee or conditional licensee in the same system where one or both parties utilizes digital transmissions or leases capacity to an operator which utilizes digital transmissions, except that an ITFS licensee or conditional licensee may not exchange one of its assigned channels for MDS channel 2A. The licensees or conditional licensees seeking to exchange channels shall file in tandem with the Commission separate pro forma assignment of license applications, each attaching an exhibit which clearly specifies that the application is filed pursuant to a channel exchange agreement. The exchanged channel(s) shall be regulated according to the requirements applicable to the assignee; provided, however, that an ITFS licensee or conditional licensee which receives one or more E or F Group channels through a channel exchange with an MDS licensee or conditional licensee shall not be subject to the restrictions on ITFS licensees who were authorized to operate on the E or F Group channels prior to May 26, 1983.

* * * * *

32. In § 74.903, paragraphs (a)(1) through (a)(3), paragraph (b) introductory text, paragraphs (b) (1), (2), (4) and (5), paragraph (c) and paragraph (d) are revised, paragraphs (e) and (f) are removed, and new paragraph (a)(6) is added, to read as follows:

§ 74.903 Interference.

(a) * * *

(1) Cochannel interference is defined as the ratio of the desired signal to the undesired signal, at the output of a reference receiving antenna oriented to receive the maximum desired signal level. Harmful interference will be considered present when a free space calculation determines that this ratio is less than 45 dB (both stations utilizing 6 MHz bandwidths).

(2) Adjacent channel interference is defined as the ratio of the desired signal to undesired signal present in an adjacent channel, at the output of a reference receiving antenna oriented to receive the maximum desired signal level.

(i) Harmful interference will be considered present when a free space calculation determines that this ratio is less than 0 dB (both stations utilizing 6 MHz bandwidths).

(ii) In the alternative, harmful interference will be considered present for an ITFS station constructed before May 26, 1983, when a free space calculation determines that this ratio is less than 10 dB (both stations utilizing 6 MHz bandwidths), unless:

(A) The individual receive site under consideration has been subsequently upgraded with up-to-date reception equipment, in which case the ratio shall be less than 0 dB. Absent information presented to the contrary, however, the Commission will assume that reception equipment installation occurred simultaneously with original station equipment; or

(B) The license for an ITFS station is conditioned on the proffer to the affected ITFS station licensee of equipment capable of providing a ratio of 0 dB or more at no expense to the ITFS station licensee, and also conditioned, if necessary, on the proffer of installation of such equipment; and there has been no showing by the affected ITFS station licensee demonstrating good cause and that the proposed equipment will not provide a ratio of 0 dB or more, or that installation of such equipment, at no expense to the ITFS station licensee, is not possible or has not been proffered.

(3) For purposes of this section and except as set forth in § 74.939 regarding the protection of response station hubs, all interference calculations involving receive antenna performance shall use the reference antenna characteristics shown in Figure I, § 74.937(a) or, in the alternative, utilize the actual pattern characteristics of the antenna in use at the receive site under study. If the actual receive antenna pattern is utilized, the applicant must submit complete details including manufacturer, model number(s), co-polar and cross-polar gain patterns, and other pertinent data.

* * * * *

(6) Notwithstanding the above, main, booster and response stations shall use the following formulas, as applicable, for determining compliance with: (1) Radiated field contour limits where bandwidths other than 6 MHz are employed at stations utilizing digital modulation with uniform power spectral density; and (2) Cochannel and adjacent channel D/U ratios where the bandwidths in use at the interfering and protected stations are unequal and both stations are utilizing digital modulation with uniform power spectral density or one station is utilizing such modulation and the other station is utilizing either 6 MHz NTSC analog modulation or 125 kHz analog modulation (I channels only).

(i) Contour limit: -73 dBW + 10 log (X/6), where X is the bandwidth in MHz of the digital channel.

(ii) Cochannel D/U: 45 dB + 10 log (X1/X2), where X1 is the bandwidth in MHz of the protected channel and X2 is the bandwidth in MHz of the interfering channel.

(iii) Adjacent channel D/U: 0 dB + 10 log (X1/X2), where X1 is the bandwidth in MHz of the protected channel and X2 is the bandwidth in MHz of the interfering channel.

(b) All applicants for instructional television fixed stations are expected to take full advantage of such directive antenna techniques to prevent interference to the reception of any

existing or previously-proposed operational fixed, multipoint distribution, international control or instructional television fixed station at authorized receiving locations. Therefore, all applications for new or major changes must include an analysis of potential interference to all existing and previously-proposed stations in accordance with paragraph (a) of this section. An applicant for a new instructional television fixed station or for changes in an existing ITFS facility or conditional license must include the following technical information with the application:

(1) An analysis of the potential for harmful interference with the receive sites registered as of September 17, 1998, and with the protected service area, of any authorized or previously-proposed cochannel station if:

(i) The proposed transmitting antenna has an unobstructed electrical path to receive site(s) and/or the protected service area of any other station that utilizes, or would utilize, the same frequency; or

(ii) The proposed transmitter is within 80.5 km (50 miles) of the coordinates of any such station.

(2) An analysis of the potential for harmful adjacent channel interference with the receive sites registered as of September 17, 1998, and with the protected service area, of any authorized or previously-proposed station if the proposed transmitter is within 80.5 km (50 miles) of the coordinates of any station that utilizes, or would utilize, an adjacent channel frequency.

* * * * *

(4) In lieu of the interference analyses required by paragraphs (b)(1) and (2) of this section, an applicant may submit (a) statement(s) from the affected cochannel or adjacent channel licensee(s) or conditional licensee(s) that any resulting interference is acceptable.

(5) Specific rules relating to response station hubs, booster stations, and 125 kHz channels are set forth in §§ 21.909 of this chapter, 21.913 of this chapter, 21.940 of this chapter, 74.939, 74.940 and 74.985. To the extent those specific rules are inconsistent with any rules set forth above, those specific rules shall control.

(c) Existing licensees, conditional licensees and prospective applicants, including those who lease or propose to lease excess capacity pursuant to § 74.931(c) or (d), are expected to cooperate fully and in good faith in attempting to resolve problems of potential interference before bringing the matter to the attention of the Commission.

(d) Each authorized or previously-proposed applicant, conditional licensee, or licensee must be protected from harmful electrical interference at each of its receive sites registered previously as of September 17, 1998, and within a protected service area as defined at § 21.902(d)(1) of this chapter and in accordance with the reference receive antenna characteristics specified at § 21.902(f) of this chapter. An ITFS entity which did not receive protected service area protection prior to September 17, 1998 shall be accorded such protection by a cochannel or adjacent channel applicant for a new station or station modification, including a booster station, response station or response station hub, where the applicant is required to prepare an analysis, study or demonstration of the potential for harmful interference.

33. In § 74.911, paragraph (a)(1) is revised, and new paragraph (d) is added, to read as follows:

§ 74.911 Processing of ITFS station applications.

(a) * * *

(1) In the first group are applications for new stations or major changes in the facilities of authorized stations. These applications are subject to the provisions of paragraph (c) of this section. A major change for an ITFS station will be any proposal to add new channels, change from one channel (or channel group) to another except as provided for in § 74.902(f), change polarization, increase the EIRP in any direction by more than 1.5 dB, increase the transmitting antenna height by 25 feet or more, or relocate a facility's transmitter site by 10 miles or more. Applications submitted pursuant to §§ 74.939 and 74.985 shall not be considered major change applications. However, the Commission may, within 15 days after the acceptance of an application, or 15 days after the acceptance of any other application for modification of facilities, advise the applicant that such application is considered to be one for a major change, and subject to the provisions of paragraph (c) of this section.

* * * * *

(d) Notwithstanding any other provisions of this part, effective as of September 17, 1998, there shall be one one-week window, at such time as the Commission shall announce by public notice, for the filing of applications for high-power signal booster station, response station hub, and I channels point-to-multipoint transmissions licenses, during which all applications shall be deemed to have been filed as of the same day for purposes of §§ 74.939 and 74.985. Following the publication of a public notice announcing the tendering for filing of applications submitted during that window, applicants shall have a period of sixty (60) days to amend their applications, provided such amendments do not result in any increase in interference to any previously-proposed or authorized station, or to facilities proposed during the window, absent consent of the applicant for or conditional licensee or licensee of the station that would receive such additional interference. At the conclusion of that sixty (60) day period, the Commission shall publish a public notice announcing the acceptance for filing of all applications submitted during the initial window, as amended during the sixty (60) day period. All petitions to deny such applications must be filed within sixty (60) days of such second public notice. On the sixty-first (61st) day after the publication of such second public notice, applications for new or modified response station hub and booster station licenses may be filed and will be processed in accordance with the provisions of §§ 74.939 and 74.985. Notwithstanding paragraph (d) of this section, each application submitted during the initial window shall be granted on the sixty-first (61st) day after the Commission shall have given such public notice of its acceptance for filing, unless prior to such date either a party in interest timely files a formal petition to deny or for other relief pursuant to § 74.912, or the Commission notifies the applicant that its application will not be granted. Where an application is granted pursuant to the provisions of this paragraph, the conditional licensee or licensee shall maintain a copy of the application at the transmitter site or response station hub until such time as the Commission issues a license.

34. New § 74.912 is added to read as follows:

§ 74.912 Petitions to deny.

(a) Any party in interest may file with the Commission a petition to deny any application for new facilities or major changes in the facilities of authorized stations, provided such petitions are filed by the date established pursuant to the cut-off provisions of § 74.911(c). In the case of all other applications, except those excluded under Section 309(c) of the Communications Act of 1934, as amended, and except as provided in §§ 74.939 and 74.985, petitions to deny must be filed not later than 30 days after issuance of a public notice of the acceptance for filing of the applications. In the case of applications for renewal of license, petitions to deny may be filed

after the issuance of a public notice of acceptance for filing of the applications and up until the first day of the last full calendar month of the expiring license term. Any party in interest may file with the Commission a petition to deny any notification regarding ITFS booster stations within the 60 day period provided for in § 74.985(e).

(b) The applicant may file an opposition to any petition to deny, and the petitioner a reply to such opposition in which allegations of fact or denials thereof shall be supported by affidavit of a person or persons with personal knowledge thereof. The times for filing such oppositions and replies shall be those provided in § 1.45 of this chapter.

35. In § 74.931, paragraphs (d) and (e) are redesignated as paragraphs (b) and (c), respectively, and paragraphs (f) through (k) are redesignated as paragraphs (e) through (j), respectively, paragraph (a) and newly redesignated paragraphs (b) and (c) are revised, and new paragraph (d) is added, to read as follows:

§ 74.931 Purpose and permissible service.

(a) (1) Instructional television fixed stations are intended primarily through video, data, or voice transmissions to further the educational mission of accredited public and private schools, colleges and universities providing a formal educational and cultural development to enrolled students. Authorized instructional television fixed station channels must be used to further the educational mission of accredited schools offering formal educational courses to enrolled students, with limited exceptions as set forth in paragraphs (c)(3) and (d)(2) of this section and §§ 74.990 through 74.992.

(2) In furtherance of the educational mission of accredited schools, instructional television fixed station channels may be used for:

(i) In-service training and instruction in special skills and safety programs, extension of professional training, informing persons and groups engaged in professional and technical activities of current developments in their particular fields, and other similar endeavors.

(ii) Transmission of material directly related to the administrative activities of the licensee, such as the holding of conferences with personnel, distribution of reports and assignments, exchange of data and statistics, and other similar uses.

(iii) Response channels transmitting information associated with formal educational courses offered to enrolled students, including uses described in paragraphs (a)(2) (i) and (ii) of this section, from ITFS response stations to response station hubs.

(b) Stations, including high-power ITFS signal booster stations, may be licensed in this service as originating or relay stations to interconnect instructional television fixed stations in adjacent areas, to deliver instructional and cultural material to, and obtain such material from, commercial and noncommercial educational television broadcast stations for use on the instructional television fixed system, and to deliver instructional and cultural material to, and obtain such material from, nearby terminals or connection points of closed circuit educational television systems employing wired distribution systems or radio facilities authorized under other parts of this Chapter, or to deliver instructional and cultural material to any CATV system serving a receiving site or sites which would be eligible for direct reception of ITFS signals under the provisions of paragraph (a) of this section.

(c) A licensee solely utilizing analog transmissions may use excess capacity on each channel to transmit material other than the ITFS subject matter specified in paragraphs (a) and (b) of this section, subject to the following conditions:

(1) Before leasing excess capacity on any one channel, the licensee must provide at least 20 hours per week of ITFS educational usage on that channel, except as provided in paragraph (c)(2) of this section. An additional 20 hours per week per channel must be strictly reserved for ITFS use and not used for non-ITFS purposes, or reserved for recapture by the ITFS licensee for its ITFS educational usage, subject to one year's advance, written notification by the ITFS licensee to its lessee and accounting for all recapture already exercised, with no economic or operational detriment to the licensee. These hours of recapture are not restricted as to time of day or day of the week, but may be established by negotiations between the ITFS licensee and the lessee. This 20 hours per channel per week ITFS educational usage requirement and this recapture and/or reservation requirement of an additional 20 hours per channel per week shall apply spectrally over the licensee's whole protected service area.

(2) For the first two years of operation, an ITFS entity may lease excess capacity if it provides ITFS educational usage for at least 12 hours per channel per week, provided that the entity does not employ channel loading technology.

(3) The licensee may shift its requisite ITFS educational usage onto fewer than its authorized number of channels, via channel mapping or channel loading technology, so that it can lease full-time channel capacity on its ITFS station, associated ITFS booster stations, and/or ITFS response stations and associated response station hubs, subject to the condition that it provide a total average of at least 20 hours per channel per week of ITFS educational usage on its authorized channels. The use of channel mapping or channel loading consistent with the Rules shall not be considered adversely to the ITFS licensee in seeking a license renewal. The licensee also retains the unabridgeable right to recapture, subject to six months' advance written notification by the ITFS licensee to its lessee, an average of an additional 20 hours per channel per week, accounting for all recapture already exercised. The licensee may agree to the transmission of this recapture time on channels not authorized to it, but which are included in the wireless system of which it is a part.

(4) An ITFS applicant, conditional licensee, or licensee may specify an omnidirectional antenna for point-to-multipoint transmissions to facilitate the leasing of excess capacity.

(5) Leasing activity may not cause unacceptable interference to cochannel or adjacent channel operations.

(6) When an ITFS licensee makes capacity available on a common carrier basis, it will be subject to common carrier regulation.

(i) A licensee operating as a common carrier is required to apply for the appropriate authorization and to comply with all policies and rules applicable to that service. Responsibility for making the initial determination of whether a particular activity is common carriage rests with the ITFS licensee. Initial determinations by the licensees are subject to Commission examination and may be reviewed at the Commission's discretion.

(ii) An ITFS licensee also may apply for authorization by the Commission to alternate, without further authorization required, between rendering service on a common carrier and non-common carrier basis, provided that the licensee notify the Commission of any service status changes at least 30 days in advance of such changes.

(iii) Licensees under paragraph (c)(6) of this section additionally shall comply with the provisions of §§ 21.304, 21.900(b), 21.903(b)(1) and (2), and 21.910 of this chapter.

(d) A licensee utilizing digital transmissions on any of its licensed channels may use excess capacity on each channel to transmit material other

than the ITFS subject matter specified in paragraphs (a) and (b) of this section, subject to the following conditions:

(1) The licensee must reserve a minimum of 5% of the capacity of its channels for instructional purposes only, and may not lease this reserved capacity. In addition, before leasing excess capacity, the licensee must provide at least 20 hours per licensed channel per week of ITFS educational usage. This 5% reservation and this 20 hours per licensed channel per week ITFS educational usage requirement shall apply spectrally over the licensee's whole protected service area.

(2) The licensee may shift its requisite ITFS educational usage onto fewer than its authorized number of channels, via channel mapping or channel loading technology, and may shift its requisite ITFS educational usage onto channels not authorized to it, but which are included in the wireless system of which it is a part (''channel shifting''), so that it can lease full-time channel capacity on its ITFS station, associated ITFS booster stations, and/or ITFS response stations and associated response station hubs, subject to the condition that it provide a total average of at least 20 hours per licensed channel per week of ITFS educational usage. The use of channel mapping, channel loading, and/or channel shifting consistent with the Rules shall not be considered adversely to the ITFS licensee in seeking a license renewal.

(3) An ITFS applicant, conditional licensee, or licensee may specify an omnidirectional antenna for point-to-multipoint transmissions to facilitate the leasing of excess capacity.

(4) Leasing activity may not cause unacceptable interference to cochannel or adjacent channel operations.

(5) A licensee leasing any of its licensed channels to be used as response channels shall be required to maintain at least 25% of the capacity of its channels for point-to-multipoint transmissions during the term of the lease and following termination of the leasing arrangement. This 25% preservation may be over the licensee's own authorized channels or over channels not authorized to it, but which are included in the wireless system of which it is a part.

(6) When an ITFS licensee makes capacity available on a common carrier basis, it will be subject to common carrier regulation.

(i) A licensee operating as a common carrier is required to apply for the appropriate authorization and to comply with all policies and rules applicable to that service. Responsibility for making the initial determination of whether a particular activity is common carriage rests with the ITFS licensee. Initial determinations by the licensees are subject to Commission examination and may be reviewed at the Commission's discretion.

(ii) An ITFS licensee also may apply for authorization by the Commission to alternate, without further authorization required, between rendering service on a common carrier and non-common carrier basis, provided that the licensee notify the Commission of any service status changes at least 30 days in advance of such changes.

(iii) Licensees under paragraph (d)(6) of this section additionally shall comply with the provisions of §§ 21.304, 21.900(b), 21.903(b)(1) and (2), and 21.910 of this chapter.

* * * * *

36. In Section 74.935, paragraphs (a) and (b) are revised to read as follows:

§ 74.935 Power limitations.

(a) The maximum EIRP of an ITFS main or booster station shall not exceed 33 dBW (or, when digital modulation with uniform power spectral density and subchannels or superchannels, or 125 kHz channels, are used, the appropriately adjusted value based upon the ratio of 6 MHz to the subchannel or superchannel, or 125 kHz, bandwidth), except as provided in paragraph (b) of this section.

(b) If a main or booster station sectorizes or otherwise uses one or more transmitting antennas with a non-omnidirectional horizontal plane radiation pattern, the maximum EIRP over a 6 MHz channel in dBW in a given direction shall be determined by the following formula:

EIRP = 33 dBW + 10 log (360/beamwidth) [where 10 log (360/beamwidth) ≤ 6 dB]

Beamwidth is the total horizontal plane beamwidth of the individual transmitting antenna for the station or any sector measured at the half-power points. The first term of the equation above, 33 dBW, must be adjusted appropriately based upon the ratio of 6 MHz to the subchannel or superchannel, or 125 kHz, bandwidth.

* * * * *

37. Section 74.936 is revised in its entirety, to read as follows:

§ 74.936 Emissions and bandwidth.

(a) An ITFS station may employ amplitude modulation (C3F) for the transmission of the visual signal and frequency modulation (F3E) or (G3E) for the transmission of the aural signal when transmitting a standard analog television signal. Quadrature amplitude modulation, digital vestigial modulation, quadrature phase shift key modulation and code division multiple access emissions may be employed, subject to compliance with the policies set forth in the Declaratory Ruling and Order, 11 FCC Rcd 18839 (1996). The licensee may subchannelize its authorized bandwidth, provided that digital modulation is employed and the aggregate power does not exceed the authorized power for the channel, and may utilize all or a portion of its authorized bandwidth for ITFS response stations authorized pursuant to § 74.939. The licensee may also, jointly with affected adjacent channel licensees, transmit utilizing bandwidth in excess of its authorized frequencies, provided that digital modulation is employed, all power spectral density requirements set forth in this part are met and the out-of-band emissions restrictions set forth in 74.936 are met at the edges of the channels employed. The wider channels thus created may be redivided to create narrower channels.

(b) Notwithstanding the above, any digital emission which meets the uniform power spectral density requirements of the Declaratory Ruling and Order may be used in the following circumstances:

(1) At any ITFS main or booster station transmitter which is located more than 160.94 km (100 miles) from the nearest boundary of all cochannel and adjacent channel ITFS and MDS protected service areas, including Basic Trading Areas and Partitioned Service Areas; and

(2) At all ITFS response station transmitters within a response service area if all points along the response service area boundary line are more than 160.94 km (100 miles) from the nearest boundary of all cochannel and adjacent channel ITFS and MDS protected service areas, including Basic Trading Areas and Partitioned Service Areas; and

(3) At any ITFS transmitter where all parties entitled by this part to interference protection from that transmitter have mutually consented to the use at that transmitter of such emissions.

(c) The maximum out-of-band power of an ITFS station transmitter or booster transmitting on a single 6 MHz channel with an EIRP in excess of −9 dBW employing analog modulation shall be attenuated at the channel edges by at least 38 dB relative to the peak visual carrier, then linearly sloping from that level to at least 60 dB of attenuation at 1 MHz below the lower band edge and 0.5 MHz above the upper band edge, and attenuated at least 60 dB at all other

frequencies. The maximum out-of-band power of an ITFS station transmitter or booster transmitting on a single 6 MHz channel or a portion thereof with an EIRP in excess of −9 dBW (or, when subchannels are used, the appropriately adjusted value based upon the ratio of the channel-to-subchannel bandwidths) employing digital modulation shall be attenuated at the 6 MHz channel edges at least 25 dB relative to the licensed average 6 MHz channel power level, then attenuated along a linear slope to at least 40 dB at 250 kHz beyond the nearest channel edge, then attenuated along a linear slope from that level to at least 60 dB at 3 MHz above the upper and below the lower licensed channel edges, and attenuated at least 60 dB at all other frequencies. Notwithstanding the foregoing, in situations where an ITFS station or booster station transmits, or where adjacent channel licensees jointly transmit, a single signal over more than one contiguous 6 MHz channel utilizing digital modulation with an EIRP in excess of −9 dBW (or, when subchannels or superchannels are used, the appropriately adjusted value based upon the ratio of 6 MHz to the subchannel or superchannel bandwidth), the maximum out-of-band power shall be attenuated at the channel edges of those combined channels at least 25 dB relative to the power level of each channel, then attenuated along a linear slope from that level to at least 40 dB at 250 kHz above or below the channel edges of those combined channels, then attenuated along a linear slope from that level to at least 60 dB at 3 MHz above the upper and below the lower edges of those combined channels, and attenuated at least 60 dB at all other frequencies. However, should harmful interference occur as a result of emissions outside the assigned channel, additional attenuation may be required. A transmitter licensed prior to November 1, 1991, that remains at the station site initially licensed, and does not comply with this paragraph, may continue to be used for its life if it does not cause harmful interference to the operation of any other licensee. Any non-conforming transmitter replaced after November 1, 1991, must be replaced by a transmitter meeting the requirements of this paragraph.

(d) A booster transmitting on multiple contiguous or non-contiguous channels carrying separate signals (a ''broadband'' booster) with an EIRP in excess of −9 dBW per 6 MHz channel and employing analog, digital or a combination of these modulations shall have the following characteristics:

(1) For broadband boosters operating in the frequency range of 2.150–2.160/2 GHz, the maximum out-of-band power shall be attenuated at the upper and lower channel edges forming the band edges by at least 25 dB relative to the licensed analog peak visual carrier or digital average power level (or, when subchannels are used, the appropriately adjusted value based on upon the ratio of the channel-to-subchannel bandwidths), then linearly sloping from that level to at least 40 dB of attenuation at 0.25 MHz above and below the band edges, then linearly sloping from that level to at least 60 dB of attenuation at 3.0 MHz above and below the band edges, and attenuated at least 60 dB at all other frequencies.

(2) For broadband boosters operating in the frequency range of 2.500–2.690 GHz, the maximum out-of-band power shall be attenuated at the upper and lower channel edges forming the band edges by at least 25 dB relative to the licensed analog peak visual carrier or digital average power level (or, when subchannels are used, the appropriately adjusted value based on upon the ratio of the channel-to-subchannel bandwidths), then linearly sloping from that level to at least 40 dB of attenuation at 0.25 MHz above and below the band edges, then linearly sloping from that level to at least 50 dB of attenuation at 3.0 MHz above and below the band edges, then linearly sloping from that level to at least 60 dB of attenuation at 20 MHz above and below the band edges, and attenuated at least 60 dB at all other frequencies.

(3) Within unoccupied channels in the frequency range of 2.500–2.690 GHz, the maximum out-of-band power shall be attenuated at the upper and lower channel edges of an unoccupied channel by at least 25 dB relative to the licensed analog peak visual carrier power level or digital average power level of the occupied channels (or, when subchannels or 125 kHz channels are used, the appropriately adjusted value based upon the ratio of the channel-to-subchannel bandwidths), then linearly sloping from that level to at least 40 dB of attenuation at 0.25 MHz above and below the occupied channel edges, then linearly sloping from that level to at least 50 dB of attenuation at 3.0 MHz above and below the occupied channel edges, and attenuated at least 50 dB at all other unoccupied frequencies.

(e) Boosters operating with an EIRP less than −9 dBW per 6 MHz channel shall have no particular out-of-band power attenuation requirement, except that if they cause harmful interference, their operation shall be terminated within 2 hours of notification by the Commission until the interference can be cured.

(f) The maximum out-of-band power of an ITFS response station using all or part of a 6 MHz channel and employing digital modulation shall be attenuated at the 6 MHz channel edges at least 25 dB relative to the licensed average 6 MHz channel power level, then attenuated along a linear slope to at least 40 dB at 250 kHz beyond the nearest channel edge, then attenuated along a linear slope from that level to at least 60 dB at 3 MHz above the upper and below the lower licensed channel edges, and attenuated at least 60 dB at all other frequencies. Where ITFS response stations with digital modulation utilize all or part of more than one contiguous 6 MHz channel to form a larger channel (e.g., a channel of width 12 MHz), the above-specified attenuations shall be applied only at the upper and lower edges of the overall combined channel. Notwithstanding these provisions, should harmful interference occur as a result of emissions outside the assigned channel(s), additional attenuation may be required by the Commission.

(g) The requirements of § 73.687(c)(2) will be considered to be satisfied insofar as measurements of operating power are concerned if the transmitter is equipped with instruments for determining the combined visual and aural operating power. However, licensees are expected to maintain the operating powers within the limits specified in § 74.935. Measurements of the separate visual and aural operating powers must be made at sufficiently frequent intervals to insure compliance with the rules, and in no event less than once a month. However, the provisions of § 73.687(c)(2) and of this paragraph shall not be applicable to ITFS response stations or to low power ITFS booster stations authorized pursuant to § 74.985(e).

(h) Compliance with the out-of-band emissions limitations shall be established in accordance with § 21.908(e) of this chapter.

38. In § 74.937, paragraph (a) is revised by amending the text preceding figure 1, and paragraph (b) is revised, to read as follows:

§ 74.937 Antennas.

(a) In order to minimize the hazard of harmful cochannel and adjacent channel interference from other stations, directive receiving antennas should be used at all receiving locations other than response station hubs. The choice of receiving antennas is left to the discretion of the licensee. However, for the purpose of interference calculations, except as set forth in § 74.939, the general characteristics of the reference receiving antenna shown in Figure I of this section (i.e., a 0.6 meter (2 foot)

parabolic reflector antenna) are assumed to be used in accordance with the provisions of § 74.903(a)(3) unless pertinent data is submitted of the actual antenna in use at the receive site. Licensees may install receiving antennas with general characteristics superior to those of the reference receive antenna. Nevertheless, should interference occur and it can be demonstrated by an applicant that the existing antenna at the receive site is inappropriate, a more suitable yet practical receiving antenna should be installed. In such cases, the modification of the receive site will be in the discretion, and will be the responsibility, of the licensee serving the site.

* * * * *

(b) Except as set forth in § 74.931 (c)(4) and (d)(3), directive transmitting antennas shall be used whenever feasible so as to minimize interference to other licensees. The radiation pattern shall be designed to minimize radiation in directions where no reception is intended. When an ITFS station is used for point-to-point service, an appropriate directional antenna must be used.

* * * * *

39. Section 74.938 is revised to read as follows:

§ 74.938 Transmission standards.

The width of an ITFS channel is 6 MHz. However, the licensee may subchannelize its authorized bandwidth, provided that digital modulation is employed and the aggregate power does not exceed the authorized power for the channel, and may utilize all or a portion of its authorized bandwidth for ITFS response stations authorized pursuant to § 74.939. The licensee may also, jointly with other licensees, transmit utilizing bandwidth in excess of its authorized bandwidth, provided that digital modulation is employed, all power spectral density requirements set forth in this part are met and the out-of-band emissions restrictions set forth in § 74.936 are met at the edges of the channels employed.

40. Section 74.939 is revised to read as follows:

§ 74.939 ITFS response stations.

(a) An ITFS response station is authorized to provide communication by voice, video and/or data signals with its associated ITFS response station hub or associated ITFS station. An ITFS response station may be operated only by the licensee of the ITFS station, by any person or entity authorized by the ITFS licensee to receive point-to-multipoint transmissions over its channels, by any lessee of excess capacity, or by a subscriber of any lessee of excess capacity. The authorized channel may be divided to provide distinct subchannels for each of more than one response station, provided that digital modulation is employed and the aggregate power does not exceed the authorized power for the channel. An ITFS response station may also, jointly with other licensees, transmit utilizing bandwidth in excess of that authorized to the station, provided that digital modulation is employed, all power spectral density requirements set forth in this part are met, and the out-of-band emission restrictions set forth in § 74.936 or paragraph (k) of this section are complied with.

(b) ITFS response stations that utilize the 2150–2162 MHz band pursuant to § 74.902(f), the 2500–2686 MHz band, and/or the 125 kHz channels identified in paragraph (j) of this section may be installed and operated without an individual license, to communicate with a response station hub authorized under a response station hub license, provided that the conditions set forth in paragraph (g) of this section are complied with and that ITFS response stations operating in the 2150–2162 MHz and/or 2500–2686 MHz band(s) employ only digital modulation with uniform power spectral density in accordance with the Commission's Declaratory Ruling and Order, 11 FCC Rcd 18839 (1996).

(c) An applicant for a response station hub license shall:

(1) File FCC Form 331 with the Commission in Washington, DC, and certify on that form that it has complied with the requirements of paragraphs (c)(2) and (d) of this section. Failure to certify compliance and to comply completely with the requirements of paragraphs (c)(2) and (d) of this section shall result in dismissal of the application or revocation of the response station hub license, and may result in imposition of a monetary forfeiture; and

(2) Submit to International Transcription Services, Inc. (''ITS''), 1231 20th Street, NW, Washington, DC 20036, both in hard copy, and on a 3.5″ computer diskette in ASCII, the following:

(i) Duplicates of the Form 331 filed with the Commission; and

(ii) The data required by Appendix D to the Report and Order in MM Docket No. 97–217, FCC 98–231, ''Methods for Predicting Interference from Response Station Transmitters and to Response Station Hubs and for Supplying Data on Response Station Systems''; and

(iii) The information, showings and certifications required by paragraph (d) of this section; and

(3) Submit to the Commission, only upon Commission staff request, duplicates of the submissions required by paragraph (c)(2) of this section.

(d) An applicant for a response station hub license shall, pursuant to paragraph (c)(2)(iii) of this section, submit to ITS the following:

(1) The geographic coordinates, street address, and the height of the center line of the reception antenna(s) above mean sea level for the response station hub; and (2) A specification of:

(i) The response service area in which the applicant or its lessee proposes to install ITFS response stations to communicate with the response station hub, any regions into which the response service area will be subdivided for purposes of interference analysis, and any regional classes of response station characteristics which will be used to define the operating parameters of groups of response stations within each region for purposes of interference analysis, including:

(A) the maximum height above ground level of the transmission antenna that will be employed by any response station in the regional class and that will be used in interference analyses; and

(B) the maximum equivalent isotropic radiated power (EIRP) that will be employed by any response station in the regional class and that will be used in interference analyses; and

(C) any sectorization that will be employed, including the polarization to be employed by response stations in each sector and the geographic orientation of the sector boundaries, and that will be used in interference analyses; and

(D) the combined worst-case outer envelope plot of the patterns of all models of response station transmission antennas that will be employed by any response station in the regional class to be used in interference analyses; and

(E) the maximum number of response stations that will be operated simultaneously in each region using the characteristics of each regional class applicable to each region.

(ii) The channel plan (including any guardbands at the edges of the channel) to be used by ITFS response stations in communicating with the response station hub, including a statement as to whether the applicant will employ the same frequencies on which response stations will transmit to also transmit on a point-to-multipoint basis from an MDS station or MDS booster station; and

(3) A demonstration that:

(i) The proposed response station hub is within the protected service area, as defined in § 21.902(d)(1) of this chapter, of the ITFS station(s) whose channels will be used for communications to the response station hub or, in the case of an application for response stations to utilize one or more of the 125 kHz response channels, the response station hub is within the protected service area of the station authorized to utilize the associated channel(s); and

(ii) The entire proposed response service area is within the protected service area of the ITFS station(s) whose channels will be used for communications to the response station hub or, in the alternative, the applicant may demonstrate that the licensee of any cochannel protected service area which is overlapped by the proposed response service area has consented to such overlap. In the case of an application for response stations to utilize one or more of the 125 kHz response channels, such demonstration shall establish that the response service area is entirely within the protected service area of the station authorized to utilize the associated channel(s), or, in the alternative, that the licensee entitled to any cochannel protected service area which is overlapped by the proposed response service area has consented to such overlap; and

(iii) The combined signals of all simultaneously operating ITFS response stations within all response service areas and oriented to transmit toward their respective response station hubs and all cochannel ITFS stations and booster stations licensed to or applied for by the applicant will not generate a power flux density in excess of -73 dBW/m^2 (or the pro rata power spectral density equivalent based on the bandwidth actually employed in those cases where less than a 6 MHz channel is to be employed) outside the boundaries of the applicant's protected service area, as measured at locations for which there is an unobstructed signal path, except to the extent that consent of affected licensees has been obtained or consents have been granted pursuant to paragraph (d)(3)(ii) of this section to an extension of the response service area beyond the boundaries of the protected service area; and

(iv) The combined signals of all simultaneously operating ITFS response stations within all response service areas and oriented to transmit toward their respective response station hubs, and all cochannel ITFS stations and booster stations licensed to or applied for by the applicant, will result in a desired to undesired signal ratio of at least 45 dB (or the appropriately adjusted value based upon the ratio of the channel-to-subchannel bandwidths):

(A) within the protected service area of any authorized or previously-proposed cochannel MDS or ITFS station with center coordinates located within 160.94 km (100 miles) of the proposed response station hub; and

(B) within the booster service area of any cochannel booster station entitled to such protection pursuant to § 21.913(f) of this chapter or 74.985(f) and located within 160.94 km (100 miles) of the proposed response station hub; and

(C) at any registered receive site of any authorized or previously-proposed cochannel ITFS station or booster station located within 160.94 km (100 miles) of the proposed response station hub, or, in the alternative, that the licensee or applicant for such cochannel station or hub consents to the application; and

(v) The combined signals of all simultaneously operating ITFS response stations within all response service areas and oriented to transmit toward their respective response station hubs, and all cochannel ITFS stations and booster stations licensed to or applied for by the applicant, will result in a desired to undesired signal ratio of at least 0 dB (or the appropriately adjusted value based upon the ratio of the channel-to-subchannel bandwidths):

(A) within the protected service area of any authorized or previously-proposed adjacent channel MDS or ITFS station with center coordinates located within 160.94 km (100 miles) of the proposed response station hub; and

(B) within the booster service area of any adjacent channel booster station entitled to such protection pursuant to §§ 21.913(f) of this chapter or 74.985(f) and located within 160.94 km (100 miles) of the proposed response station hub; and

(C) at any registered receive site of any authorized or previously-proposed adjacent channel ITFS station or booster station located within 160.94 km (100 miles) of the proposed response station hub, or, in the alternative, that the licensee of or applicant for such adjacent channel station or hub consents to such application; and

(vi) The combined signals of all simultaneously operating ITFS response stations within all response service areas and oriented to transmit toward their respective response station hub and all cochannel ITFS stations and booster stations licensed to or applied for by the applicant will comply with the requirements of §§ 21.909(i) of this chapter and paragraph (i) of this section.

(4) A certification that the application has been served upon

(i) the holder of any cochannel or adjacent channel authorization with a protected service area which is overlapped by the proposed response service area;

(ii) the holder of any cochannel or adjacent channel authorization with a protected service area that adjoins the applicant's protected service area;

(iii) the holder of a cochannel or adjacent channel authorization for any BTA or PSA inside whose boundaries are locations for which there is an unobstructed signal path for combined signals from within the response station hub applicant's protected service area; and

(iv) every licensee of, or applicant for, any cochannel or adjacent channel, authorized or previously-proposed, incumbent MDS station with a 56.33 km (35 mile) protected service area with center coordinates located within 160.94 km (100 miles) of the proposed response station hub; and

(v) every licensee of, or applicant for, any cochannel or adjacent channel, authorized or previously-proposed ITFS station (including any booster station or response station hub) located within 160.94 km (100 miles) of the proposed response station hub.

(e) Applications for response station hub licenses shall be deemed minor change applications and, except as provided in § 74.911(e), may be filed at any time. Notwithstanding any other provision of part 74, applications for response station hub licenses meeting the requirements of paragraph (c) of this section shall cut-off applications that are filed on a subsequent day for facilities that would cause harmful electromagnetic interference to the proposed response station hubs. A response station hub shall not be entitled to protection from interference caused by facilities proposed on or prior to the day the application for the response station hub license is filed. Response stations shall not be required to protect from interference facilities proposed on or after the day the application for the response station hub license is filed.

(f) Notwithstanding the provisions of § 74.912 and except as provided by § 74.911(e), any petition to deny an application for a response station hub license shall be filed no later than the sixtieth (60th) day after the date of public notice announcing the filing of such application or major amendment thereto. Notwithstanding § 74.911(d) and except as provided in § 74.911(e), an application for a response station hub license that meets the requirements of this section shall be granted on the sixty-first (61st) day after the

Commission shall have given public notice of the acceptance for filing of it, or of a major amendment to it if such major amendment has been filed, unless prior to such date either a party in interest timely files a formal petition to deny or for other relief pursuant to § 74.912, or the Commission notifies the applicant that its application will not be granted. Where an application is granted pursuant to the provisions of this paragraph, the conditional licensee or licensee shall maintain a copy of the application at the response station hub until such time as the Commission issues a response station hub license.

(g) An ITFS response station hub license establishing a response service area shall be conditioned upon compliance with the following:

(1) No ITFS response station shall be located beyond the response service area of the response station hub with which it communicates; and

(2) No ITFS response station shall operate with a transmitter output power in excess of 2 watts; and

(3) No ITFS response station shall operate with an EIRP in excess of that specified in the application for the response station hub pursuant to paragraph (d)(2)(i)(B) of this section for the particular regional class of characteristics with which the response station is associated, and such response station shall not operate at an excess of 33 dBW EIRP (or, when subchannels or superchannels, or 125 kHz channels, are used, the appropriately adjusted value based upon the ratio of 6 MHz to the subchannel or superchannel, or 125 kHz, bandwidth); and

(4) Each ITFS response station shall employ a transmission antenna oriented toward the response station hub with which the ITFS response station communicates, and such antenna shall be no less directional than the worst case outer envelope pattern specified in the application for the response station hub pursuant to paragraph (d)(2)(i)(D) of this section for the regional class of characteristics with which the response station is associated; and

(5) The combined out-of-band emissions of all response stations using all or part of one or multiple contiguous 6 MHz channels and employing digital modulation shall comply with § 74.936(e). The combined out-of-band emissions of all response stations using all or part of one or multiple contiguous 125 kHz channels shall comply with paragraph (k) of this section. However, should harmful interference occur as a result of emissions outside the assigned channel, additional attenuation may be required; and

(6) The response stations transmitting simultaneously at any time within any given region of the response service area utilized for purposes of analyzing the potential for interference by response stations shall conform to the numerical limits for each class of response station proposed in the application for the response station hub license. Notwithstanding the foregoing, the licensee of a response station hub license may alter the number of response stations of any class operating simultaneously in a given region, without prior Commission authorization, provided that the licensee:

(i) First notifies the Commission of the altered number of response stations of such class(es) to be operated simultaneously in such region, and certifies in that notification that it has complied with the requirements of paragraphs (g)(6)(ii) and (iii) of this section; and

(ii) Provides ITS with a copy of such notification and with an analysis establishing that such alteration will not result in any increase in interference to the protected service area or protected receive sites of any existing or previously-proposed, cochannel or adjacent channel MDS or ITFS station or booster station, to the protected service area of any MDS Basic Trading Area or Partitioned Service Area licensee entitled to protection pursuant to paragraph (d)(3) of this section, or to any existing or previously-proposed, cochannel or adjacent channel response station hub, or response station under § 21.940 of this chapter or § 74.940; or that the applicant for or licensee of such facility has consented to such interference; and

(iii) Serves a copy of such notification and analysis upon each party entitled to be served pursuant to paragraph (d)(4) of this section; and

(iv) Submits to the Commission, only upon Commission staff request, duplicates of the submissions required by paragraph (g)(6)(ii) of this section; and

(7) Where an application is granted under this section, if a facility operated pursuant to that grant causes harmful, unauthorized interference to any cochannel or adjacent channel facility, it must promptly remedy the interference or immediately cease operations of the interfering facility, regardless of whether any petitions to deny or for other relief were filed against the application during the application process. The burden of proving that a facility operated under this section is not causing harmful, unauthorized interference lies on the licensee of the alleged interfering facility, following the filing of a documented complaint of interference by an affected party; and

(8) In the event any MDS or ITFS receive site suffers interference due to block downconverter overload, the licensee of each response station hub with a response service area within five miles of such receive site shall cooperate in good faith to expeditiously identify the source of the interference. Each licensee of a response station hub with an associated response station contributing to such interference shall bear the joint and several obligation to promptly remedy all interference resulting from block downconverter overload at any ITFS receive site registered prior to the submission of the application for the response station hub license or at any receive site within an MDS or ITFS protected service area applied for prior to the submission of the application for the response station hub license, regardless of whether the receive site suffering the interference was constructed prior to or after the construction of the response station(s) causing the downconverter overload; provided, however, that the licensee of the registered ITFS receive site or the MDS or ITFS protected service area must cooperate fully and in good faith with efforts by the response station hub licensee to prevent interference before constructing response stations and/or to remedy interference that may occur. In the event that more than one response station hub licensee contributes to block downconverter interference at a MDS or ITFS receive site, the licensees of the contributing response station hubs shall cooperate in good faith to remedy promptly the interference.

(h) Applicants must comply with part 17 of this chapter concerning notification to the Federal Aviation Administration of proposed antenna construction or alteration. The provisions of §§ 74.967 and 74.981(a)(5), concerning antenna painting and lighting requirements, apply to ITFS response stations and response station hubs, as well as to main and booster stations.

(i) Response station hubs shall be protected from cochannel and adjacent channel interference in accordance with the following criteria:

(1) An applicant for any new or modified MDS or ITFS station (including any high-power booster station or response station hub) shall be required to demonstrate interference protection to a response station hub within 160.94 km (100 miles) of the proposed facilities. In lieu of the interference protection requirements set

forth in §§ 21.902(i) of this chapter, 21.938(b)(3) of this chapter and 74.903, such demonstration shall establish that the proposed facility will not increase the effective power flux density of the undesired signals generated by the proposed facility and any associated main stations, booster stations or response stations at the response station hub antenna for any sector. In lieu of the foregoing, an applicant for a new MDS or ITFS main station license or for a new or modified response station hub or booster license may demonstrate that the facility will not increase the noise floor at a reception antenna of the response station hub by more than 1 dB for cochannel signals and 45 dB for adjacent channel signals, provided that:

(i) The entity submitting the application may only invoke this alternative once per response station hub reception sector; or

(ii) The licensee of the affected response station hub may consent to receive a certain amount of interference at its hub.

(2) Commencing upon the filing of an application for an ITFS response station hub license and until such time as the application is dismissed or denied or, if the application is granted, a letter informing the Commission of completion of construction is submitted, the ITFS station whose channels are being utilized shall be entitled both to interference protection pursuant to §§ 21.902(i) of this chapter, 21.938(b)(3) of this chapter and 74.903, and to protection of the response station hub pursuant to the preceding paragraph. Unless the application for the response station hub license specifies that the same frequencies also will be employed for digital and/or analog point-to-multipoint transmissions by ITFS stations and/or ITFS booster stations, upon the submission of a letter informing the Commission of completion of construction of an ITFS response station hub where the channels of an ITFS station are being utilized as response station transmit frequencies, the ITFS station whose channels are being utilized for response station transmissions shall no longer be entitled to interference protection pursuant to §§ 21.902(i) of this chapter, 21.938(b)(3) of this chapter and 74.903 within the response service area with regard to any portion of any 6 MHz channel employed solely for response station communications. Upon the submission of a letter informing the Commission of completion of construction of an ITFS response station hub where the channels of an ITFS station are being utilized for response station transmissions and the application for the response station hub license specifies that the same frequencies will be employed for point-to-multipoint transmissions, the ITFS station whose channels are being utilized shall be entitled both to interference protection pursuant to §§ 21.902(i) of this chapter, 21.938(b)(3) of this chapter and 74.903, and to protection of the response station hub pursuant to the preceding provisions of this paragraph.

(j) ITFS response stations may operate on either all or part of a 6 MHz channel assigned a licensee, on any 125 kHz channel assigned a licensee, or on adjacent frequencies authorized to multiple licensees where such stations are operated jointly. The 125 kHz channels listed in the following table shall be assigned to the licensees of MDS and ITFS stations for use at response stations, or for licensing for point-to-multipoint transmissions pursuant to paragraph (l) of this section, in accordance with the table. The specified 125 kHz frequency channel may be subdivided to provide a distinct operating frequency for each of more than one station, or may be combined with adjacent channels, provided that digital modulation is employed in accordance with paragraph (a) of this section. The specified 125 kHz frequency channels also may be exchanged with the licensee of another MDS or ITFS station for use of another 125 kHz channel assigned to the other licensee.

Frequency (MHz)	Main channel designation	125 kHz channel designation
2686.0625	A1	I1
2686.1875	B1	I2
2686.3125	C1	I3
2686.4375	D1	I4
2686.5625	E1	I5
2686.6875	F1	I6
2686.8125	G1	I7
2686.9375	H1	I8
2687.0625	A2	I9
2687.1875	B2	I10
2687.3125	C2	I11
2687.4375	D2	I12
2687.5625	E2	I13
2687.6875	F2	I14
2687.8125	G2	I15
2687.9375	H2	I16
2688.0625	A3	I17
2688.1875	B3	I18
2688.3125	C3	I19
2688.4375	D3	I20
2688.5625	E3	I21
2688.6875	F3	I22
2688.8125	G3	I23
2688.9375	H3	I24
2689.0625	A4	I25
2689.1875	B4	I26
2689.3125	C4	I27
2689.4375	D4	I28
2689.5625	E4	I29
2689.6875	F4	I30
2689.8125	G4	I31

(k) 125 kHz wide response channels shall be subject to the following requirements: The 125 kHz wide channel shall be centered at the assigned frequency. If amplitude modulation is used, the carrier shall not be modulated in excess of 100%. If frequency modulation is used, the deviation shall not exceed ± 25 kHz. Any emissions outside the channel shall be attenuated at the channel edges at least 35 dB below peak output power when analog modulation is employed or 35 dB below licensed average output power when digital modulation is employed (or, when subchannels are used, the appropriately adjusted value based upon the ratio of the channel-to-subchannel bandwidths). Any emissions more than 125 kHz from either channel edge, including harmonics, shall be attenuated at least 60 dB below peak output power when analog modulation is employed, or at least 60 dB below licensed average output power when digital modulation is employed (or, when subchannels are used, the appropriately adjusted value based upon the ratio of the channel-to-subchannel bandwidths). Notwithstanding the foregoing, in situations where adjacent channel licensees jointly transmit over more than one channel utilizing digital

modulation, the maximum out-of-band power shall be attenuated at the edges of those combined channels at least 35 dB relative to the licensed average power level of each channel. Emissions more than 125 kHz from either edge of the combined channels, including harmonics, shall be attenuated at least 60 dB below peak analog power or licensed average digital power of each channel, as appropriate. Different types of emissions may be authorized for use on 125 kHz wide channels if the applicant describes fully the modulation and bandwidth desired, and demonstrates that the modulation selected will cause no more interference than is permitted under this paragraph. Greater attenuation may be required if interference is caused by out-of-channel emissions.

(l) Any MDS or ITFS conditional licensee or licensee who wishes to use one or more of its associated I channels for point-to-multipoint transmissions in a system with one or more authorized, or previously- or simultaneously-proposed, response station hub(s) shall:

(1) File FCC Form 331 with the Commission, filing with Mellon Bank for I channels associated with an MDS station, and filing with the Commission in Washington, DC for I channels associated with an ITFS station. The application shall specify which of the associated I channels is/are intended for point-to-multipoint transmissions. The applicant also shall certify on the appropriate form that it has complied with the requirements of paragraph (l)(2) of this section. Failure to certify compliance and to comply completely with the requirements of paragraph (l)(2) of this section shall result in dismissal of the application or revocation of the authorization for point-to-multipoint transmissions on the relevant I channels, and may result in imposition of a monetary forfeiture. Modification applications to convert I channels associated with ITFS stations to point-to-multipoint transmissions shall be considered minor changes for purposes of § 74.911. These applications shall be subject to the procedures set forth in § 21.27(d) of this chapter or § 74.911(e), as appropriate; and

(2) Submit to International Transcription Services, Inc., 1231 20th Street, N.W., Washington, DC 20036, both in hard copy, and on a 3.5″ computer diskette in ASCII, and likewise submit to the Commission, only upon Commission staff request:

(i) Duplicates of the Form 331 filed with Mellon Bank or with the Commission, as appropriate; and

(ii) The interference analyses required to be performed under § 21.902 of this chapter, and § 21.938 of this chapter where appropriate, including the provisions of §§ 21.909 of this chapter, 21.913 of this chapter, 74.939 and 74.985 regarding the protection of response station hubs and booster service areas from harmful electromagnetic interference, and including protection of stations authorized pursuant to §§ 21.940 of this chapter and 74.940 from harmful electromagnetic interference, using the appropriately adjusted interference protection values based upon the ratio of the bandwidths in use; and

(3) Except as provided in § 21.27(d) of this chapter or § 74.911(e), as appropriate, be permitted to file applications to convert associated I channels to point-to-multipoint transmissions at any time. I channels used for point-to-multipoint transmissions shall be afforded interference protection in the same manner as other point-to-multipoint MDS and ITFS facilities, with appropriate adjustment of the interference protection values for bandwidth. Notwithstanding any other provision of parts 21 and 74, applications to convert associated I channels to point-to-multipoint transmissions, meeting the requirements of paragraphs (l) (1) and (2) of this section, shall cut-off applications that are filed on a subsequent day for facilities that would cause harmful electromagnetic interference to the proposed point-to-multipoint operations; and

(4) Notwithstanding the provisions of §§ 21.30(a)(4) of this chapter and 74.912, and except as provided in § 21.27(d) of this chapter or § 74.911(e), as appropriate, be subject to a petition to deny an application to convert associated I channels to point-to-multipoint transmissions that is filed no later than the sixtieth (60th) day after the date of public notice announcing the filing of such application or major amendment thereto. Notwithstanding §§ 21.31 of this chapter and 74.911(d), and except as provided in § 21.27(d) of this chapter or § 74.911(e), as appropriate, an application to convert associated I channels to point-to-multipoint transmissions that meets the requirements of this paragraph shall be granted on the sixty-first (61st) day after the Commission shall have given public notice of the acceptance for filing of it, or of a major amendment to it if such major amendment has been filed, unless prior to such date either a party in interest timely files a formal petition to deny or for other relief pursuant to § 21.30(a) of this chapter or § 74.912, or the Commission notifies the applicant that its application will not be granted. Where an application is granted pursuant to the provisions of this paragraph, the conditional licensee or licensee shall maintain a copy of the application at the I channels station until such time as the Commission issues an I channels station license for point-to-multipoint transmissions; and

(5) Where an application is granted under this paragraph, and a facility operated pursuant to that grant causes harmful, unauthorized interference to any cochannel or adjacent channel facility, promptly remedy the interference or immediately cease operations of the interfering facility, regardless of whether any petitions to deny or for other relief were filed against the application during the application process. The burden of proving that a facility operated under this paragraph is not causing harmful, unauthorized interference lies on the licensee of the alleged interfering facility, following the filing of a documented complaint of interference by an affected party.

(m) A response station may be operated unattended. The overall performance of the response station transmitter shall be checked by the hub licensee as often as necessary to ensure that it is functioning in accordance with the requirements of the Commission's rules. The licensee of a response station hub is responsible for the proper operation of all associated response stations and must have reasonable and timely access to all station transmitters. Response stations shall be installed and maintained by the licensee of the associated hub station, or the licensee's employees or agents, and protected in such manner as to prevent tampering or operation by unauthorized persons. No response hub may lawfully communicate with any response station which has not been installed by an authorized person, and each response station hub licensee is responsible for maintaining, and making available to the Commission upon request, a list containing the customer name and site location (street address and latitude/longitude to the nearest second) of each associated response station, plus the technical parameters (e.g., EIRP, emission, bandwidth, and antenna pattern, height, orientation and polarization) pertinent to each specific response station.

(n) The transmitting apparatus employed at ITFS response stations shall have received type certification.

(o) An ITFS response station shall be operated only when engaged in communication with its associated ITFS response station hub or ITFS station, or

for necessary equipment or system tests and adjustments. Radiation of an unmodulated carrier and other unnecessary transmissions are forbidden.

(p) At least 20 days prior to the activation of a response station transmitter located within a radius of 1960 feet of a registered or previously-applied-for ITFS receive site, the response station hub licensee must notify, by certified mail, the licensee of the ITFS site of the intention to activate the response station. The notification must contain the street address and geographic coordinates (to the nearest second) of the response station, a specification of the station's EIRP, antenna pattern/orientation/height AMSL, channel(s) to be used, as well as the name and telephone number of a contact person who will be responsible for coordinating the resolution of any interference problems.

(q) Interference calculations shall be performed in accordance with Appendix D to the *Report and Order* in MM Docket No. 97–217, FCC 98–231, ''Methods For Predicting Interference From Response Station Transmitters and To Response Station Hubs and For Supplying Data on Response Station Systems.'' Compliance with the out-of-band emission limitations shall be established in accordance with § 21.908(e) of this chapter.

41. New § 74.940 is added, to read as follows:

§ 74.940 Individually licensed 125 kHz channel ITFS response stations.

(a) The provisions of § 74.939 (a), (e), (h), (j), (k), (n) and (o), also shall apply with respect to authorization of a 125 kHz channel(s) ITFS response station not under a response station hub license. The applicant shall comply with the requirements of § 21.902 of this chapter, and § 21.938 of this chapter where appropriate, including the provisions of §§ 21.909 of this chapter, 21.913 of this chapter, 74.939 and 74.985 regarding the protection of response station hubs and booster service areas from harmful electromagnetic interference, using the appropriately adjusted interference protection values based upon the ratio of the bandwidths in use, where the authorized or previously-proposed cochannel or adjacent channel station is operated or to be operated in a system with one or more response station hub(s).

(b) An application for a license to operate a new or modified 125 kHz channel(s) ITFS response station not under a response station hub license shall be filed with the Commission in Washington, DC, on FCC Form 330. The applicant shall supply the following information on that form for each response station:

(1) The geographic coordinates and street address of the ITFS response station transmitting antenna; and

(2) The manufacturer's name, type number, operating frequency, and power output of the proposed ITFS response station transmitter; and

(3) The type of transmitting antenna, power gain, azimuthal orientation and polarization of the major lobe of radiation in degrees measured clockwise from True North; and

(4) A sketch giving pertinent details of the ITFS response station transmitting antenna installation including ground elevation of the transmitter site above mean sea level; overall height above ground, including appurtenances, of any ground-mounted tower or mast on which the transmitting antenna will be mounted or, if the tower or mast is or will be located on an existing building or other manmade structure, the separate heights above ground of the building and the tower or mast including appurtenances; the location of the tower or mast on the building; the location of the transmitting antenna on the tower or mast; and the overall height of the transmitting antenna above ground.

(c) Each ITFS response station licensed under this section shall comply with the following:

(1) No ITFS response station shall be located beyond the protected service area of the ITFS station with which it communicates; and

(2) No ITFS response station shall operate with a transmitter output power in excess of 2 watts; and

(3) No ITFS response station shall operate at an excess of 16 dBW EIRP.

(d) During breaks in communications, the unmodulated carrier frequency shall be maintained within 35 kHz of the assigned frequency at all times. Adequate means shall be provided to insure compliance with this rule.

(e) Each ITFS response station shall employ a directive transmitting antenna oriented towards the transmitter site of the associated ITFS station or towards the response station hub with which the ITFS response station communicates. The beamwidth between half power points shall not exceed 15° and radiation in any minor lobe of the antenna radiation pattern shall be at least 20 dB below the power in the main lobe of radiation.

(f) A response station may be operated unattended. The overall performance of the response station transmitter shall be checked by the licensee of the station or hub receiving the response signal, or by the licensee's employees or agents, as often as necessary to ensure that the transmitter is functioning in accordance with the requirements of the Commission's rules. The licensee of the station or hub receiving the response signal is responsible for the proper operation of the response station and must have reasonable and timely access to the response station transmitter. The response station shall be installed and maintained by the licensee of the associated station or hub, or the licensee's employees or agents, and protected in such manner as to prevent tampering or operation by unauthorized persons. No response station which has not been installed by an authorized person may lawfully communicate with any station or hub.

§ 74.950 [Removed]

42. Section 74.950 is removed.

43. In § 74.951, paragraph (b) is revised to read as follows:

§ 74.951 Modification of transmission systems.

* * * * *

(b) Any change in the antenna system affecting the direction of radiation, directive radiation pattern, antenna gain, or radiated power; provided, however, that a licensee may install a sectorized antenna system without prior consent if such system does not change polarization or result in an increase in radiated power by more than one dB in any direction, and notice of such installation is provided to the Commission on FCC Form 331 within ten (10) days of installation.

* * * * *

44. Section 74.952 is revised to read as follows:

§ 74.952 Acceptability of equipment for licensing.

ITFS transmitters must be type certified by the Commission for the particular signals that will be employed in actual operation. Either the manufacturer or the licensee must obtain transmitter certification for the transmitter by filing an application for certification with appropriate information concerning the signal waveforms and measurements.

45. In § 74.961, paragraph (a) is revised to read as follows:

§ 74.961 Frequency tolerance.

(a) The frequency of any ITFS station, or of any ITFS booster station authorized pursuant to § 74.985(b), shall be maintained within ±1 kHz of the assigned frequency at all times when the station is in operation. ITFS 65125booster

stations authorized pursuant to § 74.985(e) and ITFS response stations authorized pursuant to § 74.939 shall employ transmitters with sufficient frequency stability to ensure that the emission stays within the authorized bandwidth. A transmitter licensed prior to November 1, 1991, that remains at the station site initially licensed and does not comply with this paragraph may continue to be used for its life if it does not cause harmful interference to the operation of any other licensee. Any non-conforming transmitter replaced after November 1, 1991, must be replaced by a transmitter meeting the requirements of this paragraph.

* * * * *

46. Section 74.965 is revised to read as follows.

§ 74.965 Posting of station license.

(a) The instrument of authorization, a clearly legible photocopy thereof, or the name, address and telephone number of the custodian of the instrument of authorization shall be available at each station, booster station authorized pursuant to § 74.985(b) and ITFS response station hub. Each operator of an ITFS booster station shall post at the booster station the name, address and telephone number of the custodian of the notification filed pursuant to § 74.985(e) if such notification is not maintained at the booster station.

(b) If an ITFS station, an ITFS booster station or an ITFS response station hub is operated unattended, the call sign and name of the licensee shall be displayed such that it may be read within the vicinity of the transmitter enclosure or antenna structure.

47. In § 74.982, paragraph (b) is revised, and new paragraph (g) is added, to read as follows:

§ 74.982 Station identification.

* * * * *

(b) Except as otherwise provided in paragraphs (c) and (d) of this section, each instructional television fixed station solely utilizing analog transmissions shall transmit its call sign at the beginning and end of each period of operation and, during operation, on the hour. Visual or aural transmissions shall be employed.

* * * * *

(g) The provisions of paragraphs (b) through (e) of this section shall not apply to any ITFS licensee's station or transmissions where digital transmissions are utilized by the ITFS licensee on any of its licensed or shifted channels.

48. Section 74.985 is revised to read as follows:

§ 74.985 Signal booster stations.

(a) An ITFS booster station may reuse channels to repeat the signals of ITFS stations or to originate signals on ITFS channels. The aggregate power flux density generated by an ITFS station and all associated signal booster stations and all simultaneously operating cochannel response stations licensed to or applied for by the applicant may not exceed –73 dBW/m^2 (or, when subchannels or 125 kHz channels are used, the appropriately adjusted value based upon the ratio of the channel-to-subchannel or 125 kHz bandwidths) at or beyond the boundary of the protected service area, as defined by § 21.902(d)(1) of this chapter, of the main ITFS station whose channels are being reused, as measured at locations for which there is an unobstructed signal path, unless the consent of the cochannel licensee is obtained.

(b) An ITFS licensee or conditional licensee who is a response station hub licensee, conditional licensee or applicant may secure a license for an ITFS signal booster station that has a maximum power level in excess of –9 dBW EIRP (or, when subchannels or superchannels, or 125 kHz channels, are used, the appropriately adjusted value based upon the ratio of 6 MHz to the subchannel or superchannel, or 125 kHz, bandwidth) and that employs only digital modulation with uniform power spectral density in accordance with the Commission's Declaratory Ruling and Order, 11 FCC Rcd 18839 (1996) (a ''high-power ITFS signal booster station''). The applicant for a high-power ITFS signal booster station shall file FCC Form 331 with the Commission in Washington, DC, and certify on that form that the applicant has complied with the additional requirements of paragraph (b) of this section. Failure to certify compliance and to comply completely with the following requirements of paragraph (b) of this section shall result in dismissal of the application or revocation of the high-power ITFS signal booster station license, and may result in imposition of a monetary forfeiture. The applicant for a high-power ITFS signal booster station additionally is required to submit to International Transcription Services, Inc., 1231 20th Street, N.W., Washington, DC 20036, both in hard copy, and on a 3.5'' computer diskette in ASCII, and likewise to submit to the Commission, only upon Commission staff request, duplicates of the Form 331 filed with the Commission, and the following information:

(1) A demonstration that the proposed signal booster station site is within the protected service area, as defined in § 21.902(d)(1) of this chapter, of the main ITFS station whose channels are to be reused; and

(2) A demonstration that the booster service area is entirely within the protected service area of the ITFS station whose channels are being reused, or in the alternative, that the licensee entitled to any cochannel protected service area which is overlapped by the proposed booster service area has consented to such overlap; and

(3) A demonstration that the proposed booster service area can be served by the proposed booster without interference; and

(4) A study which demonstrates that the aggregate power flux density of the ITFS station and all associated booster stations and simultaneously operating cochannel response stations licensed to or applied for by the applicant does not exceed –73 dBW/m^2 (or, when subchannels or 125 kHz channels are used, the appropriately adjusted value based upon the ratio of the channel-to-subchannel or 125 kHz bandwidths) at or beyond the boundary of the protected service area of the main ITFS station whose channels are to be reused, as measured at locations for which there is an unobstructed signal path, unless the consent of affected licensees has been obtained; and

(5) In lieu of the requirements of § 74.903, a study which demonstrates that the proposed signal booster station will cause no harmful interference (as defined in § 74.903(a) (1) and (2)) to cochannel and adjacent channel, authorized or previously-proposed ITFS and MDS stations with protected service area center coordinates as specified in § 21.902(d) of this chapter, to any authorized or previously-proposed response station hubs, booster service areas, or I channel stations associated with such ITFS and MDS stations, or to any previously-registered ITFS receive sites, within 160.94 kilometers (100 miles) of the proposed booster station's transmitter site. Such study shall consider the undesired signal levels generated by the proposed signal booster station, the main station, all other licensed or previously-proposed associated booster stations, and all simultaneously operating cochannel response stations licensed to or applied for by the applicant. In the alternative, a statement from the affected MDS or ITFS licensee or conditional licensee stating that it does not object to operation of the high-power ITFS signal booster station may be submitted; and

(6) A description of the booster service area; and

(7) A certification that copies of the materials set forth in paragraph (b) of this section have been served upon the licensee or conditional licensee of each station (including each response station hub and booster station) required to be studied pursuant to paragraph (b)(5) of this section, and upon any affected holder of a BTA or PSA authorization pursuant to paragraph (b)(4) of this section.

(c) Applications for high-power ITFS signal booster station licenses shall be deemed minor change applications and, except as provided in § 74.911(e), may be filed at any time. Notwithstanding any other provision of part 74, applications for high-power ITFS signal booster station licenses meeting the requirements of paragraph (b) of this section shall cut-off applications that are filed on a subsequent day for facilities that would cause harmful electromagnetic interference to the proposed booster stations.

(d) Notwithstanding the provisions of § 74.912 and except as provided in § 74.911(e), any petition to deny an application for a high-power ITFS signal booster station license shall be filed no later than the sixtieth (60th) day after the date of public notice announcing the filing of such application or major amendment thereto. Notwithstanding § 74.911(d) and except as provided in § 74.911(e), an application for a high-power ITFS signal booster station license that meets the requirements of paragraph (b) of this section shall be granted on the sixty-first (61st) day after the Commission shall have given public notice of the acceptance for filing of it, or of a major amendment to it if such major amendment has been filed, unless prior to such date either a party in interest timely files a formal petition to deny or for other relief pursuant to § 74.912, or the Commission notifies the applicant that its application will not be granted. Where an application is granted pursuant to the provisions of this paragraph, the conditional licensee or licensee shall maintain a copy of the application at the ITFS booster station until such time as the Commission issues a high-power ITFS signal booster station license.

(e) Eligibility for a license for an ITFS signal booster station that has a maximum power level of –9 dBW EIRP (or, when subchannels or superchannels, or 125 kHz channels, are used, the appropriately adjusted value based upon the ratio of 6 MHz to the subchannel or superchannel, or 125 kHz, bandwidth) (a ''low-power ITFS signal booster station'') shall be restricted to an ITFS licensee or conditional licensee. A low-power ITFS signal booster station may operate only on one or more ITFS channels that are licensed to the licensee of the ITFS booster station, but may be operated by a third party with a fully-executed lease or consent agreement with the ITFS conditional licensee or licensee. An ITFS licensee or conditional licensee may install and commence operation of a low-power ITFS signal booster station for the purpose of retransmitting the signals of the ITFS station or for originating signals. Such installation and operation shall be subject to the condition that for sixty (60) days after installation and commencement of operation, no objection or petition to deny is filed by an authorized cochannel or adjacent channel ITFS or MDS station with a transmitter within 8.0 kilometers (5 miles) of the coordinates of the low-power ITFS signal booster station. An ITFS licensee or conditional licensee seeking to install a low-power ITFS signal booster station under this rule must, within 48 hours after installation, submit FCC Form 331 to the Commission in Washington, DC, and submit to International Transcription Services, Inc., 1231 20th Street, NW., Washington, DC 20036, both in hard copy, and on a 3.5″ computer diskette in ASCII, duplicates of the Form 331 filed with the Commission, and the following (which also shall be submitted to the Commission only upon Commission staff request at any time):

(1) A description of the signal booster technical specifications (including an antenna envelope plot or, if the envelope plot is on file with the Commission, the make and model of the antenna, antenna gain and azimuth), the coordinates of the booster, the height of the center of radiation above mean sea level, the street address of the signal booster, and a description of the booster service area; and

(2) A demonstration that the booster service area is entirely within the protected service area of the station whose channels are being reused, or, in the alternative, that the licensee entitled to any protected service area which is overlapped by the proposed booster service area has consented to such overlap; and

(3) A demonstration that the proposed booster service area can be served by the proposed booster without interference; and

(4) A certification that no Federal Aviation Administration determination of No Hazard to Air Navigation is required under part 17 of this chapter or, if such determination is required, either

(i) A statement of the FCC Antenna Structure Registration Number; or

(ii) If an FCC Antenna Structure Registration Number has not been assigned for the antenna structure, the filer must indicate the date the application by the antenna structure owner to register the antenna structure was filed with the FCC in accordance with part 17 of this chapter; and

(5) A certification that

(i) The maximum power level of the signal booster transmitter does not exceed −9 dBW EIRP (or, when subchannels or superchannels, or 125 kHz channels, are used, the appropriately adjusted value based upon the ratio of 6 MHz to the subchannel or superchannel, or 125 kHz, bandwidth); and

(ii) Where the booster is operating on channel D4, E1, F1, E2, F2, E3, F3, E4, F4 and/or G1, no registered receiver of an ITFS E or F channel station, constructed prior to May 26, 1983, is located within a 1 mile (1.61 km) radius of the coordinates of the booster, or in the alternative, that a consent statement has been obtained from the affected ITFS licensee; and

(iii) The applicant has complied with § 1.1307 of this chapter; and

(iv) Each MDS and/or ITFS station licensee (including the licensees of booster stations and response station hubs) with protected service areas and/or registered receivers within a 8 km (5 mile) radius of the coordinates of the booster has been given notice of its installation; and

(v) The signal booster site is within the protected service area of the ITFS station whose channels are to be reused; and

(vi) The aggregate power flux density of the ITFS station and all associated booster stations and simultaneously operating cochannel response stations licensed to or applied for by the applicant does not exceed −73 dBW/m2 (or, when subchannels or 125 kHz channels are used, the appropriately adjusted value based upon the ratio of the channel-to-subchannel or 125 kHz bandwidths) at or beyond the boundary of the protected service area of the main ITFS station whose channels are to be reused, as measured at locations for which there is an unobstructed signal path, unless the consent of affected licensees has been obtained; and

(vii) The antenna structure will extend less than 6.10 meters (20 feet) above the ground or natural formation or less than 6.10 meters (20 feet) above an existing manmade structure (other than an antenna structure); and

(viii) The ITFS conditional licensee or licensee understands and agrees that in

the event harmful interference is claimed by the filing of an objection or petition to deny, the conditional licensee or licensee must terminate operation within two (2) hours of notification by the Commission, and must not recommence operation until receipt of written authorization to do so by the Commission.

(f) Commencing upon the filing of an application for a high-power ITFS signal booster station license and until such time as the application is dismissed or denied or, if the application is granted, a letter informing the Commission of completion of construction is submitted, an applicant for any new or modified MDS or ITFS station (including any response station hub, high-power booster station, or I channels station) shall demonstrate compliance with the interference protection requirements set forth in §§ 21.902(i) of this chapter, 21.938(b)(3) of this chapter or 74.903 with respect to any previously-proposed or authorized booster service area both using the transmission parameters of the high-power ITFS signal booster station (e.g., EIRP, polarization(s) and antenna height) and the transmission parameters of the ITFS station whose channels are to be reused by the high-power ITFS signal booster station. Upon the submission of a letter informing the Commission of completion of construction of an ITFS booster station applied for pursuant to paragraph (b) of this section, or upon the submission of an ITFS booster station notification pursuant to paragraph (e) of this section, the ITFS station whose channels are being reused by the ITFS signal booster shall no longer be entitled to interference protection pursuant to §§ 21.902(i) of this chapter, 21.938(b)(3) of this chapter and 74.903 within the booster service area based on the transmission parameters of the ITFS station whose channels are being reused. A booster station shall not be entitled to protection from interference caused by facilities proposed on or prior to the day the application or notification for the booster station is filed. A booster station shall not be required to protect from interference facilities proposed on or after the day the application or notification for the booster station is filed.

(g) Where an application is granted under paragraph (d) of this section, if a facility operated pursuant to that grant causes harmful, unauthorized interference to any cochannel or adjacent channel facility, it must promptly remedy the interference or immediately cease operations of the interfering facility, regardless of whether any petitions to deny or for other relief were filed against the application during the application process. The burden of proving that a high-power ITFS signal booster station is not causing harmful, unauthorized interference lies on the licensee of the alleged interfering facility, following the filing of a documented complaint of interference by an affected party.

(h) In the event any MDS or ITFS receive site suffers interference due to block downconverter overload, the licensee of each signal booster station within five miles of such receive site shall cooperate in good faith to expeditiously identify the source of the interference. Each licensee of a signal booster station contributing to such interference shall bear the joint and several obligation to promptly remedy all interference resulting from block downconverter overload at any ITFS receive site registered prior to the submission of the application or notification for the signal booster station or at any receive site within an MDS or ITFS protected service area applied for prior to the submission of the application or notification for the signal booster station, regardless of whether the receive site suffering the interference was constructed prior to or after the construction of the signal booster station(s) causing the downconverter overload; provided, however, that the licensee of the registered ITFS receive site or the MDS or ITFS protected service area must cooperate fully and in good faith with efforts by the signal booster station licensee to prevent interference before constructing the signal booster station and/or to remedy interference that may occur. In the event that more than one signal booster station licensee contributes to block downconverter interference at a MDS or ITFS receive site, the licensees of the contributing signal booster stations shall cooperate in good faith to remedy promptly the interference.

49. In § 74.986, paragraph (a) is revised, and new paragraph (a)(8) is added, to read as follows:

§ 74.986 Involuntary ITFS station modifications.

(a) Parties specified in paragraph (b) of this section may, subject to Commission approval, involuntarily modify the facilities of an existing ITFS licensee in the following situations:

* * * * *

(8) There are no response station hubs licensed to or previously-proposed by any of the parties specified in paragraph (b) of this section, in the same system as the existing ITFS licensee of whose facilities involuntary modification is sought; however, in no event shall the Commission approve an involuntary retuning of an existing ITFS licensee's station to other frequencies, except as provided in § 74.902(i) through (k).

* * * * *

50. The alphabetical index to part 74 is amended by adding ''ITFS'' as the last entry under the ''Changes of Equipment'' heading; removing the ''ITFS'' entry from under the ''Equipment and installation'' heading; removing the ''ITFS'' entry from under the ''Equipment Performance'' heading; revising the entries under the ''ITFS'' heading; removing the ''ITFS'' entry from under the ''Remote control operation'' heading; revising the ''Signal boosters, UHF translator (LPTV/TV Translators)'' heading to read ''Signal boosters'', and adding entries under the ''Signal boosters'' heading; removing the ''Mutually exclusive applications, selection procedure (ITFS)'' heading; revising the ''Response stations (ITFS)'' heading; and adding in alphabetical order a ''Response station hubs (ITFS)'' heading and a ''Wireless cable usage of ITFS'' heading, to read as follows:

ALPHABETICAL INDEX—PART 74

* * * * * * *

Changes of Equipment—

* * * * * * *

ITFS 74.951

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ITFS—

Application processing 74.911

ALPHABETICAL INDEX—PART 74—Continued

[FR Doc. 98–31334 Filed 11–24–98; 8:45 am]
BILLING CODE 6712–01–P

DEPARTMENT OF TRANSPORTATION

Office of the Secretary

49 CFR Part 40

[Docket No. OST–98–4777]

RIN 2105–AC74

Amendments to Opiate Threshold Levels

AGENCY: Office of the Secretary, DOT.

ACTION: Final rule.

SUMMARY: This final rule makes conforming changes to the Department's drug testing procedures to incorporate changes made by the Department of Health and Human Services (DHHS) in the threshold levels of opiates. It is essential for the Department's drug testing procedures to remain consistent with the DHHS Guidelines, as Congress provided in the Omnibus Transportation Employee Testing Act of 1991.

EFFECTIVE DATE: The final rule takes effect on December 1, 1998.

FOR FURTHER INFORMATION CONTACT: Robert C. Ashby, Deputy Assistant General Counsel for Regulation and Enforcement, Room 10424, (202–366–9306); 400 7th Street, SW., Washington, DC 20590 or Mary Bernstein, Director, Office of Drug and Alcohol Policy and Compliance, Room 5405, (202–366–3784); 400 7th Street, SW., Washington, DC 20590.

SUPPLEMENTARY INFORMATION: On September 30, 1997, the Department of Health and Human Services (DHHS) published the final amendments to its Mandatory Guidelines for Federal Workplace Testing Programs (DHHS Guidelines) and indicated that May 1, 1998 would be the effective date for implementing these amendments. The amendments raised the initial and confirmatory test opiate thresholds from 300 nanograms per milliliter (ng/ml) to 2000 ng/ml. The DHHS amendments also established a new requirement to test for 6-acetylmorphine (6-AM), a metabolite that comes only from heroin, using a 10 ng/ml confirmatory level, for specimens that have tested positive for morphine on the confirmatory test at the 2000 ng/ml level.

DHHS made changes to the testing cutoff levels for opiates following a notice and opportunity for comment. DHHS received 22 comments, of which a majority favored their proposal. Under the previous standards, 87 percent of laboratory positive opiate specimens were verified as negative by medical review officers (MROs). DHHS anticipates that these amendments will eliminate the identification of most individuals legitimately taking prescriptions including morphine or codeine or who have ingested poppy seeds.

Subsequent to the publication of the final amendments, it became clear that manufacturers would not be able to provide a sufficient supply of the modified opiate test kits by the May 1, 1998 effective date. On February 4, 1998, DHHS sent a letter to all Federal agencies, HHS certified and applicant drug testing laboratories, and immunoassay kit manufacturers informing them that the effective date would be delayed 4 to 6 months beyond the May 1, 1998 effective date.

DHHS chose December 1, 1998 as the new effective date for implementing the new opiate testing cutoff levels. DHHS was satisfied that manufacturers of test kits can provide an adequate supply of the modified opiate test kits to the laboratories by the December 1, 1998 effective date and that the laboratories would be able to use these opiate test kits to conduct the initial and confirmatory tests at the revised testing levels for opiates.

It is essential for the Department's drug testing procedures to remain consistent with the DHHS Guidelines, as Congress provided in the Omnibus Transportation Employee Testing Act of 1991. Consistency is also necessary to avoid confusion in the testing process. For these reasons, the Department is making conforming changes to its drug testing procedures in 49 CFR Part 40.

Regulatory Process Matters

The final rule is considered to be a nonsignificant rulemaking under the DOT Regulatory Policies and Procedures. It is also a nonsignificant rule for purposes of Executive Order 12886. The Department certifies, under the Regulatory Flexibility Act, that the final rule does not have a significant economic effect on a substantial number of small entities. The rule does not impose any costs or burdens on regulated entities, since it will result in

fewer opiate positives having to be reviewed by medical review officers. The rule has also been analyzed in accordance with the principles and criteria contained in Executive Order 12612, and it has been determined that it does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

Issuance of Final Rule Without Opportunity for Notice and Comment

With respect to the amendments to 49 CFR Part 40 concerning opiate testing levels, the Department has determined that it would be impracticable, unnecessary, or contrary to the public interest to provide an opportunity for notice and comment under 5 U.S.C. 553(b). These amendments are conforming amendments making the Department's drug testing procedures consistent with those of DHHS, as is required under the Omnibus Transportation Employee Testing Act of 1991. Before publishing its amendments to the DHHS Guidelines, DHHS solicited, received, and responded to public comment on the identical provisions. Since there has already been an opportunity for public comment on the substance of the changes and consistency is necessary to avoid confusion in the testing process, the Secretary finds good cause under 5 U.S.C. 553(d)(3) for the final rule to be effective less than 30 days from the date of publication in the **Federal Register**.

Paperwork Reduction Act

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

Unfunded Mandates Reform Act of 1995

The Department has determined that the requirements of Title II of the Unfunded Mandates Reform Act of 1995 do not apply to this rulemaking.

Office of the Secretary of Transportation

List of Subjects in 49 CFR Part 40

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

For the reasons set forth in the preamble, the Office of the Secretary amends 49 CFR Part 40 as follows:

PART 40—PROCEDURES FOR TRANSPORTATION WORKPLACE DRUG AND ALCOHOL TESTING PROGRAMS

1. The authority citation for Part 40 continues to read as follows:

Authority: 49 U.S.C. 102, 301, 322; 49 U.S.C. App. 1301 nt., app. 1434 nt., app. 2717., app. 1618a.

§ 40.29 [Amended]

2. In section 40.29(e)(1), the initial test level for opiates appearing in the table is amended by revising the value ''300'' to ''2000'' and deleting the footnote ''*'' that had specified a 25 ng/ml testing level if the immunoassay test was specific for free morphine.

3. In section 40.29(f)(1), the confirmatory test level for morphine appearing in the table is amended by revising the value from ''300'' to ''2000''.

4. In section 40.29(f)(1), the confirmatory test level for codeine appearing in the table is amended by revising the value from ''300'' to ''2000''.

5. In section 40.29(f)(1), the table is amended by adding a new line under opiates to read as follows:

§ 40.29 Laboratory analysis procedures.

	Confirmatory test cutoff levels (ng/ml)
* * * * *	
6-Acetylmorphine [4]	10 ng/ml.
* * * * *	

[4] Test for 6–AM when morphine concentration exceeds 2,000 ng/ml.

Issued this 17th day of November, 1998, at Washington, D.C.

Rodney E. Slater,

Secretary.

[FR Doc. 98–31495 Filed 11–24–98; 8:45 am]

BILLING CODE 4910–62–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 230

[I.D. 022398A]

Whaling Provisions: Aboriginal Subsistence Whaling Quotas

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

ACTION: Revision of aboriginal subsistence whaling quota.

SUMMARY: The U.S. Government and Russian Federation have concluded bilateral arrangements to ensure that the quotas for bowhead whales and gray whales set at the 1997 Annual Meeting of the International Whaling Commission are not exceeded. In response, NMFS is revising the 1998 quota for bowhead whales from 77 bowhead whales struck to 75 bowhead whales struck. The gray whale quota for 1998 remains 5 gray whales landed. The revised bowhead quota will govern the harvest of bowhead whales by members of the Alaska Eskimo Whaling Commission.

FOR FURTHER INFORMATION CONTACT: Catherine Corson, (301) 713–2322.

SUPPLEMENTARY INFORMATION: So that the 1998 quota of bowhead strikes is not exceeded, the Russian natives may use no more than 7 strikes, and the Alaska Eskimos may use no more than 75 strikes. Each side will ensure that the numbers specified in this paragraph for its native group are not exceeded. The two sides plan to confer on monitoring of the 1999 quota, including any strikes that may be carried forward from 1998.

Likewise, so that the 1998 quota of gray whales is not exceeded, the bilateral arrangements concluded that the Makah Indian Tribe may take no more than five gray whales, and the Russian natives may take no more than 135 gray whales. Each side will ensure that the numbers specified in this paragraph for its native group are not exceeded. The two sides plan to confer on monitoring of the 1999 quota.

Dated: November 16, 1998.

Rolland A. Schmitten,

Assistant Administrator for Fisheries, National Marine Fisheries Service.

[FR Doc. 98–31521 Filed 11–24–98; 8:45 am]

BILLING CODE 3510–22–F

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 679

[Docket No. 961107312–7021–02; I.D. 111698D]

Fisheries of the Exclusive Economic Zone Off Alaska; Bycatch Rate Standards for the First Half of 1999

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

ACTION: Pacific halibut and red king crab bycatch rate standards; request for comments.

SUMMARY: NMFS announces the Pacific halibut and red king crab bycatch rate standards for the first half of 1999.

Publication of these bycatch rate standards is necessary under regulations implementing the vessel incentive program. This action is necessary to implement the bycatch rate standards for trawl vessel operators who participate in the Alaska groundfish trawl fisheries. The intent of this action is to reduce prohibited species bycatch rates and promote conservation of groundfish and other fishery resources.

DATES: Effective 1201 hours, Alaska local time (A.l.t.), January 20, 1999, through 2400 hours, A.l.t., June 30, 1999. Comments on this action must be received at the following address no later than 4:30 p.m., A.l.t., December 24, 1998.

ADDRESSES: Comments should be mailed to Sue Salveson, Assistant Regional Administrator, Sustainable Fisheries Division, NMFS, P.O. Box 21668, Juneau, AK 99802–1668, Attn: Lori Gravel; or be delivered to 709 West 9th Street, Federal Building, Room 401, Juneau, AK.

FOR FURTHER INFORMATION CONTACT: Sue Salveson, 907–586–7228.

SUPPLEMENTARY INFORMATION: NMFS manages the domestic groundfish fisheries in the exclusive economic zone of the Bering Sea and Aleutian Islands management area (BSAI) and Gulf of Alaska (GOA) according to 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). Regulations implementing these FMPs and governing the U.S. groundfish fisheries appear at 50 CFR part 679.

Regulations at § 679.21(f) implement a vessel incentive program to reduce halibut and red king crab bycatch rates in the groundfish trawl fisheries. Under the incentive program, operators of trawl vessels may not exceed Pacific halibut bycatch rate standards specified for the BSAI and GOA midwater pollock and ''other trawl'' fisheries, and the BSAI yellowfin sole and bottom pollock fisheries. Vessel operators also may not exceed red king crab bycatch standards specified for the BSAI yellowfin sole and ''other trawl'' fisheries in Bycatch Limitation Zone 1 (defined in § 679.2). The fisheries included under the incentive program are defined in regulations at § 679.21(f)(2).

Regulations at § 679.21(f)(3) require publication of halibut and red king crab bycatch rate standards for each fishery included under the incentive program. The standards are in effect for specified seasons within the 6-month periods of January 1 through June 30, and July 1 through December 31. Because the Alaskan groundfish fisheries are closed to trawling from January 1 to January 20 of each year (§ 679.23(c)), the Administrator, Alaska Region, NMFS (Regional Administrator) is promulgating bycatch rate standards for the first half of 1999 effective from January 20, 1999, through June 30, 1999.

As required by § 679.21(f)(4), bycatch rate standards are based on the following information:

(A) Previous years' average observed bycatch rates;

(B) Immediately preceding season's average observed bycatch rates;

(C) The bycatch allowances and associated fishery closures specified under § 679.20;

(D) Anticipated groundfish harvests;

(E) Anticipated seasonal distribution of fishing effort for groundfish; and

(F) Other information and criteria deemed relevant by the Regional Administrator.

At its October 1998 meeting, the Council reviewed halibut and red king crab bycatch rates experienced by vessels participating in the fisheries under the incentive program during 1994–1998. Based on this and other information presented below, the Council recommended halibut and red king crab bycatch rate standards for the first half of 1999. These standards are unchanged from those specified for the past 5 years. Table 1 lists the Council's recommended bycatch rate standards.

TABLE 1.—BYCATCH RATE STANDARDS, BY FISHERY AND QUARTER, FOR THE FIRST HALF OF 1999 FOR PURPOSES OF THE VESSEL INCENTIVE PROGRAM IN THE BSAI AND GOA

Fishery and quarter	1999 bycatch rate standard
Halibut bycatch rate standards (kilogram (kg) of halibut/metric ton (mt) of groundfish catch	
BSAI Midwater pollock:	
Qt 1	1.0
Qt 2	1.0
BSAI Bottom pollock:	
Qt 1	7.5
Qt 2	5.0
BSAI Yellowfin sole:	
Qt 1	5.0
Qt 2	5.0
BSAI Other trawl:	
Qt 1	30.0
Qt 2	30.0
GOA Midwater pollock:	
Qt 1	1.0
Qt 2	1.0
GOA Other trawl:	
Qt 1	40.0
Qt 2	40.0
Zone 1 red king crab bycatch rate standards (number of crab/mt of groundfish catch)	
BSAI yellowfin sole:	
Qt 1	2.5
Qt 2	2.5
BSAI Other trawl:	
Qt 1	2.5

TABLE 1.—BYCATCH RATE STANDARDS, BY FISHERY AND QUARTER, FOR THE FIRST HALF OF 1999 FOR PURPOSES OF THE VESSEL INCENTIVE PROGRAM IN THE BSAI AND GOA—Continued

Fishery and quarter	1999 bycatch rate standard
Qt 2	2.5

Bycatch Rate Standards for Pacific Halibut

The BSAI pollock roe season begins January 20 and ends April 15. In 1998, NMFS closed the inshore and offshore component fisheries for pollock 5 to 8 weeks prior to April 15, depending on the processing component and area. Directed fishing for pollock by the inshore and offshore component fisheries did not reopen until September 1, the start of the pollock non-roe season. Directed fishing for pollock by vessels participating in the community development quota program could continue after the end of roe season. However, the community development quota pollock fishery did not resume until just prior to September 1. As in past years, the directed fishing allowances specified for the 1999 pollock roe season likely will be reached before the end of the roe season on April 15.

As in past years, the halibut bycatch rate standard recommended for the BSAI and GOA midwater pollock fisheries (1 kg halibut/mt of groundfish) is higher than the bycatch rates normally experienced by vessels participating in these fisheries. The recommended standard is intended to encourage vessel operators to maintain off-bottom trawl operations and limit further bycatch of halibut in the pollock fishery when halibut bycatch restrictions at § 679.21 prohibit directed fishing for pollock by vessels using non-pelagic trawl gear.

The recommended halibut bycatch rate standards for the first calendar quarter BSAI bottom pollock fishery approximate the average rates observed on trawl vessels participating in this fishery during 1998 (7.87 kg halibut/mt groundfish). Though these rates are slightly higher than the average bycatch rate observed during 1994–1997, the recommended halibut bycatch rate standard remains at 7.5 kg halibut/mt groundfish to discourage unacceptably high halibut bycatch rates. The bycatch rate standard for the second quarter remains at 5 kg halibut/mt groundfish even though little fishing for pollock is anticipated during this period.

At its June 1998 meeting, the Council adopted a management measure that would prohibit the use of non-pelagic trawl gear in the BSAI pollock fishery. NMFS currently is preparing a proposed rule, that if approved, would implement the Council's intent and further reduce halibut bycatch mortality and bycatch rates in the pollock fishery. At this time, NMFS does not anticipate that the proposed prohibition on the use of non-pelagic trawl gear in the pollock fishery would be effective prior to the 1999 pollock non-roe season on September 1.

Other factors that could affect the spatial and temporal distribution of the directed pollock fishery include the 1999 allocations of pollock among the inshore and offshore fleets under the American Fisheries Act and conservation measures that may be necessary under the Endangered Species Act to mitigate potential fishery impacts on Steller sea lions. At this time, the effect of these changes on halibut bycatch rates in the pollock fishery are unknown.

Data available on halibut bycatch rates in the yellowfin sole fishery during the first and second quarters of 1998 showed average bycatch rates of 9.65 and 6.57 kg halibut/mt of groundfish, respectively. These rates are slightly higher than in past years, but the Council has presumed that a bycatch rate standard of 5.0 kg halibut/mt of groundfish for the yellowfin sole fishery will continue to encourage vessel operators to take action to avoid excessively high bycatch rates of halibut.

For the ''other trawl'' fisheries, the Council recommended a 30 kg halibut/mt of groundfish bycatch rate standard for the BSAI and a 40 kg halibut/mt of groundfish bycatch rate standard for the GOA. Observer data collected from the 1998 BSAI ''other trawl'' fishery show first and second quarter halibut bycatch rates of 12.07 and 13.78 kg halibut/mt of groundfish, respectively. Observer data collected from the 1998 GOA ''other trawl'' fishery show first and second quarter halibut bycatch rates of 26.23 and 57.15 kg halibut/mt of groundfish, respectively.

With the exception of the GOA second quarter ''other trawl'' fishery, the average bycatch rates experienced by vessels participating in the GOA and BSAI ''other trawl'' fisheries have been lower than the Council's recommended bycatch rate standards for these fisheries. The Council determined that its recommended halibut bycatch rate standards for the ''other trawl'' fisheries, including the second quarter GOA fishery, would continue to provide an incentive to vessel operators to avoid unusually high halibut bycatch rates while participating in these fisheries and contribute towards an overall reduction in halibut bycatch rates experienced in the Alaska trawl fisheries. Furthermore, these standards would provide some leniency to those vessel operators that choose to use large mesh trawl gear as a means to reduce groundfish discard amounts. The bycatch rates of halibut and crab could increase for those vessels using large mesh sizes, but the Council recommended maintaining the current bycatch rate standards for the ''other trawl'' fisheries until data becomes available that would provide a basis for bycatch rate standards for vessels using large mesh trawl gear.

Bycatch Rate Standards for Red King Crab

For the BSAI yellowfin sole and ''other trawl'' fisheries in Zone 1 of the Bering Sea subarea, the Council's recommended red king crab bycatch rate standard is 2.5 crab/mt of groundfish. This standard is unchanged since 1992. The red king crab bycatch rates experienced by the yellowfin sole fishery in Zone 1 during the first and second quarters of 1998 averaged 0.01 and 0.03 crab/mt of groundfish, respectively. The average bycatch rates of red king crab experienced in the ''other trawl'' fishery during the first and second quarter of 1998 were 0.12 and 0.01 crab/mt groundfish, respectively. The low 1998 red king crab bycatch rates primarily were due to trawl closures in Zone 1 that were implemented to reduce red king crab bycatch.

During 1998 through October, the total bycatch of red king crab by trawl vessels fishing in Zone 1 is estimated at 37,000 crab, considerably less than the 100,000 red king crab bycatch limit established for the trawl fisheries in Zone 1. NMFS anticipates that the 1999 red king crab bycatch in Zone 1 will increase relative to 1998 because the bycatch limit will double to 200,000 crab under criteria set out at

§ 679.21(e)(1)(i). The increased bycatch limit as well as the increased abundance of crab upon which the bycatch limit is based could result in increased red king crab bycatch rates, but the magnitude of any such increase is unknown at this time.

In spite of anticipated 1999 red king crab bycatch rates being significantly lower than 2.5 red king crab/mt of groundfish, the Council recommended the red king crab bycatch rate standards be maintained at this level to avoid unusually high crab bycatch rates while providing some leniency to those vessel operators that choose to use large mesh trawl gear as a means to reduce groundfish discard amounts.

The Regional Administrator has determined that Council recommendations for bycatch rate standards are appropriately based on the information and considerations necessary for such determinations under § 679.21(f). Therefore, the Regional Administrator concurs in the Council's determinations and recommendations for halibut and red king crab bycatch rate standards for the first half of 1999 as set forth in Table 1. The Regional Administrator may revise the bycatch rate standards when appropriate based on consideration of the information set forth at § 679.21(f)(4).

As required in regulations at §§ 679.2 and 679.21(f)(5), the 1999 fishing months are specified as the following periods for purposes of calculating vessel bycatch rates under the incentive program:

Month 1: January 1 through January 30;
Month 2: January 31 through February 27;
Month 3: February 28 through April 3;
Month 4: April 4 through May 1;
Month 5: May 2 through May 29;
Month 6: May 30 through July 3;
Month 7: July 4 through July 31;
Month 8: August 1 through August 28;
Month 9: August 29 through October 2;
Month 10: October 3 through October 30;
Month 11: October 31 through November 27; and
Month 12: November 28 through December 31.

Classification

This action is taken under 50 CFR 679.21(f) and is exempt from OMB review under E.O. 12866.

Authority: 16 U.S.C. 773 *et seq.*, 1801 *et seq.* and 3631 *et seq.*

Dated: November 19, 1998.

Richard W. Surdi,

Acting Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. 98–31520 Filed 11–24–98; 8:45 am]

BILLING CODE 3510–22–P

Proposed Rules

Federal Register
Vol. 63, No. 227
Wednesday, November 25, 1998

This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

DEPARTMENT OF AGRICULTURE

Farm Service Agency

7 CFR Part 729

RIN 0560–AF48

1999-Crop Peanut National Poundage Quota for Quota Peanuts

AGENCY: Farm Service Agency, USDA.

ACTION: Proposed rule.

SUMMARY: The Agricultural Adjustment Act of 1938, (the 1938 Act) as amended, requires that the national peanut poundage quota for the 1999 crop be announced by December 15, 1998. This proposed rule suggests a national poundage quota figure in the range between 1,175,000 short tons (st) and 1,225,000 st.

DATES: Comments must be received by December 8, 1998, in order to be assured of consideration.

ADDRESSES: Comments must be submitted to the Director, Tobacco and Peanuts Division, Farm Service Agency (FSA), United States Department of Agriculture, STOP 0514, 1400 Independence Avenue, S.W., Washington, DC 20250–0514. All written submissions will be made available for public inspection from 8:15 a.m. to 4:45 p.m., Monday through Friday, except holidays, in Room 5750-South Building, 1400 Independence Avenue, S.W., Washington, DC 20250–0514.

FOR FURTHER INFORMATION CONTACT: Kenneth M. Robison, Tobacco and Peanuts Division, FSA, USDA, STOP 0514, 1400 Independence Avenue, S.W., Washington, DC 20250–0514, telephone 202–720–9255. Copies of the cost-benefit assessment prepared for the rule can be obtained from Mr. Robison.

SUPPLEMENTARY INFORMATION:

Executive Order 12866

This proposed rule has been determined to be significant for purposes of Executive Order 12866 and, therefore, has been reviewed by OMB.

Federal Assistance Program

The title and number of the Federal Assistance Program, as found in the Catalog of Federal Domestic Assistance, to which this rule applies are: Commodity Loans and Purchases—10.051.

Executive Order 12998

This proposed rule has been reviewed in accordance with Executive Order 12998. The provisions of this proposed rule do not preempt State laws, are not retroactive, and do not involve administrative appeals.

Regulatory Flexibility Act

It has been determined that the Regulatory Flexibility Act is not applicable to this proposed rule since neither the Farm Service Agency (FSA) nor Commodity Credit Corporation (CCC) are required by 5 U.S.C. 553 or any other provision of law to publish a notice of proposed rulemaking with respect to the subject of these determinations.

Paperwork Reduction Act

This proposed amendment does not contain information collections that require clearance by the Office of Management and Budget under the provisions of 44 U.S.C. chapter 35.

Unfunded Federal Mandates

This proposed rule contains no Federal mandates under the regulatory provisions of Title II of the Unfunded Mandate Reform Act (UMRA), for State, local, and tribal governments or the private sector. Thus, this rule is not subject to the requirements of sections 202 and 205 of the UMRA.

Discussion

This proposed rule would amend 7 CFR part 729 to set forth the 1999-crop peanut national poundage quota.

Determination of the Quota

Peanut producers voting in a mail referendum December 1 through 4, 1997, approved poundage quotas for the 1998 through 2002 marketing years (MY) by an affirmative vote of 94.8 percent. Therefore, as provided for in the 1938 Act, the Secretary is required to administer a peanut program in which marketings are governed through the use of federally-granted quota and in which price support is offered.

Section 358–1(a)(1) of the 1938 Act, as amended by the Federal Agricultural Improvement and Reform Act of 1996 (the 1996 Act), requires that the national poundage quota for peanuts for each of the 1996 through 2002 MYs be established by the Secretary at a level that is equal to the quantity of peanuts (in tons) that the Secretary estimates will be devoted in each MY to domestic edible use (excluding seed use) and related uses. Under the 1996 amendments to the 1938 Act, seed use remains a quota use but, unlike in the past, the seed aspect of the quota is accounted for through the grant of a temporary seed quota to all producers—hence, seed is no longer part of the basic quota calculation which will be codified through this determination. The MY for 1999-crop peanuts runs from August 1, 1999, through July 31, 2000.

The national poundage quota for MY 1998 was set at 1,167,000 st. This rule proposes that the national poundage quota for MY 1999 be set between 1,175,000 st and 1,225,000 st based on the following data:

ESTIMATED DOMESTIC EDIBLE, EXCLUDING SEED, AND RELATED USES FOR 1999-CROP PEANUTS WITH MARKETING LEVELS OF 98.4 PERCENT AND 94.4 PERCENT

Item	Farmer Stock Equivalent (Short tons)	
	98.4% of Quota Marketed	94.4% of Quota Marketed
Regular domestic food use	984,000	984,000
Related uses:		
Crushing residual	128,500	128,500
Shrinkage and other losses	44,000	44,000
Unused quota	18,500	68,500
Totals	1,175,000	1,225,000

The estimate of 1999 domestic food use was developed in two steps. First, normal commercial use was estimated based upon figures from the USDA Interagency Commodity Estimates Committee (ICEC) adjusted to take out peanut imports, peanut butter imports, and peanut butter exports (which are normally comprised of additional peanuts only). Then, farm sales and other direct marketings to consumers

were added based upon differences between production data and Federal-State Inspection Service inspection data. Insofar as related uses are concerned, an added allowance is made for the normal crushing residual that cannot effectively be used for food use and that amount has traditionally been expected to be about 12 percent, on a farmer stock basis, of the total of MY domestic production. An allowance for shrinkage and other losses is made to account for reduced kernel and other kernel losses during storage, using the customary factor of 4 percent of domestic food use. In addition, disaster transfers of poor quality peanuts are included as part of other losses. Finally the unused quota allowance goes to those instances where the farmer cannot fulfill a quota either because of under-planting or because the farmer is unable to produce enough Segregation 1 peanuts to fulfill the full quota. Because of the program changes in the 1996 Act, which have been outlined in previous notices, there is now a greater incentive than in the past to fully market the quota and it is expected that, after discounting for quality problems, somewhere between 94.4 percent and 98.4 percent of the quota will be marketed.

In MY 1996 about 97.3 percent was marketed, in MY 1997 about 99.7 percent of quota was marketed and for MY 1998 between 94 and 98 percent of the quota is anticipated to be marketed. Also, it is anticipated that between 94.4 and 98.4 percent of the MY 1999 quota will be marketed.

The proposed 1999 quota range, as set forth above, reflects expected growth in domestic consumption of peanut products through government purchases, new uses and a small increase in demand resulting from lower peanut support prices in recent years. Overall demand, including imports, is projected to increase about 2 percent. However, government support purchases in MY 1997 have increased about 15 percent from 28,516 st in MY 1996 to 32,799 st in MY 1997.

List of Subjects in 7 CFR Part 729

Peanuts, Penalties, Poundage quotas, Reporting and recordkeeping requirements.

Accordingly, it is proposed that 7 CFR parts 729 be amended as follows:

PART 729—PEANUTS

1. The authority citation for 7 CFR part 729 shall continue to read as follows:

Authority: 7 U.S.C. 1301, 1357 et seq., 1372, 1373, 1375, and 7271.

2. Section 729.216 paragraph (c) is revised to read as follows:

§ 729.216 National poundage quota.

* * * * *

(c) Quota determination for individual marketing years:

(1) The national poundage quota (excluding seed) for quota peanuts for marketing year 1996 is 1,100,000 short tons.

(2) The national poundage quota (excluding seed) for quota peanuts for marketing year 1997 is 1,133,000 short tons.

(3) The national poundage quota (excluding seed) for quota peanuts for marketing year 1998 is 1,167,000 short tons.

(4) The national poundage quota (excluding seed) for quota peanuts for marketing year 1999 will be set between 1,175,000 and 1,225,000 short tons.

Signed at Washington, DC, on November 20, 1998.

Parks Shackelford,

Acting Administrator, Farm Service Agency.

[FR Doc. 98–31563 Filed 11–20–98; 4:37 pm]

BILLING CODE 3410–05–P

DEPARTMENT OF AGRICULTURE

Grain Inspection, Packers and Stockyards Administration

7 CFR Part 868

RIN 0580–AA67

Fees for Rice Inspection

AGENCY: Grain Inspection, Packers and Stockyards Administration, USDA.

ACTION: Proposed rule.

SUMMARY: The Grain Inspection, Packers and Stockyards Administration (GIPSA) is proposing an increase in certain fees for Federal Rice Inspection Services performed under the Agricultural Marketing Act (AMA) of 1946. This fee increase is intended to cover, as nearly as practicable, the projected approximate 3.6 percent increase to Federal salaries for Federal Rice Inspection Services. The proposed increase is designated to generate additional revenue required to recover operational costs created by cost-of-living increases to Federal salaries January 1, 1999.

DATES: Written comments must be submitted on or before January 25, 1999.

ADDRESSES: Written comments must be submitted to Sharon Vassiliades, USDA, GIPSA, ART, 1400 Independence Avenue, SW., Stop 3649, Washington, DC 20250–3649, or faxed to (202) 720–4628. Comments may also be sent by electronic mail or Internet to: svassili@fgisdc.usda.gov. All comments received will be made available for public inspection during regular business hours in Room 0623, South Building, USDA, 1400 Independence Avenue, SW., Washington, DC 20250–3649 (7 CFR 1.27(b)).

FOR FURTHER INFORMATION CONTACT: Sharon Vassiliades at 202 720–1738.

SUPPLEMENTARY INFORMATION:

Executive Order 12866

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

Executive Order 12988

This proposed rule has been reviewed under Executive Order 12988, Civil Justice Reform. This action is not intended to have a retroactive effect. This action will not preempt any State or local laws, regulations, or policies unless they present irreconcilable conflict with this rule. There are no administrative procedures which must be exhausted prior to any judicial challenge to provisions of this rule.

Regulatory Flexibility Act and Effects on Small Entities

James R. Baker, Administrator, GIPSA, has determined that this proposed rule will not have a significant economic impact on a substantial number of small entities as defined under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*).

The proposed cost of living increase in the rice service fee is primarily applicable to GIPSA customers that produce, process, and market rice for the domestic and international markets. There are approximately 550 such customers located primarily in the Arkansas, Louisiana and Texas geographic areas. Many of these customers meet the criteria for small business. GIPSA has determined that this proposed rule will have a limited economic impact on small entities as defined in the Regulatory Flexibility Act.

Under the provisions of the Agricultural Marketing Act of 1946 (7 U.S.C. 1621 et seq.), rice inspection services are provided upon customer request and GIPSA must recover from the customer the cost of providing such services. GIPSA is proposing to recover a projected January 1, 1999, 3.6 percent increase in federal salary costs by raising its rice service fee. The proposed increase will affect only that portion of the fees associated with the hourly salaries paid to Federal employees and

administrative personnel; overhead recovery is not being proposed in this docket.

GIPSA cannot absorb the approximate 3.6 percent increase in salary costs with the existing deficit in retained earnings. In fiscal year 1998, GIPSA's obligations were $3,820,820 with revenue of $4,011,446, resulting in a positive margin of $190,626 and retained earnings of negative $895,584.

The proposed increase in fees would not have a significant impact on either small or large entities. GIPSA estimates that the increased fee charged to its 550 customers will provide an annual increase of $155,356 in revenue (assuming fiscal year 1998 volume equivalents).

Information Collection and Record Keeping Requirements

In compliance with the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35), the information collection and record keeping requirements concerning applications for official inspection services including rice inspections have been previously approved by the Office of Management and Budget under control number 0580–0013.

Background

The rice inspection fees were last amended on July 3, 1996 (61 FR 34714), with a tri-level fee increase with effective dates of August 2, 1996, January 1, 1997, and January 1, 1998. These fees were to cover, as nearly as practicable, the projected operating costs, including related supervisory and administrative costs and to maintain an operating reserve for Federal Rice Inspection Services. They presently appear at 7 CFR 868.91 in Tables 1 and 2. Currently, the regular workday contract and noncontract fees are $40.20 and $48.90, respectively, while the nonregular workday contract and noncontract fees are $56.00 and $67.90, respectively. The unit rate per hundredweight for export port services is currently $.048/cwt. and the unit rate for total oil and free fatty acid tests is currently $39.80. These unit rates also are proposed to be changed.

The proposed increase will affect only that portion of the fees associated with hourly salaries paid to Federal employees and administrative personnel; overhead recovery is not being proposed in this docket. The proposed fee increase generates additional revenue required to recover operational costs created by a projected January 1999 cost-of-living increase to Federal salaries. The average salary increase for GIPSA employees in calendar year 1999 is projected at approximately 3.6 percent. This proposed action is being taken to ensure that the service fees charged by GIPSA generate adequate revenue to cover the additional cost created by the January 1999 Federal salary increase.

The hourly fees covered by this proposal generate revenue to cover the basic salary, benefits, and leave for those employees providing direct service delivery and administrative salaries and benefits, as well as contributing to overall overhead cost recovery. GIPSA has also identified that part of the hourly rate that is directly attributable to salaries and benefits and certain unit fees for services not performed at an applicant's facility that contain labor costs. This proposal increases those hourly rates and unit fees based on an approximate 3.6 percent increase to the labor cost of each hourly rate and unit.

The amount of revenue collected under this proposal will be a direct result of the work volume. GIPSA estimates an annual increase of $155,356 in revenue (assuming fiscal year 1998 volume equivalents). If GIPSA foregoes this adjustment, GIPSA will incur a net loss equivalent to the approximate 3.6 percent Federal salary increase for every hour worked by an employee providing direct service delivery and administrative personnel.

In fiscal year 1998, GIPSA's obligations were $3,820,820 with revenue of $4,011,446, resulting in a positive margin of $190,626 and retained earnings of negative $895,589. GIPSA cannot afford to absorb a $155,356 loss due to the approximate 3.6 percent increase in salary costs with the existing deficit in retained earnings. Additionally, GIPSA will continue to monitor its costs to improve operating efficiencies and adopt cost saving measures, where possible and practicable.

Proposed Action

Section 203 of the AMA (7 U.S.C. 1622) provides for the establishment and collection of fees that are reasonable and, as nearly as practicable, cover the costs of the services rendered. These fees cover the GIPSA administrative and supervisory costs for the performance of official services, including personnel compensation, personnel benefits, travel, rent, communications, utilities, contractual services, supplies, and equipment.

Section 868.91, Tables 1 and 2 are proposed to be revised to provide for the increase in rice inspection fees.

List of Subjects in 7 CFR Part 868

Administrative practice and procedure, Agricultural commodities.

For reasons set out in the preamble, 7 CFR Part 868 is proposed to be amended as follows:

PART 868—GENERAL REGULATIONS AND STANDARDS FOR CERTAIN AGRICULTURAL COMMODITIES

1. The authority citation for part 868 continues to read as follows:

Authority: Secs. 202–208, 60 Stat. 1087, as amended (7 U.S.C. 1621 et seq.).

2. Section 868.91 is revised to read as follows:

§ 868.91 Fees for certain Federal rice inspection services.

The fees shown in Tables 1 and 2 apply to Federal Rice Inspection Services.

TABLE 1—HOURLY RATES/UNIT RATE PER CWT

[Fees for Federal Rice Inspection Services]

Service [1]	Regular workday (Monday–Saturday)	Nonregular workday (Sunday–holiday)
Contract (per hour per Service representative)	$40.80	$56.80
Noncontract (per hour per Service representative) [2]	50.00	69.00
Export Port Services [2]	0.05	0.05

[1] Original and appeal inspection services include: Sampling, grading, weighing, and other services requested by the applicant when performed at the applicant's facility.

[2] Services performed at export port locations on lots at rest.

TABLE 2.—UNIT RATES

Service [1] [3]	Rough rice	Brown rice for processing	Milled rice
Inspection for quality (per lot, sublot, or sample inspection)	$32.90	28.40	20.20
Factor analysis for any single factor (per factor):			
(a) Milling yield (per sample)	25.50	25.50	.....
(b) All other factors (per factor)	12.10	12.10	12.10
Total oil and free fatty acid interpretative line samples: [2]	.....	40.00	40.00
(a) Milling degree (per set)	.....	.....	85.10
(b) Parboiled light (per sample)	.....	.....	21.30
Extra copies of certificates (per copy)	3.00	3.00	3.00

[1] Fees apply to determinations (original or appeals) for kind, class, grade, factor analysis, equal to type, milling yield, or any other quality designation as defined in the U.S. Standards for Rice or applicable instructions, whether performed singly or combined at other than at the applicant's facility.

[2] Interpretive lines samples may be purchased from the U.S. Department of Agriculture, GIPSA, FGIS, Technical Services Division, 10383 North Executive Hills Boulevard, Kansas City, Missouri 68030. Interpretive line samples also are available for examination at selected FGIS field offices. A list of field offices may be obtained from the Director, Field Management Division, USDA, GIPSA, FGIS, 1400 Independence Avenue, SW, STOP 3630, Washington, DC 20250–3630. The interpretive line samples illustrate the lower limit for milling degrees only and the color limit for the factor ''Parboiled Light'' rice.

[3] Fees for other services not referenced in Table 2 will be based on the noncontract hourly rate listed in Section 868.90, Table 1.

Dated: November 20, 1998.

James R. Baker,

Administrator.

[FR Doc. 98–31514 Filed 11–24–98; 8:45 am]

BILLING CODE 3410–EN–M

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 95–ANE–39]

RIN 2120–AA64

Airworthiness Directives; General Electric Company CF6 Series Turbofan Engines

AGENCY: Federal Aviation Administration, DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: This document proposes the supersedure of an existing airworthiness directive (AD), applicable to General Electric Company (GE) CF6 series turbofan engines, that currently requires initial and repetitive ultrasonic and eddy current inspections of high pressure compressor rotor (HPCR) stage 3–9 spools for cracks. This action would define more aggressive inspection intervals for certain HPCR stage 3–9 spools, add CF6–80E1 engines to the inspection program, add inspection requirements for spools manufactured from 8 inch diameter billet, add a one-time inspection of the stage 3–5 blade slot bottoms, and add a one-time inspection of the web and hub-to-web transition areas. This proposal is prompted by analysis of recent HPCR stage 3–9 spool inspection results and separations, and assessment of the adequacy of the existing program to prevent HPCR stage 3–9 spool cracking and separation. As a result of that assessment, the FAA has determined there is a need to make changes to the existing AD. The actions specified by the proposed AD are intended to prevent HPCR stage 3–9 spool cracking and separation, which can result in an uncontained engine failure and aircraft damage.

DATES: Comments must be received by January 25, 1999.

ADDRESSES: Submit comments in triplicate to the Federal Aviation Administration (FAA), New England Region, Office of the Regional Counsel, Attention: Rules Docket No. 95–ANE–39, 12 New England Executive Park, Burlington, MA 01803–5299. Comments may also be sent via the Internet using the following address: ''9-ad-engineprop@faa.dot.gov''. Comments sent via the Internet must contain the docket number in the subject line. Comments may be inspected at this location between 8:00 a.m. and 4:30 p.m., Monday through Friday, except Federal holidays.

The service information referenced in the proposed rule may be obtained from General Electric Company via Lockheed Martin Technology Services, 10525 Chester Road, Suite C, Cincinnati, Ohio 45215, telephone (513) 672–8400, fax (513) 672–8422. This information may be examined at the FAA, New England Region, Office of the Regional Counsel, 12 New England Executive Park, Burlington, MA.

FOR FURTHER INFORMATION CONTACT: William S. Ricci, Aerospace Engineer, Engine Certification Office, FAA, Engine and Propeller Directorate, 12 New England Executive Park, Burlington, MA 01803–5299; telephone (781) 238–7742, fax (781) 238–7199.

SUPPLEMENTARY INFORMATION:

Comments Invited

Interested persons are invited to participate in the making of the proposed rule by submitting such written data, views, or arguments as they may desire. Communications should identify the Rules Docket number and be submitted in triplicate to the address specified above. All communications received on or before the closing date for comments, specified above, will be considered before taking action on the proposed rule. The proposals contained in this notice may be changed in light of the comments received.

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

Commenters wishing the FAA to acknowledge receipt of their comments submitted in response to this notice must submit a self-addressed, stamped postcard on which the following statement is made: ''Comments to Docket Number 95–ANE–39.'' The postcard will be date-stamped and returned to the commenter.

Availability of NPRMs

Any person may obtain a copy of this NPRM by submitting a request to the FAA, New England Region, Office of the Regional Counsel, Attention: Rules Docket No. 95–ANE–39, 12 New

England Executive Park, Burlington, MA 01803–5299.

Discussion

On January 31, 1995, the Federal Aviation Administration (FAA) issued airworthiness directive (AD) 95–03–01, Amendment 39–9138 (60 FR 8930, February 16, 1995), applicable to General Electric Company (GE) CF6–45/–50/–80A series turbofan engines, to require initial and repetitive ultrasonic and eddy current inspections of a certain population of high pressure compressor rotor (HPCR) stage 3–9 spools for cracks. That action was prompted by a finding of several cracked parts in service.

Since the issuance of AD 95–03–01, the FAA received a report of an in-service uncontained failure of an HPCR stage 3–9 spool. The investigation revealed that the uncontained failure was caused by a crack that developed from the same metallurgical condition which prompted AD 95–03–01. However, that spool was not part of the population required to be inspected by AD 95–03–01. Further investigation indicated that the scope of AD 95–03–01 had to be expanded to include other HPCR stage 3–9 spools installed on GE CF6–45/–50/–80A engines, and also HPCR stage 3–9 spools installed on GE CF6–80C2 series engines, and that the inspection schedule for the spools affected by AD 95–03–01 needed to be accelerated. The FAA issued AD 95–23–03, amendment 39–9423 on November 13, 1995 (60 FR 57803, November 21, 1995) that superseded AD 95–03–01 and incorporated these inspection program changes and added a reporting requirement for operators to advise the FAA of the results of the inspections.

Since issuing AD 95–23–03, the FAA has analyzed the inspection reports submitted in accordance with AD 95–23–03, the results of an investigation of an uncontained failure caused by a crack that developed from a hard alpha inclusion material defect in the hub-to-web transition area of CF6–50 stage 6 disk, and the results of an investigation of an uncontained failure caused by a crack that developed in a CF6–80C2 stage 3 blade slot bottom. The stage 3–9 spool is one of the major structural elements of the fourteen-stage axial flow HPCR installed in the CF6 engine. The CF6 HPCR is manufactured from Ti 6–2–4–2 titanium alloy. Since 1974 there have been 9 events where CF6 stage 3–9 spools have failed due to cracking. All of these events have resulted in the release of engine fragments, and a majority have resulted in an uncontained engine failure. The root cause of the cracking and separation events has been attributed to two failure mechanisms. The first failure mechanism is crack initiation from hard alpha inclusions. Hard alpha inclusions are hard brittle areas within the material which can crack under service loads and propagate in fatigue. The second failure mechanism is dwell time fatigue (DTF). DTF is a crack initiation mode associated with certain creep resistant titanium alloys under sustained loading (dwell) at temperatures below 400 degrees Fahrenheit that results in internal crack initiations at flat facets. The facets are associated with groups or colonies of primary alpha grains having a common alpha phase crystal orientation. Crack initiation by both of these failure mechanisms can occur at relatively low cyclic exposures and result in HPCR stage 3–9 failure. Based on this analysis, the FAA has determined that the inspection program required by AD 95–23–03 must be accelerated and expanded to include spools manufactured from 8 inch diameter billets. This condition, if not corrected, could result in HPCR stage 3–9 spool cracking and separation, which can result in an uncontained engine failure and aircraft damage.

The FAA has reviewed and approved the technical contents of the following GE Service Bulletins (SBs) and Alert Service Bulletins (ASBs): CF6–50 SB No. 72–1108, Revision 1, dated July 29, 1996; CF6–80A SB No. 72–678, Revision 1, dated July 29, 1996; CF6–80C2 SB No. 72–812, Revision 1, dated January 30, 1998, CF6–80E1 ASB No. 72–A135, Original, dated August 13, 1998, CF6–50 SB No. 72–1157, Original, dated June 10, 1998, CF6–80A SB No. 72–719, Revision 1, dated September 24, 1998, CF6–80C2 SB No. 72–934, Original, dated June 10, 1998, CF6–80E1 SB No. 72–137, Original, dated June 9, 1998, CF6–50 ASB No. 72–A1131, Revision 1, dated March 12, 1998, CF6–80A ASB No. 72–A691, Revision 2, dated September 23, 1998, CF6–80C2 ASB No. 72–A848, Revision 2, dated March 12, 1998, CF6–80E1 ASB No. 72–A126, Revision 1, dated March 31, 1998, and Table 801 of GE CF6–50 Shop Manual GEK 50481, section 05–11–02 Time Limits. These service documents describe procedures for eddy current and ultrasonic inspections of HPCR stage 3–9 spools for cracks.

Since an unsafe condition has been identified that is likely to exist or develop on other products of this same type design, the proposed AD would supersede AD 95–23–03 to define more aggressive inspection intervals for certain HPCR stage 3–9 spools, add CF6–80E1 engines to the inspection program, add inspection requirements for spools manufactured from 8 inch diameter billet, add a one-time inspection of the stage 3–5 blade slot bottoms, and add a one-time inspection of the web and hub-to-web transition areas. The proposed inspection program would also incorporated repetitive inspection intervals that change based on the calendar time that has elapsed since the effective date of this proposed AD. These calendar date triggers have the effect of tightening the repetitive inspection intervals as the affected population of engines ages through normal utilization. The dates also reflect the risk analysis performed by the manufacturer which took into consideration many factors including the shop capacity to perform the required inspections. The FAA chose to use calendar dates for these triggers rather than engine cycles or hours in order not to unduly penalize high utilization users while providing some definite ending point for each phase of the repetitive inspection program.

The FAA is also considering additional rulemaking that would require eddy current and ultrasonic inspections of the side fillet radii of the stage 3–5 blade slot bottoms, the stage 6–9 blade slot bottoms, and a module level inspection of the stage 3–5 bores.

There are approximately 4,506 engines of the affected design in the worldwide fleet. The FAA estimates that 1,197 engines installed on aircraft of U.S. registry would be affected by this proposed AD, that it would take approximately 216 work hours per engine to accomplish the proposed actions, and that the average labor rate is $60 per work hour. Based on these figures, the total cost impact of the proposed AD on U.S. operators is estimated to be $15,485,340.

The regulations proposed herein would not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order 12612, it is determined that this proposal would not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

For the reasons discussed above, I certify that this proposed regulation (1) is not a ''significant regulatory action'' under Executive Order 12866; (2) is not a ''significant rule'' under the DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); and (3) if promulgated, will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory

Flexibility Act. A copy of the draft regulatory evaluation prepared for this action is contained in the Rules Docket. A copy of it may be obtained by contacting the Rules Docket at the location provided under the caption **ADDRESSES.**

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Safety.

The Proposed Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

2. Section 39.13 is amended by removing amendment 39–9423 (60 FR 57803, November 21, 1995) and by adding a new airworthiness directive to read as follows:

General Electric Company: Docket No. 95–ANE–39. Supersedes AD 95–23–03, Amendment 39–9423.

Applicability: General Electric Company (GE) CF6–45, –50, –80A, –80C2 and –80E1 series turbofan engines, with High Pressure Compressor Rotor (HPCR) stage 3–9 spools, part numbers (P/Ns) 1333M66G01, 1333M66G03, 1333M66G07, 1333M66G09, 1333M66G10, 1669M22G01, 1781M52P01, 1781M53G01, 1782M22G01, 1782M22G02, 1782M22G04, 1854M95P01, 1854M95P02, 1854M95P03, 1854M95P04, 1854M96P05, 1854M95P06, 9136M89G02, 9136M89G03, 9136M89G06, 9187M89G07, 9136M89G08, 9136M89G09, 9136M89G10, 9136M89G11, 9136M89G17, 9136M89G18, 9136M89G19, 9136M89G20, 9136M89G21, 9136M89G22, 9136M89G27, 9136M89G28, 9136M89G29, 9253M85G01, 9253M85G02, 9273M14G01, 9331M29G01, and 9380M28P05 installed. These engines are installed on but not limited to Airbus A300, A310, and A330 series, Boeing 747 and 767 series, and McDonnell Douglas DC–10 and MD–11 series aircraft.

Note 1: This airworthiness directive (AD) applies to each engine identified in the preceding applicability provision, regardless of whether it has been modified, altered, or repaired in the area subject to the requirements of this AD. For engines that have been modified, altered, or repaired so that the performance of the requirements of this AD is affected, the owner/operator must request approval for an alternative method of compliance in accordance with paragraph (k) 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 HPCR stage 3–9 spool cracking and separation, which can result in an uncontained engine failure and aircraft damage, accomplish the following:

(a) For the purpose of this AD, the following abbreviations apply:

(1) Cycles Since New (CSN).

(2) Cycles Since Last Inspection (CSLI).

(3) Cycles At Last Inspection (CALI).

(4) Engine Shop Visit (ESV).

Note 2: Paragraph (b) of this AD is only applicable to GE CF6–45/50 series engines. Paragraph (c) of this AD is only applicable to GE CF6–80A series engines. Paragraph (d) of this AD is only applicable to GE CF6–80C2 series engines. Paragraph (e) of this AD is only applicable to GE CF6–80E1 series engines.

(b) For HPCR stages 3–9 spools installed in CF6–45/50 series engines, eddy current and ultrasonic inspect for cracks as follows:

(1) Eddy current and ultrasonic inspect for cracks HPCR stage 3–9 spools with P/Ns 9136M89G02, 9136M89G03, 9136M89G06, 9136M89G07, 9136M89G08, 9136M89G09, 9136M89G17, 9136M89G18, 9136M89G19, 9136M89G21, 9136M89G22, 9136M89G27, 9136M89G29, 9253M85G01, 9253M85G02, 9273M14G01, and 9331M29G01, installed in GE CF6–45/–50 series engines, as follows:

(i) Perform eddy current and ultrasonic inspections in accordance with GE CF6–50 Service Bulletin (SB) No. 72–1157, Original, dated June 10, 1998, at the next piece-part exposure after 1,000 CSN.

(ii) Perform eddy current and ultrasonic inspections in accordance with GE CF6–50 Alert Service Bulletin (ASB) No. 72–A1131, Revision 1, dated March 12, 1998, at the next piece-part exposure after 1,000 CSN.

(iii) Remove from service, prior to further flight, HPCR stage 3–9 spools that equal or exceed the reject criteria established by SB No. 72–1157, Original, dated June 10, 1998, or ASB No. 72–A1131, Revision 1, dated March 12, 1998, as applicable, and replace with a serviceable part.

(2) Eddy current and ultrasonic inspect for cracks HPCR stage 3–9 spools with P/Ns 9136M89G08, 9253M85G02, 9273M14G01, and 9331M29G01 and with Serial Numbers (S/Ns) listed in Table 801 of GE CF6–50 Shop Manual GEK50481, section 05–11–02 Time Limits, and with P/Ns 9136M89G02 and 9136M89G06 installed in GE CF6–45/–50 series engines. Perform the inspections in accordance with GE CF6–50 SB No. 72–1108, Revision 1, dated July 29, 1996, as follows:

(i) For HPCR stage 3–9 spools that have not been previously inspected using the procedures in GE SB No. 72–888, Revision 6, dated December 22, 1995; or SB No. 72–1000, Revision 2, dated September 9, 1993; or SB No. 72–1108, Revision 1, dated July 29, 1996, or any earlier versions of these SBs, inspect at the first piece-part exposure after 1,000 CSN but prior to accumulating 3,500 CSN, or prior to exceeding 30 days from the effective date of this AD, whichever occurs later.

(ii) For HPCR stage 3–9 spools that have been previously inspected using the procedures in GE SB No. 72–888, Revision 6, dated December 22, 1995; or SB No. 72–1000, Revision 2, dated September 9, 1993; or SB No. 72–1108, Revision 1, dated July 29, 1996, or any earlier versions of these SBs, perform repeat inspections at the earliest occurrence of the requirements of Table 1, 2, or 3 of this AD, as applicable, based on elapsed calendar time from the effective date of this AD, as specified in paragraph (b)(2)(v) of this AD.

TABLE 1

First piece-part exposure after both 1,000 CSLI and 3,500 CSN, but not later than the first ESV after both 2,000 CSLI and 3,500 CSN, and before 3,500 CSLI.

TABLE 2

First piece-part exposure after both 1,000 CSLI and 3,500 CSN, but not later than the first ESV after both 2,000 CSLI and 3,500 CSN, and before:
3,500 CSLI, if spool CALI is 0–6,500, or
9,500 CSN, if spool CALI is 6,501–7,000, or
2,500 CSLI, if spool CALI is 7,001–8,000, or
10,500 CSN, if spool CALI is 8,001–8,500, or
2,000 CSLI, if spool CALI is greater than 8,500.

TABLE 3

First piece-part exposure after both 1,000 CSLI and 3,500 CSN, but not later than the first ESV after both 2,000 CSLI and 3,500 CSN, and before:
3,500 CSLI, if spool CALI is 0–5,000, or
8,500 CSN, if spool CALI is 5,001–5,500, or
3,000 CSLI, if spool CALI is 5,501–6,500, or
9,500 CSN, if spool CALI is 6,501–7,000, or
2,500 CSLI, if spool CALI is 7,001–8,000, or
10,500 CSN, if spool CALI is 8,001–8,500, or
2,000 CSLI, if spool CALI is greater than 8,500.

(iii) Thereafter, inspect HPCR stage 3–9 spools at intervals not to exceed the earliest occurrence shown in Table 1, Table 2, or Table 3 of this AD, as applicable, based on the elapsed calendar time from the effective date of this AD, as specified in paragraph (b)(2)(v) of this AD.

(iv) Remove from service prior to further flight HPCR stage 3–9 spools that equal or exceed the reject criteria established by GE CF6–50 SB No. 72–1108, Revision 1, dated July 29, 1996, and replace with a serviceable part.

(v) Use the Tables as follows:

(A) Use Table 1 from the effective date of this AD to 18 months from the effective date of this AD.

(B) Use Table 2 after 18 months from the effective date of this AD to 36 months from the effective date of this AD.

(C) Use Table 3 after 36 months from the effective date of this AD.

(3) Eddy current and ultrasonic inspect for cracks HPCR stage 3–9 spools with P/Ns 9136M89G08, 9253M85G02, 9273M14G01, and 9331M29G01, with S/Ns not listed in Table 801 of GE CF6–50 Shop Manual GEK50481, section 05–11–02 Time Limits, and with P/Ns 9136M89G03, 9136M89G07, 9136M89G09, 9136M89G17, 9136M89G18, and 9253M85G01 installed in GE CF6–45/–50 series engines. Perform the inspections in accordance with GE CF6–50 SB No. 72–1108, Revision 1, dated July 29, 1996, as follows:

(i) For HPCR stage 3–9 spools that have not been previously inspected using the procedures in GE SB No. 72–888, Revision 6, dated December 22, 1995; or SB No. 72–1000, Revision 2, dated September 9, 1993; or SB No. 72–1108, Revision 1, dated July 29, 1996, or any earlier versions of these SBs, inspect at the first piece-part exposure after 1,000 CSN but not later than the first ESV after 4,000 CSN.

(ii) For HPCR stage 3–9 spools that have been previously inspected using the procedures in GE SB No. 72–888, Revision 6, dated December 22, 1995; or SB No. 72–1000, Revision 2, dated September 9, 1993; or SB No. 72–1108, Revision 1, dated July 29, 1996, or any earlier versions of these SBs, perform repeat inspections at the first piece-part exposure after both 1,000 CSLI and 4,000 CSN, but not later than the first ESV after both 2,000 CSLI and 4,000 CSN.

(iii) Thereafter, inspect HPCR stage 3–9 spools at intervals not to exceed the first piece-part exposure after both 1,000 CSLI and 4,000 CSN, but not later than the first ESV after both 2,000 CSLI and 4,000 CSN.

(iv) Remove from service prior to further flight HPCR stage 3–9 spools that equal or exceed the reject criteria established by GE CF6–50 SB No. 72–1108, Revision 1, dated July 29, 1996, and replace with a serviceable part.

(4) Eddy current and ultrasonic inspect for cracks HPCR stage 3–9 spools with P/Ns 9136M89G19, 9136M89G21, 9136M89G22, and 9136M89G27 installed in GE CF6–45/–50 series engines. Perform the inspections in accordance with GE CF6–50 SB No. 72–1108, Revision 1, dated July 29, 1996, as follows:

(i) For HPCR stage 3–9 spools that have not been previously inspected using the procedures in GE SB No. 72–888, Revision 6, dated December 22,1995; or SB No. 72–1000, Revision 2, dated September 9, 1993; or SB No. 72–1108, Revision 1, dated July 29, 1996, or any earlier versions of these SBs, inspect at the first piece-part exposure after 1,000 CSN but not later than the first ESV after 3,000 CSN, provided, however, from 18 to 36 months after the effective date of this AD, inspect not later than 9,500 CSN, and after 36 months after the effective date of this AD, inspect not later than 3,500 CSN.

(ii) For HPCR stage 3–9 spools that have been previously inspected using the procedures in GE SB No. 72–888, Revision 6, dated December 22,1995; or SB No. 72–1000, Revision 2, dated September 9, 1993; or SB No. 72–1108, Revision 1, dated July 29, 1996, or any earlier versions of these SBs, perform repeat inspections at the earliest occurrence of the requirements of Table 4, 5, or 6 of this AD, as applicable, based on elapsed calendar time from the effective date of this AD, as specified in paragraph (b)(4)(vi) of this AD.

TABLE 4

First piece-part exposure after both 1,000 CSLI and 5,000 CSN, but not later than the first ESV after both 2,000 CSLI and 5,000 CSN.

TABLE 5

First piece-part exposure after both 1,000 CSLI and 5,000 CSN, but not later than the first ESV after both 2,000 CSLI and 5,000 CSN, and before:
9,500 CSN, if spool CALI is 0–7,000, or
2,500 CSLI, if spool CALI is 7,001–8,000, or
10,500 CSN, if spool CALI is 8,001–8,500, or
2,000 CSLI, if spool CALI is greater than 8,500.

TABLE 6

First piece-part exposure after both 1,000 CSLI and 5,000 CSN, but not later than the first ESV after both 2,000 CSLI and 5,000 CSN, and before:
5,000 CSN, if spool CALI is 0–1,500, or
3,500 CSLI, if spool CALI is 1,501–5,000, or
8,500 CSN, if spool CALI is 5,001–5,500, or
3,000 CSLI, if spool CALI is 5,501–6,500, or

TABLE 6—Continued

9,500 CSN, if spool CALI is 6,501–7,000, or 2,500 CSLI, if spool CALI is 7,001–8,000, or 10,500 CSN, if spool CALI is 8,001–8,500, or 2,000 CSLI, if spool CALI is greater than 8,500.

(iii) Thereafter, inspect HPCR stage 3–9 spools at intervals not to exceed the earliest occurrence shown in Table 4, Table 5, or Table 6 of this AD, as applicable, based on the elapsed calendar time from the effective date of this AD, as specified in paragraph (b)(4)(vi) of this AD.

(iv) Remove from service prior to further flight HPCR stage 3–9 spools that equal or exceed the reject criteria established by GE CF6–50 SB No. 72–1108, Revision 1, dated July 29, 1996, and replace with a serviceable part.

(v) HPCR stage 3–9 spools with a CSN of 10,500 or greater may not be put back in service after an ESV.

(vi) Use the Tables as follows:

(A) Use Table 4 from the effective date of this AD to 18 months from the effective date of this AD.

(B) Use Table 5 after 18 months from the effective date of this AD to 36 months from the effective date of this AD.

(C) Use Table 6 after 36 months from the effective date of this AD.

(5) Eddy current and ultrasonic inspect for cracks HPCR stage 3–9 spools with P/N 9136M89G29 installed in GE CF6–45/–50 series engines. Perform the inspections in accordance with GE CF6–50 SB No. 72–1108, Revision 1, dated July 29, 1996, as follows:

(i) For HPCR stage 3–9 spools that have not been previously inspected using the procedures in GE SB No. 72–888, Revision 6, dated December 22,1995; or SB No. 72–1000, Revision 2, dated September 9, 1993; or SB No. 72–1108, Revision 1, dated July 29, 1996, or any earlier versions of these SBs, or any of the combinations of service documents specified by Table 7 of this AD, inspect at the next piece-part exposure after 1,000 CSN.

TABLE 7

Either any one of the following:
CF6 Standard Practice Manual GEK9250 Procedures 70–32–09, Revision 71, dated October 1, 1995, CF6 Standard Practice Manual GEK9250 Procedures 70–32–09, Revision 72, dated November 15, 1996, CF6 Standard Practice Manual GEK9250 Procedures 70–32–09, Revision 74, dated May 1, 1998,
and any one of the following:
CF6 Standard Practice Manual GEK9250 Procedures 70–32–10, Revision 71, dated October 1, 1995, CF6 Standard Practice Manual GEK9250 Procedures 70–32–010, Revision 72, dated November 15, 1996, CF6 Standard Practice Manual GEK9250 Procedures 70–32–010, Revision 74, dated May 1, 1998;
or any one of the following:
CF6 Standard Practice Manual GEK9250 Procedures 70–32–13, Revision 70–25, dated August 26, 1996, CF6 Standard Practice Manual GEK9250 Procedure 70–32–13, Revision 72, dated November 15, 1996, CF6 Standard Practice Manual GEK9250 Procedures 70–32–13, Revision 73, dated November 1, 1997,
and any one of the following:
CF6 Standard Practice Manual GEK9250 Procedures 70–32–14, Revision 70–26, dated August 26, 1996, CF6 Standard Practice Manual GEK9250 Procedure 70–32–14, Revision 72, dated November 15, 1996, CF6 Standard Practice Manual GEK9250 Procedures 70–32–14, Revision 73, dated November 1, 1997.

(ii) For HPCR stage 3–9 spools that have been previously inspected using the procedures in GE SB No. 72–888, Revision 6, dated December 22,1995; or SB No. 72–1000, Revision 2, dated September 9, 1993; or SB No. 72–1108, Revision 1, dated July 29, 1996, or any earlier versions of these SBs, or any of the combinations of service documents specified by Table 7 of this AD, inspect at first piece-part exposure after both 1,000 CSLI and 5,000 CSN.

(iii) Thereafter, inspect HPCR stage 3–9 spools at piece part exposure after both 1,000 CSLI and 5,000 CSN.

(iv) Remove from service prior to further flight HPCR stage 3–9 spools that equal or exceed the reject criteria established by GE CF6–50 SB No. 72–1108, Revision 1, dated July 29, 1996, and replace with a serviceable part.

(c) For HPCR stages 3–9 spools installed in GE CF6–80A/–80A1/–80A2/–80A3 series engines, eddy current and ultrasonic inspect for cracks as follows:

(1) Eddy current and ultrasonic inspect for cracks HPCR stage 3–9 spools with P/Ns 9136M89G10, 9136M89G11, 9136M89G20, 9136M89G21, 9136M89G22, 9136M89G27, and 9136M89G28 installed in GE CF6–80A/–80A1/–80A2/–80A3 series engines, as follows:

(i) Perform eddy current and ultrasonic inspections in accordance with GE CF6–80A SB No. 72–719, Revision 1, dated September 24, 1998, at the next piece-part exposure after 1,000 CSN.

(ii) Perform eddy current and ultrasonic inspections in accordance with GE CF6–80A ASB No. 72–A691, Revision 2, dated September 23, 1998, at the next piece-part exposure after 1,000 CSN.

(iii) Remove from service, prior to further flight, HPCR stage 3–9 spools that equal or exceed the reject criteria established by the SB No. 72–719, Revision 1, dated September 24, 1998, or ASB No. 72–A691, Revision 2, dated September 23, 1998, as applicable, and replace with a serviceable part.

(2) Eddy current and ultrasonic inspect for cracks HPCR stage 3–9 spools with P/N 9136M89G10, with the following S/Ns: MPOM0054, MPOM7090, MPOM8303, MPOM8304, MPOM9263, MPOM9264, MPON0054, MPON0071, MPON0072, MPON1643, MPON4251, and MPON4253 installed in GE CF6–80A/–80A1/–80A2/–80A3 series engines. Perform the inspections in accordance with GE CF6–80A SB No. 72–678, Revision 1, dated August 8, 1996, as follows:

(i) For HPCR stage 3–9 spools that have not been previously inspected using the procedures in GE SB No. 72–500, Revision 6, dated December 22,1995; or SB No. 72–583, Revision 5, dated December 22, 1995; or SB No. 72–678, Revision 1, dated July 29, 1996, or any earlier versions of these SBs, inspect at the first piece-part exposure after 1,000 CSN but before accumulating 3,500 CSN, or prior to exceeding 30 days from the effective date of this AD, whichever is later.

(ii) For HPCR stage 3–9 spools that have been previously inspected using the procedures in GE SB No. 72–500, Revision 6, dated December 22, 1995; or SB No. 72–583, Revision 5, dated December 22, 1995; or SB No. 72–678, Revision 1, dated July 29, 1996, or any earlier versions of these SBs, perform repeat inspections at the earliest occurrence of the requirements of Table 8, 9, or 10 of this AD, as applicable, based on elapsed calendar time from the effective date of this AD, as specified in paragraph (c)(2)(vi) of this AD.

TABLE 8

First piece-part exposure after both 1,000 CSLI and 3,500 CSN, but not later than the first ESV after both 3,500 CSN and 2,000 CSLI (for GE CF6–80A1/A3 engines) or 1,500 CSLI (for GE CF6–80A/A2 engines), and before 3,500 CSLI.

TABLE 9

First piece part exposure after both 1,000 CSLI and 3,500 CSN, but not later than the first ESV after both 3,500 CSN and 2,000 CSLI (for GE CF6–80A1/A3 engines) or 1,500 CSLI (for GE CF6–80A/A2 engines), and before:
3,500 CSLI, if spool CALI is 0—6,500, or
9,500 CSN, if spool CALI is 6,501—7,000, or
2,500 CSLI, if spool CALI is 7,001—8,000, or
10,500 CSN, if spool CALI is 8,001-8,500, or
2,000 CSLI, if spool CALI is greater than 8,500.

TABLE 10

First piece-part exposure after both 1,000 CSLI and 3,500 CSN, but not later than the first ESV after both 2,000 CSLI (for GE CF6–80A1/A3) or 1,500 CSLI (for GE CF6–80A/A2) and 3,500 CSN, and before:
3,500 CSLI, if spool CALI is 0—5,000, or
8,500 CSN, if spool CALI is 5,001—5,500, or
3,000 CSLI, if spool CALI is 5,501—6,500, or
9,500 CSN, if spool CALI is 6,501—7,000, or
2,500 CSLI, if spool CALI is 7,001—8,000, or
10,500 CSN, if spool CALI is 8,001—8,500, or
2,000 CSLI, if spool CALI is greater than 8,500.

(iii) Thereafter, inspect HPCR stage 3–9 spools at intervals not to exceed the earliest occurrence shown in Table 8, Table 9, or Table 10 of this AD, as applicable, based on the elapsed calendar time from the effective date of this AD, as specified in paragraph (c)(2)(vi) of this AD.

(iv) Remove from service prior to further flight HPCR stage 3–9 spools that equal or exceed the reject criteria established by GE CF6–80A SB No. 72–678, Revision 1, dated August 8, 1996, and replace with a serviceable part.

(v) HPCR stage 3–9 spools with a CSN of 10,500 or greater may not be put back in service after an ESV.

(vi) Use the Tables as follows:

(A) Use Table 8 from the effective date of this AD to 18 months from the effective date of this AD.

(B) Use Table 9 after 18 months from the effective date of this AD to 36 months from the effective date of this AD.

(C) Use Table 10 after 36 months from the effective date of this AD.

(3) Eddy current and ultrasonic inspect for cracks HPCR stage 3–9 spools with P/N 9136M89G10, with S/Ns other than those listed in paragraph (c)(2) of this AD, and P/N 9136M89G11, installed in GE CF6–80A/A2 series engines. Perform the inspections in accordance with GE CF6–80A SB No. 72–678, Revision 1, dated August 8, 1996, as follows:

(i) For HPCR stage 3–9 spools that have not been previously inspected using the procedures in GE SB No. 72–500, Revision 6, dated December 22,1995; or SB No. 72–583, Revision 5, dated December 22, 1995; or SB No. 72–678, Revision 1, dated July 29, 1996, or any earlier versions of these SBs, inspect at the first piece-part exposure after 1,000 CSN, but not later than the first ESV after 5,000 CSN.

(ii) For HPCR stage 3–9 spools that have been previously inspected using the procedures in GE SB No. 72–500, Revision 6, dated December 22, 1995; or SB No. 72–583, Revision 5, dated December 22, 1995; or SB No. 72–678, Revision 1, dated July 29, 1996, or any earlier versions of these SBs, perform repeat inspections at the first piece-part exposure after both 1,000 CSLI and 5,000 CSN, but not later than the first ESV after both 1,500 CSLI and 5,000 CSN.

(iii) Thereafter, inspect HPCR stage 3–9 spools at intervals not to exceed the first piece-part exposure after both 1,000 CSLI and 5,000 CSN, but not later than the first ESV after both 1,500 CSLI and 5,000 CSN.

(iv) Remove from service prior to further flight HPCR stage 3–9 spools that equal or exceed the reject criteria established by GE CF6–80A SB No. 72–678, Revision 1, dated August 8, 1996, and replace with a serviceable part.

(4) Eddy current and ultrasonic inspect for cracks HPCR stage 3–9 spools with P/N 9136M89G10, with S/Ns other than those listed in paragraph (c)(2) of this AD, and P/N 9136M89G11, installed in GE CF6–80A1/A3 series engines. Perform the inspections in accordance with GE CF6–80A SB No. 72–678, Revision 1, dated August 8, 1996, as follows:

(i) For HPCR stage 3–9 spools that have not been previously inspected using the procedures in GE SB No. 72–500, Revision 6, dated December 22,1995; or SB No. 72–583, Revision 5, dated December 22, 1995; or SB No. 72–678, Revision 1, dated July 29, 1996, or any earlier versions of these SBs, inspect at the first piece-part exposure after 1,000 CSN but not later than the first ESV after 5,000 CSN.

(ii) For HPCR stage 3–9 spools that have been previously inspected using the procedures in GE SB No. 72–500, Revision 6, dated December 22,1995; or SB No. 72–583, Revision 5, dated December 22, 1995; or SB No. 72–678, Revision 1, dated July 29, 1996, or any earlier versions of these SBs, perform repeat inspections at the first piece-part exposure after both 1,000 CSLI and 5,000 CSN, but not later than the first ESV after both 2,000 CSLI and 5,000 CSN.

(iii) Thereafter, inspect HPCR stage 3–9 spools at intervals not to exceed the first piece-part exposure after both 1,000 CSLI and 5,000 CSN, but not later than the first ESV after both 2,000 CSLI and 5,000 CSN.

(iv) Remove from service prior to further flight HPCR stage 3–9 spools that equal or exceed the reject criteria established by GE CF6–80A SB No. 72–678, Revision 1, dated August 8, 1996, and replace with a serviceable part.

(5) Eddy current and ultrasonic inspect for cracks HPCR stage 3–9 spools with P/Ns 9136M89G20, 9136M89G21, 9136M89G22 and 9136M89G27, installed in GE CF6–80A1/A3 series engines. Perform the inspections in accordance with GE CF6–80A SB No. 72–678, Revision 1, dated August 8, 1996, as follows:

(i) For HPCR stage 3–9 spools that have not been previously inspected using the procedures in GE SB No. 72–500, Revision 6, dated December 22,1995; or SB No. 72–583, Revision 5, dated December 22, 1995; or SB No. 72–678, Revision 1, dated July 29, 1996, or any earlier versions of these SBs, inspect at the first piece-part exposure after 1,000 CSN but not later than the first ESV after 3,000 CSN, provided, however, from 18 to 36 months after the effective date of this AD, inspect not later than 9,500 CSN, and after 36 months after the effective date of this AD, inspect not later than 3,500 CSN.

(ii) For HPCR stage 3–9 spools that have been previously inspected using the procedures in GE SB No. 72–500, Revision 6, dated December 22,1995; or SB No. 72–583, Revision 5, dated December 22, 1995; or SB No. 72–678, Revision 1, dated July 29, 1996, or any earlier versions of these SBs, perform repeat inspections at the earliest occurrence of the requirements of Table 11, 12, or 13 of this AD, as applicable, based on elapsed calendar time from the effective date of this AD, as specified in paragraph (c)(5)(vi) of this AD.

TABLE 11

First piece-part exposure after both 1,000 CSLI and 5,000 CSN, but not later than the first ESV after both 2,000 CSLI and 5,000 CSN.

TABLE 12

First piece-part exposure after both 1,000 CSLI and 5,000 CSN, but not later than the first ESV after both 2,000 CSLI and 5,000 CSN, and before:
9,500 CSN, if spool CALI is 0–7,000, or
2,500 CSLI, if spool CALI is 7,001–8,000, or
10,500 CSN, if spool CALI is 8,001–8,500, or
2,000 CSLI, if spool CALI is greater than 8,500.

TABLE 13

First piece-part exposure after both 1,000 CSLI and 5,000 CSN, but not later than the first ESV after both 2,000 CSLI and 5,000 CSN, and before:
5,000 CSN, if spool CALI is 0–1,500, or
3,500 CSLI, if spool CALI is 1,501–5,000, or
8,500 CSN, if spool CALI is 5,001–5,500, or
3,000 CSLI, if spool CALI is 5,501–6,500, or
9,500 CSN, if spool CALI is 6,501–7,000, or
2,500 CSLI, if spool CALI is 7,001–8,000, or
10,500 CSN, if spool CALI is 8,001–8,500, or
2,000 CSLI, if spool CALI is greater than 8,500.

(iii) Thereafter, inspect HPCR stage 3–9 spools at intervals not to exceed the earliest occurrence shown in Table 11, Table 12, or Table 13 of this AD, as applicable, based on the elapsed calendar time from the effective date of this AD, as specified in paragraph (c)(5)(vi) of this AD.

(iv) Remove from service prior to further flight HPCR stage 3–9 spools that equal or exceed the reject criteria established by GE CF6–80A SB No. 72–678, Revision 1, dated August 8, 1996, and replace with a serviceable part.

(v) HPCR stage 3–9 spools with a CSN of 10,500 or greater may not be put back in service after an ESV.

(vi) Use the Tables as follows:

(A) Use Table 11 from the effective date of this AD to 18 months from the effective date of this AD.

(B) Use Table 12 after 18 months from the effective date of this AD to 36 months from the effective date of this AD.

(C) Use Table 13 after 36 months from the effective date of this AD.

(6) Eddy current and ultrasonic inspect for cracks HPCR stage 3–9 spools with P/Ns 9136M89G20, 9136M89G21, 9136M89G22, and 9136M89G27 installed in GE CF6–80A/A2 series engines. Perform the inspections in accordance with GE CF6–80A SB No. 72–678, Revision 1, dated August 8, 1996, as follows:

(i) For HPCR stage 3–9 spools that have not been previously inspected using the procedures in GE SB No. 72–500, Revision 6, dated December 22, 1995; or SB No. 72–583, Revision 5, dated December 22, 1995; or SB No. 72–678, Revision 1, dated July 29, 1996, or any earlier versions of these SBs, inspect at the first piece-part exposure after 1,000 CSN but not later than the first ESV after 3,000 CSN, provided, however, from 18 to 36 months after the effective date of this AD, inspect not later than 9,500 CSN, and after 36 months after the effective date of this AD, inspect not later than 3,500 CSN.

(ii) For HPCR stage 3–9 spools that have been previously inspected using the procedures in GE SB No. 72–500, Revision 6, dated December 22, 1995; or SB No. 72–583, Revision 5, dated December 22, 1995; or SB No. 72–678, Revision 1, dated July 29, 1996, or any earlier versions of these SBs, perform repeat inspections at the earliest occurrence of the requirements of Table 14, 15, or 16 of this AD, as applicable, based on elapsed calendar time from the effective date of this AD, as specified in paragraph (c)(6)(vi) of this AD.

TABLE 14

First piece-part exposure after both 1,000 CSLI and 5,000 CSN, but not later than the first ESV after both 1,500 CSLI and 5,000 CSN.

TABLE 15

First piece-part exposure after both 1,000 CSLI and 5,000 CSN, but not later than the first ESV after both 1,500 CSLI and 5,000 CSN, and before:
9,500 CSN, if spool CALI is 0–7,000, or
2,500 CSLI, if spool CALI is 7,001–8,000, or
10,500 CSN, if spool CALI is 8,001–8,500, or
2,000 CSLI, if spool CALI is greater than 8,500.

TABLE 16

First piece-part exposure after both 1,000 CSLI and 5,000 CSN, but not later than the first ESV after both 1,500 CSLI and 5,000 CSN, and before:
5,000 CSN, if spool CALI is 0–1,500, or
3,500 CSLI, if spool CALI is 1,501–5,000, or
8,500 CSN, if spool CALI is 5,001–5,500, or
3,000 CSLI, if spool CALI is 5,501–6,500, or
9,500 CSN, if spool CALI is 6,501–7,000, or
2,500 CSLI, if spool CALI is 7,001–8,000, or
10,500 CSN, if spool CALI is 8,001–8,500, or
2,000 CSLI, if spool CALI is greater than 8,500.

(iii) Thereafter, inspect HPCR stage 3–9 spools at intervals not to exceed the earliest occurrence shown in Table 14, Table 15, or Table 16 of this AD, as applicable, based on the elapsed calendar time from the effective date of this AD, as specified in paragraph (c)(6)(vi) of this AD.

(iv) Remove from service prior to further flight HPCR stage 3–9 spools that equal or exceed the reject criteria established by GE CF6–80A SB No. 72–678, Revision 1, dated August 8, 1996, and replace with a serviceable part.

(v) HPCR stage 3–9 spools with a CSN of 10,500 or greater may not be put back in service after an ESV.

(vi) Use the Tables as follows:

(A) Use Table 14 from the effective date of this AD to 18 months from the effective date of this AD.

(B) Use Table 15 after 18 months from the effective date of this AD to 36 months from the effective date of this AD.

(C) Use Table 16 after 36 months from the effective date of this AD.

(7) Eddy current and ultrasonic inspect for cracks HPCR stage 3–9 spools with P/N 9136M89G28 installed in GE CF6–80A/A1/A2/A3 series engines. Perform the inspections in accordance with GE CF6–80A SB No. 72–678, Revision 1, dated August 8, 1996, as follows:

(i) For HPCR stage 3–9 spools that have not been previously inspected using the procedures in GE SB No. 72–500, Revision 6, dated December 22,1995; or SB No. 72–583, Revision 5, dated December 22, 1995; or SB No. 72–678, Revision 1, dated July 29, 1996, or any earlier versions of these SBs, or any of the combinations of service documents specified by Table 7 of this AD, inspect at the first piece-part exposure after both 1,000 CSN and the effective date of this AD.

(ii) For HPCR stage 3–9 spools that have been previously inspected using the procedures in GE SB No. 72-500, Revision 6, dated December 22, 1995; or SB No. 72–583, Revision 5, dated December 22, 1995; or SB No. 72–678, Revision 1, dated July 29, 1996, or any earlier versions of these SBs, or any of the service documents listed in Table 7 of this AD, inspect at first piece-part exposure after both 1,000 CSLI and 5,000 CSN.

(iii) Thereafter, inspect HPCR stage 3–9 spools at piece-part exposure after both 1,000 CSLI and 5,000 CSN.

(iv) Remove from service prior to further flight HPCR stage 3–9 spools that equal or exceed the reject criteria established by GE CF6–80A SB No. 72–678, Revision 1, dated August 8, 1996, and replace with a serviceable part.

(d) For HPCR stages 3–9 spools installed in GE CF6-80C2 series engines, eddy current and ultrasonic inspect for cracks as follows:

(1) Eddy current and ultrasonic inspect for cracks HPCR stage 3–9 spools with P/Ns 1333M66G01, 1333M66G03, 1333M66G07, 1333M66G09, 1333M66G10, 1781M52P01, 1781M53G01, 1854M95P01, 1854M95P02, 1854M95P03, 1854M95P04, 1854M95P05, 1854M95P06, and 9380M28P05 installed in GE CF6–80C2 series engines, as follows:

(i) Perform eddy current and ultrasonic inspections in accordance with GE CF6–80C2 SB No. 72–934, Original, dated June 10,1998, at the next piece-part exposure after 1,000 CSN.

(ii) Perform eddy current and ultrasonic inspections in accordance with GE CF6–80C2 ASB No. 72–A848, Revision 2, dated March 12, 1998, at the next piece-part exposure after 1,000 CSN.

(iii) Remove from service prior to further flight HPCR stage 3–9 spools that equal or exceed the reject criteria established by the SB No. 72–934, Original, dated June 10, 1998 or ASB No. 72-A848, Revision 2, dated March 12, 1998, as applicable and replace with a serviceable part.

(2) Eddy current and ultrasonic inspect for cracks HPCR stage 3–9 spools with P/Ns 1781M52P01, 1854M95P02, 1854M95P05, and 9380M28P05 installed in GE CF6–80C2 series engines. Perform the inspections in accordance with GE CF6-80C2 SB No. 72–812, Revision 1, dated January 30, 1998, as follows:

(i) For HPCR stage 3–9 spools that have not been previously inspected using the procedures in GE SB No. 72–418, Revision 4, dated December 22, 1995; or SB No. 72–758, Revision 1, dated December 22, 1995; or SB No. 72–812, Revision 1, dated January 30, 1998, or any earlier versions of these SBs, inspect at the first piece-part exposure after 1,000 CSN but prior to accumulating 3,500 CSN, or prior to exceeding 30 days from the effective date of this AD, whichever occurs later.

(ii) For HPCR stage 3–9 spools that have been previously inspected using the procedures in GE SB No. 72–418, Revision 4, dated December 22, 1995; or SB No. 72–758, Revision 1, dated December 22, 1995; or SB No. 72–812, Revision 1, dated January 30, 1998, or any earlier versions of these SBs, perform repeat inspections at the earliest occurrence of the requirements of Table 17, 18, or 19 of this AD, as applicable, based on elapsed calendar time from the effective date of this AD, as specified in paragraph (d)(2)(vi) of this AD.

TABLE 17

First piece-part or module level exposure after both 1,000 CSLI and 3,500 CSN, but not later than the first ESV after both 1,500 CSLI and 3,500 CSN, and before 3,500 CSLI.

TABLE 18

First piece-part or module level exposure after both 1,000 CSLI and 3,500 CSN, but not later than the first ESV after both 1,500 CSLI and 3,500 CSN, and before:
3,500 CSLI, if spool CALI is 0–6,500, or
9,500 CSN, if spool CALI is 6,501–7,000, or
2,500 CSLI, if spool CALI is 7,001–8,000, or
10,500 CSN, if spool CALI is 8,001–8,500, or
2,000 CSLI, if spool CALI is greater than 8,500.

TABLE 19

First piece-part or module level exposure after both 1,000 CSLI and 3,500 CSN, but not later than the first ESV after both 1,500 CSLI and 3,500 CSN, and before:
3,500 CSLI, if spool CALI is 0–5,000, or 8,500 CSN, if spool CALI is 5,001–5,500, or 3,000 CSLI, if spool CALI is 5,501–6,500, or 9,500 CSN, if spool CALI is 6,501–7,000, or 2,500 CSLI, if spool CALI is 7,001–8,000, or 10,500 CSN, if spool CALI is 8,001–8,500, or 2,000 CSLI, if spool CALI is greater than 8,500.

(iii) Thereafter, inspect HPCR stage 3–9 spools at intervals not to exceed the earliest occurrence shown in Table 17, Table 18, or Table 19 of this AD, as applicable, based on the elapsed calendar time from the effective date of this AD, as specified in paragraph (d)(2)(vi) of this AD.

(iv) Remove from service prior to further flight HPCR stage 3–9 spools that equal or exceed the reject criteria established by GE CF6–80C2 SB No. 72–812, Revision 1, dated January 30, 1998, and replace with a serviceable part.

(v) HPCR stage 3–9 spools with a CSN of 10,500 or greater may not be put back in service after an ESV.

(vi) Use the Tables as follows:

(A) Use Table 17 from the effective date of this AD to 18 months from the effective date of this AD.

(B) Use Table 18 after 18 months from the effective date of this AD to 36 months from the effective date of this AD.

(C) Use Table 19 after 36 months from the effective date of this AD.

(3) Eddy current and ultrasonic inspect for cracks HPCR stage 3–9 spools with P/Ns 1333M66G01, 1333M66G03, 1333M66G07, 1333M66G09, 1781M53G01, 1854M95P01, 1854M95P03, 1854M95P04, and 1854M95P06 installed in GE CF6–80C2 series engines. Perform the inspections in accordance with GE CF6–80C2 SB No. 72–812, Revision 1, dated January 30, 1998, as follows:

(i) For HPCR stage 3–9 spools that have not been previously inspected using the procedures in GE SB No. 72–418, Revision 4, dated December 22, 1995; or SB No. 72–758, Revision 1, dated December 22, 1995; or SB No. 72–812, Revision 1, dated January 30, 1998, or any earlier versions of these SBs, inspect at the first piece–part exposure after 1,000 CSN but not later than the first ESV after 3,000 CSN, provided, however, from 18 to 36 months after the effective date of this AD, inspect not later than 9,500 CSN, and after 36 months after the effective date of this AD, inspect not later than 3,500 CSN.

(ii) For HPCR stage 3–9 spools that have been previously inspected using the procedures in GE SB No. 72–418, Revision 4, dated December 22, 1995; or SB No. 72–758, Revision 1, dated December 22, 1995; or SB No. 72–812, Revision 1, dated January 30, 1998, or any earlier versions of these SBs, perform repeat inspections at the earliest occurrence of the requirements of Table 20, 21, or 22 of this AD, as applicable, based on elapsed calendar time from the effective date of this AD, as specified in paragraph (d)(3)(vi) of this AD.

TABLE 20

First piece-part or module level exposure after both 1,000 CSLI and 3,500 CSN, but not later than the first ESV after both 1,500 CSLI and 3,500 CSN.

TABLE 21

First piece-part or module level exposure after both 1,000 CSLI and 3,500 CSN, but not later than the first ESV after both 1,500 CSLI and 3,500 CSN, and before:
9,500 CSN, if spool CALI is 0–7,000, or 2,500 CSLI, if spool CALI is 7,001–8,000, or 10,500 CSN, if spool CALI is 8,001–8,500, or 2,000 CSLI, if spool CALI is greater than 8,500.

TABLE 22

First piece-part or module level exposure after both 1,000 CSLI and 3,500 CSN, but not later than the first ESV after both 1,500 CSLI and 3,500 CSN, and before:
3,500 CSLI, if spool CALI is 0–5,000, or 8,500 CSN, if spool CALI is 5,001–5,500, or 3,000 CSLI, if spool CALI is 5,501–6,500, or 9,500 CSN, if spool CALI is 6,501–7,000, or 2,500 CSLI, if spool CALI is 7,001–8,000, or 10,500 CSN, if spool CALI is 8,001–8,500, or 2,000 CSLI, if spool CALI is greater than 8,500.

(iii) Thereafter, inspect HPCR stage 3–9 spools at intervals not to exceed the earliest occurrence shown in Table 21, Table 22, or Table 23 of this AD, as applicable, based on elapsed calendar time from the effective date of this AD, as specified in paragraph (d)(3)(vi) of this AD.

(iv) Remove from service prior to further flight HPCR stage 3–9 spools that equal or exceed the reject criteria established by GE CF6–80C2 SB No. 72–812, Revision 1, dated January 30, 1998, and replace with a serviceable part.

(v) HPCR stage 3–9 spools with a CSN of 10,500 or greater may not be put back in service after an ESV.

(vi) Use the Tables as follows:

(A) Use Table 21 from the effective date of this AD to 18 months from the effective date of this AD.

(B) Use Table 22 after 18 months from the effective date of this AD to 36 months from the effective date of this AD.

(C) Use Table 23 after 36 months from the effective date of this AD.

(4) Eddy current and ultrasonic inspect for cracks HPCR stage 3–9 spools with P/N 1333M66G10 installed in GE CF6–80C2 series engines. Perform the inspections in accordance with GE CF6–80C2 SB No. 72–812, Revision 1, dated January 30, 1998, as follows:

(i) For HPCR stage 3–9 spools that have not been previously inspected using the procedures in GE SB No. 72–418, Revision 4, dated December 22, 1995; or SB No. 72–758, Revision 1, dated December 22, 1995; or SB No. 72–812, Revision 1, dated January 30, 1998, or any earlier versions of these SBs, or any of the combinations of service documents specified by Table 7 of this AD, inspect at the first piece-part exposure after both 1,000 CSN and the effective date of this AD.

(ii) For HPCR stage 3–9 spools that have been previously inspected using the procedures in GE SB No. 72–418, Revision 4, dated December 22, 1995; or SB No. 72–758, Revision 1, dated December 22, 1995; or SB No. 72–812, Revision 1, dated January 30, 1998, or any earlier versions of these SBs, or any of the combinations of service documents specified by Table 7 of this AD, inspect at first piece part exposure after both 1,000 CSLI and 3,500 CSN.

(iii) Thereafter, inspect HPCR stage 3–9 spools at piece part exposure after both 1,000 CSLI and 3,500 CSN.

(iv) Remove from service prior to further flight HPCR stage 3–9 spools that equal or exceed the reject criteria established by GE CF6–80C2 SB No. 72–812, Revision 1, dated January 30, 1998, and replace with a serviceable part.

(e) For HPCR stages 3–9 spools installed in GE CF6–80E1 series engines, eddy current and ultrasonic inspect for cracks as follows:

(1) Eddy current and ultrasonic inspect for cracks HPCR stage 3–9 spools with P/Ns 1669M22G01, 1669M22G03, 1782M22G01, 1782M22G02, and 1782M22G04 installed in GE CF6–80E1 series engines, as follows:

(i) Perform eddy current and ultrasonic inspections in accordance with GE CF6–80E1 SB No. 72–137, Original, dated June 9, 1998, at the next piece-part exposure after 1,000 CSN.

(ii) Perform eddy current and ultrasonic inspections in accordance with GE CF6–80E1 ASB No. 72–A126, Revision 1, dated March 31, 1998, at the next piece-part exposure after 1,000 CSN.

(iii) Remove from service prior to further flight HPCR stage 3–9 spools that equal or exceed the reject criteria established by SB No. 72–137, Original, dated June 9, 1998 or ASB No. 72–A126, Revision 1, dated March 31, 1998, as applicable, and replace with a serviceable part.

(2) Eddy current and ultrasonic inspect for cracks HPCR stage 3–9 spools with P/Ns 1669M22G01, 1669M22G03, 1782M22G01, and 1782M22G02 installed in GE CF6–80E1 series engines. Perform the inspections in accordance with GE CF6–80E1 ASB No. 72–A135, Original, dated August 13, 1998, as follows:

(i) For HPCR stage 3–9 spools that have not been previously inspected in accordance with in accordance GE CF6–80E1 ASB No. 72–A135, Original, dated August 13, 1998, or any of the combinations of service documents specified by Table 7 of this AD, inspect HPCR stage 3–9 spools at the first piece-part exposure after 1,000 CSN, but not later than the first ESV after 3,000 CSN, provided, however, from 18 to 36 months after the effective date of this AD, inspect not later than 9,500 CSN, and after 36 months after the effective date of this AD, inspect not later than 3,500 CSN.

(ii) For HPCR stage 3–9 spools that have been previously inspected in accordance with GE CF6–80E1 ASB No. 72–A135, Original, dated August 13, 1998, or any of the combinations of service documents specified by Table 7 of this AD, perform repeat inspections at the earliest occurrence of the requirements of Table 24, 25, or 26 of this AD, as applicable, based on elapsed calendar time from the effective date of this AD, as specified in paragraph (e)(2)(vi) of this AD.

TABLE 24

First piece-part or module level exposure after both 1,000 CSLI and 3,500 CSN, but not later than the first ESV after both 1,500 CSLI and 3,500 CSN.

TABLE 25

First piece-part or module level exposure after both 1,000 CSLI and 3,500 CSN, but not later than the first ESV after both 1,500 CSLI and 3,500 CSN, and before:
9,500 CSN, if spool CALI is 0–7,000, or
2,500 CSLI, if spool CALI is 7,001–8,000, or
10,500 CSN, if spool CALI is 8,001–8,500, or
2,000 CSLI, if spool CALI is greater than 8,500.

TABLE 26

First piece-part or module level exposure after both 1,000 CSLI and 3,500 CSN, but not later than the first ESV after both 1,500 CSLI and 3,500 CSN, and before:
3,500 CSLI, if spool CALI is 0–5,000, or
8,500 CSN, if spool CALI is 5,001–5,500, or
3,000 CSLI, if spool CALI is 5,501–6,500, or
9,500 CSN, if spool CALI is 6,501–7,000, or
2,500 CSLI, if spool CALI is 7,001–8,000, or
10,500 CSN, if spool CALI is 8,001–8,500, or
2,000 CSLI, if spool CALI is greater than 8,500.

(iii) Thereafter, inspect HPCR stage 3–9 spools at intervals not to exceed the earliest occurrence shown in Table 24, Table 25, or Table 26 of this AD, as applicable, based on the elapsed calendar time from the effective date of this AD, as specified in paragraph (e)(2)(vi) of this AD.

(iv) Remove from service prior to further flight HPCR stage 3–9 spools that equal or exceed the reject criteria established by GE CF6–80E1 ASB No. 72–A135, Original, dated August 13, 1998, and replace with a serviceable part.

(v) HPCR stage 3–9 spools with a CSN of 10,500 or greater may not be put back in service after an ESV.

(vi) Use the Tables as follows:

(A) Use Table 24 from the effective date of this AD to 18 months from the effective date of this AD.

(B) Use Table 25 after 18 months from the effective date of this AD to 36 months from the effective date of this AD.

(C) Use Table 26 after 36 months from the effective date of this AD.

(3) Eddy current and ultrasonic inspect for cracks HPCR stage 3–9 spools with P/N 1782M22G04 installed in GE CF6–80E1 series engines. Perform the inspections in accordance GE CF6–80E1 ASB No. 72–A135, Original, dated August 13, 1998, as follows:

(i) For HPCR stage 3–9 spools that have not been previously inspected in accordance with any of the service documents listed in Table 24 of this AD, inspect at first piece-part exposure after both 1,000 CSN and the effective date of this AD.

(ii) Thereafter, inspect at first piece part exposure after both 1,000 CSLI and 3,500 CSN.

(iii) Remove from service prior to further flight HPCR stage 3–9 spools that equal or exceed the reject criteria established by GE CF6–80E1 ASB No. 72–A135, Original, dated August 13, 1998, and replace with a serviceable part.

(f) Report within 5 calendar days of inspection the results of inspections that equal or exceed the reject criteria to: William Ricci, Aerospace Engineer, Engine Certification Office, FAA, Engine and Propeller Directorate, 12 New England Executive Park, Burlington, MA 01803–5299; telephone (718) 238–7742, fax (781) 238–7199, as follows:

(1) Engine model in which the HPCR stage 3–9 spool was installed;
(2) P/N;
(3) S/N;
(4) Part CSN;
(5) Part CSLI;
(6) Date and location of inspection.

Reporting requirements have been approved by the Office of Management and Budget and assigned OMB control number 2120–0056.

(g) For the purpose of this AD, a serviceable part for installation in an engine is defined as an HPCR stage 3–9 spool with less than 1,000 CSN or with less than 1,000 CSLI, in accordance with the inspection and pass/fail criteria contained in the applicable service documents or combinations of service documents provided by Table 27 of this AD.

TABLE 27

GE CF6–50 SB No. 72–888, Revision 3, dated January 31, 1991,
GE CF6–50 SB No. 72–888, Revision 4, dated March 28, 1991,
GE CF6–50 SB No. 72–888, Revision 5, dated November 7, 1994,
GE CF6–50 SB No. 72–888, Revision 6, dated December 22, 1995,
GE CF6–50 SB No. 72–1000, Original, dated December 14, 1990,
GE CF6–50 SB No. 72–1000, Revision 1, dated March 28, 1991,
GE CF6–50 SB No. 72–1000, Revision 2, dated September 9, 1993,
GE CF6–50 SB No. 72–1000, Revision 3, dated December 22, 1995,
GE CF6–50 SB No. 72–1108, Original, dated November 6, 1995,
GE CF6–50 SB No. 72–1108, Revision 1, dated July 29, 1996,
GE CF6–80A SB No. 72–500, Revision 3, dated March 19, 1991,
GE CF6–80A SB No. 72–500, Revision 4, dated July 1, 1991,
GE CF6–80A SB No. 72–500, Revision 5, dated November 7, 1994,
GE CF6–80A SB No. 72–500, Revision 6, dated December 22, 1995,
GE CF6–80A SB No. 72–583, Original, dated December 20, 1990,
GE CF6–80A SB No. 72–583, Revision 1, dated March 18, 1991,
GE CF6–80A SB No. 72–583, Revision 2, dated July 15, 1991,
GE CF6–80A SB No. 72–583, Revision 3, dated July 24, 1991,
GE CF6–80A SB No. 72–583, Revision 4, dated September 15, 1993,
GE CF6–80A SB No. 72–583, Revision 5, dated December 22, 1995,
GE CF6–80A SB No. 72–678, Original, dated November 6, 1995,
GE CF6–80A SB No. 72–678, Revision 1, dated July 29, 1996,
GE CF6–80C2 SB No. 72–418, Revision 2, May 14, 1991,
GE CF6–80C2 SB No. 72–418, Revision 3, November 7, 1994,
GE CF6–80C2 SB No. 72–418, Revision 4, December 22, 1995,
GE CF6–80C2 SB No. 72–758, Original, dated November 7, 1994,
GE CF6–80C2 SB No. 72–758, Revision 1, dated December 22, 1995,
GE CF6–80C2 SB No. 72–812, Original, dated November 6, 1995,
GE CF6–80C2 SB No. 72–812, Revision 1, dated January 30, 1998,
GE CF6–80E1 ASB No. 72–A135, Original, dated August 13, 1998,

Either any one of the following:

CF6 Standard Practice Manual GEK9250 Procedures 70–32–09, Revision 71, dated October 1, 1995,
CF6 Standard Practice Manual GEK9250 Procedures 70–32–09, Revision 72, dated November 15, 1996,
CF6 Standard Practice Manual GEK9250 Procedures 70–32–09, Revision 74, dated May 1, 1998,

and any one of the following:

CF6 Standard Practice Manual GEK9250 Procedures 70–32–10, Revision 71, dated October 1, 1995,
CF6 Standard Practice Manual GEK9250 Procedures 70–32–10, Revision 72, dated November 15, 1996,
CF6 Standard Practice Manual GEK9250 Procedures 70–32–10, Revision 74, dated May 1, 1998;

or any one of the following:

CF6 Standard Practice Manual GEK9250 Procedures 70–32–13, Revision 70–25, dated August 26, 1996,
CF6 Standard Practice Manual GEK9250 Procedures 70–32–13, Revision 72, dated November 15, 1996,
CF6 Standard Practice Manual GEK9250 Procedures 70–32–13, Revision 73, dated November 1, 1997,

and any one of the following:

CF6 Standard Practice Manual GEK9250 Procedures 70–32–14, Revision 70–26, dated August 26, 1996,
CF6 Standard Practice Manual GEK9250 Procedure 70–32–14, Revision 72, dated November 15, 1996,
CF6 Standard Practice Manual GEK9250 Procedure 70–32–14, Revision 73, dated November 1, 1997.

(h) For the purpose of this AD, core module exposure is defined as separation of the fan module from the engine.

(i) For the purpose of this AD, piece-part exposure is defined as disassembly and removal of the stage 3–9 spool from the HPC rotor structure, regardless of any blades, locking lugs, bolts or balance weights assembled to the spool.

(j) For the purpose of this AD, an ESV is defined as the introduction of an engine into a shop where the separation of a major engine flange will occur after the effective date of this AD. The following maintenance actions are not considered ESVs for the purpose of this AD:

(1) Introduction of an engine into a shop solely for removal of the compressor top case for airfoil maintenance;
(2) Introduction of an engine into a shop solely for removal or replacement of the Stage 1 Fan Disk;
(3) Introduction of an engine into a shop solely for replacement of the Turbine Rear Frame;
(4) Introduction of an engine into a shop solely for replacement of the Accessory and/or Transfer Gearboxes;

(5) Introduction of an engine into a shop for any combination of the above specified exceptions.

(k) An alternative method of compliance or adjustment of the compliance time that provides an acceptable level of safety may be used if approved by the Manager, Engine Certification Office. Operators shall submit their requests through an appropriate FAA Principal Maintenance Inspector, who may add comments and then send it to the Manager, Engine Certification Office.

Note 3: Information concerning the existence of approved alternative methods of compliance with this airworthiness directive, if any, may be obtained from the Engine Certification Office.

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

Issued in Burlington, Massachusetts, on November 17, 1998.

Jay J. Pardee,

Manager, Engine and Propeller Directorate, Aircraft Certification Service.

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DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 97–CE–32–AD]

RIN 2120–AA64

Airworthiness Directives; The New Piper Aircraft, Inc. Models PA–31, PA–31–300, PA–31–325, PA–31–350, and PA–31P–350 Airplanes

AGENCY: Federal Aviation Administration, DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: This document proposes to adopt a new airworthiness directive (AD) that would apply to certain The New Piper Aircraft, Inc. (Piper) Models PA–31, PA–31–300, PA–31–325, PA–31–350, and PA–31P–350 airplanes. The proposed AD would require installing access holes for the inspection of the elevator spar; inspecting the elevator ice protection boots for looseness and reinstalling or replacing the elevator ice protection boots if looseness is found. The proposed AD also requires repetitively inspecting the elevator spars for cracks, and replacing the elevators or elevator spar assemblies with parts of improved design either at a certain time period or when cracks are found, whichever occurs first. The proposed AD is the result of reports of cracks developing in the elevator spar inboard of the outboard hinge location on the affected airplanes. The actions specified by the proposed AD are intended to prevent failure of the elevator spar caused by fatigue cracking, which could result in reduced airplane controllability.

DATES: Comments must be received on or before January 27, 1999.

ADDRESSES: Submit comments in triplicate to the Federal Aviation Administration (FAA), Central Region, Office of the Regional Counsel, Attention: Rules Docket No. 97–CE–32–AD, Room 1558, 601 E. 12th Street, Kansas City, Missouri 64106. Comments may be inspected at this location between 8 a.m. and 4 p.m., Monday through Friday, holidays excepted.

Service information that applies to the proposed AD may be obtained from The New Piper Aircraft, Inc., Customer Services, 2926 Piper Drive, Vero Beach, Florida 32960. This information also may be examined at the Rules Docket at the address above.

FOR FURTHER INFORMATION CONTACT: William Herderich, Aerospace Engineer, FAA, Atlanta Certification Office, One Crown Center, 1895 Phoenix Boulevard, suite 450, Atlanta, Georgia 30349; telephone: (770) 703–6084; facsimile: (770) 703–6097.

SUPPLEMENTARY INFORMATION:

Comments Invited

Interested persons are invited to participate in the making of the proposed rule by submitting such written data, views, or arguments as they may desire. Communications should identify the Rules Docket number and be submitted in triplicate to the address specified above. All communications received on or before the closing date for comments, specified above, will be considered before taking action on the proposed rule. The proposals contained in this notice may be changed in light of the comments received.

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

Commenters wishing the FAA to acknowledge receipt of their comments submitted in response to this notice must submit a self-addressed, stamped postcard on which the following statement is made: ''Comments to Docket No. 97-CE–32-AD.'' The postcard will be date stamped and returned to the commenter.

Availability of NPRMs

Any person may obtain a copy of this NPRM by submitting a request to the FAA, Central Region, Office of the Regional Counsel, Attention: Rules Docket No. 97–CE–32–AD, Room 1558, 601 E. 12th Street, Kansas City, Missouri 64106.

Discussion

The FAA has received several reports of cracks in the elevator spar inboard of the outboard hinge attachment location on Piper Models PA–31, PA–31–300, PA–31–325, PA–31–350, and PA–31P–350 airplanes. Initiation of these cracks is at the end rivets in the reinforcement doubler on the aft surface of the spar. These cracks are occurring at the end row of rivets that attach the spar and reinforcement doubler. The FAA has also received reports of cracks at the outboard end of the spar.

Poorly installed or maintained ice protection boots on the affected airplanes may aggravate the occurrence and growth of these cracks. If these ice protection boots become loose, they may set up a vibration and promote fatigue cracking of the elevator spar.

These conditions, if not corrected in a timely manner, could result in failure of the elevator spar with reduced airplane controllability.

Relevant Service Information

Piper has issued Service Bulletin No. 998A, dated August 4, 1997, which specifies procedures for installing access holes for the inspection of the elevator spar; inspecting the elevator ice protection boots for looseness and reinstalling or replacing the elevator ice protection boots if looseness is found; and repetitively inspecting the elevator spars for cracks.

The FAA's Determination

After examining the circumstances and reviewing all available information related to the incidents described above,

including the referenced service information, the FAA has determined that AD action should be taken to prevent failure of the elevator spar caused by fatigue cracking, which could result in reduced airplane controllability.

Explanation of the Provisions of the Proposed AD

Since an unsafe condition has been identified that is likely to exist or develop in other Piper Models PA–31, PA–31–300, PA–31–325, PA–31–350, and PA–31P–350 airplanes of the same type design, the FAA is proposing AD action. The proposed AD would require installing access holes for the inspection of the elevator spar; inspecting the elevator ice protection boots for looseness and reinstalling or replacing the elevator ice protection boots if looseness is found. The proposed AD also requires repetitively inspecting the elevator spars for cracks, and replacing the elevators or elevator spar assemblies with parts of improved design either at a certain time period or when cracks are found, whichever occurs first.

Accomplishment of the proposed inspection access holes installation, inspections, and elevator ice protection boots reinstallation or replacement is required in accordance with Piper Service Bulletin No. 998A, dated August 4, 1997.

Accomplishment of the installation of the improved design elevators or elevator spar assemblies is required in accordance with the maintenance manual.

The FAA's Aging Commuter Aircraft Policy

The actions proposed in this NPRM are consistent with the FAA's aging commuter aircraft policy, which briefly states that, when a modification exists that could eliminate or reduce the number of required critical inspections, the modification should be incorporated. This policy is based on the FAA's determination that reliance on critical repetitive inspections on airplanes utilized in commuter service carries an unnecessary safety risk when a design change exists that could eliminate or, in certain instances, reduce the number of those critical inspections. In determining what inspections are critical, the FAA considers (1) the safety consequences of the airplane if the known problem is not detected by the inspection; (2) the reliability of the inspection such as the probability of not detecting the known problem; (3) whether the inspection area is difficult to access; and (4) the possibility of damage to an adjacent structure as a result of the problem.

The alternative to replacing the elevators or elevator spar assemblies with ones of improved design would be to repetitively inspect this area for the life of the airplane.

Cost Impact

The FAA estimates that 1,739 airplanes in the U.S. registry would be affected by the proposed AD.

The proposed inspection holes installation and inspections would take approximately 2 workhours per airplane to accomplish with an average labor rate of approximately $60 an hour. Parts cost approximately $26 per airplane. Based on these figures, the total cost impact of the proposed inspection access holes installation and inspections on U.S. operators is estimated to be $253,894, or $146 per airplane.

The proposed elevator spar assembly replacements would take approximately 36 workhours per airplane to accomplish with an average labor rate of approximately $60 an hour. Parts cost approximately $600 per airplane ($300 per elevator spar assembly with 2 elevator spar assemblies per airplane). Based on these figures, the total cost impact of the proposed elevator spar assembly replacement on U.S. operators is estimated to be $4,799,640, or $2,760 per airplane.

According to Piper, numerous airplanes already have complied with the proposed initial inspection requirements of this NPRM, specifically most of the Model PA–31–350 airplanes since many of these are used in commuter service.

Regulatory Impact

The regulations proposed herein would not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order 12612, it is determined that this proposal would not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

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

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Safety.

The Proposed Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

The New Piper Aircraft, Inc.: Docket No. 97–CE–32–AD.

Applicability: The following airplane model and serial numbers, certificated in any category, that are not equipped with the applicable improved design elevators or elevator spar assemblies specified in the ''Replacement Elevator P/N'' and ''Replace Spar P/N'' columns of the ''Material Required Table'' on page 4 of Piper Service Bulletin No. 998A, dated August 4, 1997:

Models	Serial numbers
PA–31, PA–31–300, and PA–31–325	31–2 through 31–8312019.
PA–31–350	31–5001 through 31–8553002.
PA–31P–350	31P–8414001 through 31P–8414050.

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 (g) of this AD. The request should include an assessment of the effect of the modification, alteration, or repair on the unsafe condition addressed by this AD; and, if the unsafe condition has not been eliminated, the request should include specific proposed actions to address it.

Compliance: Required as indicated in the body of this AD, unless already accomplished.

To prevent failure of the elevator spar caused by fatigue cracking, which could result in reduced airplane controllability, accomplish the following:

(a) Upon accumulating 2,500 hours time-in-service (TIS) on each elevator spar assembly or within the next 100 hours TIS after the effective date of this AD, whichever occurs later, accomplish the following in accordance with the INSTRUCTIONS section of Piper Service Bulletin No. 998A, dated August 4, 1997:

(1) Install access holes for the inspection of the elevator spar;

(2) Inspect the elevator spars for cracks; and

(3) Inspect the elevator ice protection boots for looseness.

(b) If the elevator ice protection boots are found loose during the inspection required by paragraph (a)(3) of this AD, prior to further flight, reinstall or replace the elevator ice protection boots in accordance with the INSTRUCTIONS section of Piper Service Bulletin No. 998A, dated August 4, 1997.

(c) If no cracks are found in the elevator spars during the inspection required by paragraph (a)(2) of this AD, reinspect the elevator spars for cracks at intervals not to exceed 100 hours TIS, provided no cracks are found (if cracks are found, refer to paragraphs (d) and (d)(1) of this AD).

(d) At whichever of the compliance times presented in paragraphs (d)(1) and (d)(2) of this AD that occurs first, replace each elevator or elevator spar assembly with a part of improved design as specified in the ''Replacement Elevator P/N'' and ''Replace Spar P/N'' columns of the ''Material Required Table'' on page 4 of Piper Service Bulletin No. 998A, dated August 4, 1997. Accomplish these replacements in accordance with the applicable maintenance manual.

(1) Prior to further flight on any elevator spar assembly where any cracks are found during the initial inspection required by paragraph (a)(2) of this AD or any repetitive inspection required by paragraph (c) of this AD; or

(2) Within 1,000 hours TIS after the initial inspection required by paragraph (a)(2) of this AD.

(e) Replacing both the left and right elevators or elevator spar assemblies with parts of improved design as specified in the ''Replacement Elevator P/N'' and ''Replace Spar P/N'' columns of the ''Material Required Table'' on page 4 of Piper Service Bulletin No. 998A, dated August 4, 1997, is considered terminating action for the repetitive inspection requirement of this AD.

(1) This action may be accomplished at any time to terminate the repetitive inspections, but must be accomplished prior to further flight on any elevator spar found cracked or within 1,000 hours TIS after the initial inspection, whichever occurs first.

(2) If one elevator spar assembly is replaced prior to further flight when a crack is found, the other elevator spar assembly must still be repetitively inspected every 100 hours TIS until replacement at 1,000 hours TIS after the initial inspection or when cracks are found, whichever occurs later.

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

(g) An alternative method of compliance or adjustment of the initial or repetitive compliance times that provides an equivalent level of safety may be approved by the Manager, Atlanta Aircraft Certification Office (ACO), One Crown Center, 1895 Phoenix Boulevard, Suite 450, Atlanta, Georgia 30349. The request shall be forwarded through an appropriate FAA Maintenance Inspector, who may add comments and then send it to the Manager, Atlanta ACO.

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

(h) All persons affected by this directive may obtain copies of the document referred to herein upon request to The New Piper Aircraft, Inc., 2926 Piper Drive, Vero Beach, Florida 32960; or may examine this document at the FAA, Central Region, Office of the Regional Counsel, Room 1558, 601 E. 12th Street, Kansas City, Missouri 64106.

Issued in Kansas City, Missouri, on November 17, 1998.

Michael Gallagher,

Manager, Small Airplane Directorate, Aircraft Certification Service.

[FR Doc. 98–31436 Filed 11–24–98; 8:45 am]

BILLING CODE 4910–13–U

DEPARTMENT OF THE INTERIOR

Office of Surface Mining Reclamation and Enforcement

30 CFR Part 936

[SPATS No. OK–024–FOR]

Oklahoma Regulatory Program

AGENCY: Office of Surface Mining Reclamation and Enforcement (OSM), Interior.

ACTION: Proposed rule; reopening and extension of public comment period on proposed amendment.

SUMMARY: OSM is announcing receipt of revisions to and other explanatory information about a previously proposed amendment to the Oklahoma regulatory program (Oklahoma program) under the Surface Mining Control and Reclamation Act of 1977 (SMCRA). The revisions and explanatory information concern definitions, permitting requirements, small operator assistance program, performance standards, inspection and enforcement procedures, and corrections of reference citations and typographical errors. Oklahoma intends to revise its program to be consistent with the corresponding Federal regulations.

DATES: We will accept written comments until 4:00 p.m., c.s.t., December 10, 1998.

ADDRESSES: You should mail or hand deliver written comments to Michael C. Wolfrom, Director, Tulsa Field Office at the address listed below.

You may review copies of the Oklahoma program, the amendment, and all written comments received in response to this document at the addresses listed below during normal business hours, Monday through Friday, excluding holidays. You may receive one free copy of the amendment by contacting OSM's Tulsa Field Office.

Michael C. Wolfrom, Director, Tulsa Field Office, Office of Surface Mining, 5100 East Skelly Drive, Suite 470, Tulsa, Oklahoma 74135–6547, Telephone: (918) 581–6430.

Oklahoma Department of Mines, 4040 N. Lincoln Blvd., Suite 107, Oklahoma City, Oklahoma 73105, Telephone: (405) 521–3859.

FOR FURTHER INFORMATION CONTACT: Michael C. Wolfrom, Director, Tulsa Field Office. Telephone: (918) 581–6430. Internet: mwolfrom@mcrgw.osmre.gov.

SUPPLEMENTARY INFORMATION:

I. Background on the Oklahoma Program

On January 19, 1981, the Secretary of the Interior conditionally approved the Oklahoma program. You can find background information on the Oklahoma program, including the Secretary's findings, the disposition of comments, and the conditions of approval in the January 19, 1981, **Federal Register** (46 FR 4902). You can find later actions on the Oklahoma program at 30 CFR 936.15 and 936.16.

II. Discussion of the Proposed Amendment

By letter dated December 18, 1997 (Administrative Record No. OK–981), Oklahoma sent us an amendment to its

program under SMCRA. Oklahoma sent the amendment in response to a letter dated June 17, 1997 (Administrative Record No. OK–979), that we sent to Oklahoma under 30 CFR 732.17(c). We announced receipt of the proposed amendment in the January 6, 1998, **Federal Register** (63 FR 454) and invited public comment on its adequacy. The public comment period ended February 5, 1998.

During our review of the amendment, we identified concerns relating to definitions, permitting requirements, small operator assistance program, performance standards, inspection and enforcement procedures, and corrections of reference citations and typographical errors. We notified Oklahoma of the concerns by facsimiles dated June 5 and 30, and October 21, 1998 (Administrative Record Nos. OK–981.13, OK–981.08, and OK–981.11). On June 22, August 10, September 24, and November 5, 1998, Oklahoma sent us a revised amendment or additional explanatory information (Administrative Record Nos. OK–981.06, OK–981.09, OK–981.10, and OK–981.12, respectively).

Oklahoma proposes to correct any incorrect reference citations and any typographical errors throughout the proposed amendment. Also, Oklahoma submitted additional revisions or other explanatory information for the following provisions of the amendment:

1. OAC 460:20–3–5. Definitions

Oklahoma proposes to revise the definitions for ''other treatment facilities'' and ''previously mined areas.''

2. OAC 460:20–27–14. Reclamation plan: siltation structures, impoundments, banks, dams, and embankments (Surface Mining Activities)

a. Oklahoma proposes to revise paragraph (a)(3) so that structures that do not meet the size or other criteria of 30 CFR 77.216(a) or the Class B or C criteria for dams in the U.S. Department of Agriculture Soil Conservation Service Technical Release No. 60 (210–VI–TR60, Oct. 1985), ''Earth Dams and Reservoirs,'' Technical Release No. 60 (TR–60) are not subject to the regulations in paragraphs (a)(3)(A)–(3)(D).

b. Oklahoma proposes to revise paragraph (c)(3) regarding permanent and temporary impoundments to read as follows:

(3) For an impoundment not meeting the size or other criteria of 30 CFR 77.216(a) or the Class B or C criteria for dams in TR–60, (210–VI–TR60, Oct. 1985), ''Earth Dams and Reservoirs,'' or located where failure would not be expected to cause loss of life or serious property damage, the Department may establish through the State program approval process engineering design standards that ensure stability comparable to a 1.3 minimum static safety factor in lieu of engineering tests to establish compliance with the minimum static safety factor of 1.3 specified in Section 460:20–43–14(a)(3)(B) of this Chapter.

c. Oklahoma proposes to revise paragraph (f) regarding stability analysis so that it also applies to structures meeting the Class B or C criteria for dams in TR–60 or other criteria of 30 CFR 77.216(a).

3. OAC 460:20–31–9. Reclamation plan: siltation structures, impoundments, banks, dams, and embankments (Underground Mining Activities)

a. Oklahoma proposes to revise paragraph (a)(3) so that structures that do not meet the size or other criteria of 30 CFR 77.216(a) or the Class B or C criteria for dams in the U.S. Department of Agriculture Soil Conservation Service Technical Release No. 60 (210–VI–TR60, Oct. 1985), ''Earth Dams and Reservoirs'' Technical Release No. 60 (TR–60) are not subject to the regulations in paragraphs (a)(3)(A) through (3)(D).

b. Oklahoma proposes to revise paragraph (c)(2) to read as follows:

(2) For an impoundment not meeting the size or other criteria of 30 CFR 77.216(a) or the Class B or C criteria for dams in TR–60, (210–VI–TR60, Oct. 1985) ''Earth Dams and Reservoirs'' TR60, or located where failure would not be expected to cause loss of life or serious property damage, the Department may establish through the State program approval process engineering design standards that ensure stability comparable to a 1.3 minimum static safety factor in lieu of engineering tests to establish compliance with the minimum static safety factor of 1.3 specified in Section 460:20–45–14(a)(3)(B) of this Chapter.

c. Oklahoma proposes to revise paragraph (f) Stability analysis to read as follows:

(f) Stability analysis. If the structure meets Class B or C criteria for dams in TR–60 or the size or other criteria of 30 CFR 77.216(a) then each plan under Subsections (b), (c), and (e) of this Section shall include a stability analysis of each structure. The stability analysis shall include, but not limited to, strength parameters, pore pressures, and long-term seepage conditions. The plan shall also contain a description of each engineering design assumption and calculation with a discussion of each alternative considered in selecting the specific design parameters and construction methods.

4. OAC 460:20–31–16. Operation plan: Maps and plans (Underground Mining Activities)

Oklahoma proposes to redesignate paragraphs (a) through (c) as paragraphs (1) through (3) and to redesignate paragraphs (b)(1) through (b)(13) as paragraphs (2)(A) through (2)(M).

5. OAC 460:20–35–6. Program services and data requirements

Oklahoma proposes to revise paragraphs (b)(3) through (b)(6) to read as follows:

(3) The collection of archaeological and historical information required by Section 460:20–25–5(b), 460:20–29–5(2), 460:20–27–17 and 460:20–31–10 and any other archaeological and historical information required by the Department, and the preparation of plans necessitated thereby; and (4) The collection of site-specific resource information and production of protection and enhancement plans for fish and wildlife habitats and other environmental values and plans required by the Department under Section 460:20–27–9, 460:20–31–14, and any other applicable regulations; and (5) Pre-blast surveys if required under Section 460:20–43–19; and (6) The development of cross-section maps and plans required under Section 460:20–25–11, 460:20–29–11, and any other applicable regulation.

6. OAC 460:20–35–7. Applicant liability

In paragraph (a), Oklahoma proposes to remove the word ''laboratory'' so that applicants are responsible, under certain conditions, for reimbursing the Department for any services rendered under Subchapter 460:20–35 and not just for those pertaining to laboratory services.

7. OAC 460:20–35–8. Assistance funding

Oklahoma proposes to add this new section to read as follows:

(a) Use of funds. Funds specifically authorized for this program shall be used to provide the services specified in 460:20–35–6 of this Subchapter and shall not be used to cover administrative expenses.

(b) Allocation of funds. The program administrator shall establish a formula for allocating funds to provide services for eligible small operators if available funds are less than those required to provide the services pursuant to this Subchapter.

8. OAC 460:20–43–12. Hydrologic balance: siltation structures (Surface Mining Activities)

Oklahoma proposes to combine paragraph (a)(1) with paragraph (a) and to redesignate existing paragraphs (a)(2)(A) and (a)(2)(B) as new paragraphs (a)(1) and (a)(2).

9. OAC 460:20–43–14. Impoundments (Surface Mining Activities)

a. Oklahoma proposes to add new paragraph (a)(1) to specify that impoundments meeting the Class B or C criteria for dams in the U.S. Department of Agriculture, Soil Conservation Service Technical Release No. 60 (210–VI–TR60, Oct. 1985) must comply with the ''Minimum Emergency Spillway Hydrologic Criteria'' table in TR–60 and the requirements of section 460:20–43–14.

b. Oklahoma proposes to redesignate existing paragraphs (a)(1) through (a)(12) as new paragraphs (a)(2) through (a)(13).

c. Oklahoma proposes to revise new paragraph (a)(2) to read as follows:

(2) Impoundments meeting the criteria of 30 CFR 77.216(a) shall comply with the requirements of 30 CFR Section 77.216 and this section. The plan required to be submitted to the District Manager of MSHA under 30 CFR Section 77.216 shall also be submitted to the Department as part of the permit application.

d. Oklahoma proposes to revise new paragraph (a)(4)(A) to include impoundments meeting the Class B or C criteria for dams in TR–60.

e. Oklahoma proposes to revise new paragraph (a)(4)(B) to read as follows:

(B) Impoundments not included in Subsection (a)(4)(A) of this Section, except for a coal mine waste impounding structure, or located where failure would not be expected to cause loss of life or serious property damage shall have a minimum static safety factor of 1.3 for a normal pool with steady state seepage saturation conditions or meet the requirements of Section 460:20–27–14(c)(3).

f. The State proposes to revise new paragraph (a)(5) to require impoundments that meet the Class B or C criteria for dams in TR–60 to comply with the freeboard hydrograph criteria in the ''Minimum Emergency Spillway Hydrologic Criteria'' table in TR–60.

g. Oklahoma proposes to revise new paragraph (a)(6)(A) to require impoundments that meet the Class B or C criteria for dams in TR–60 or the size or other criteria of 30 CFR 77.216(a) to be stable under all conditions of construction and operation. The impoundments must also be designed based on accurate and adequate information on the foundation conditions. In addition, the State requires sufficient foundation investigations and laboratory testing of foundation materials in order to determine the design requirements for foundation stability.

h. Oklahoma proposes to revise new paragraph (a)(9)(B)(i)-(iii) to read as follows:

(i) For an impoundment meeting the Class B or C criteria for dams in TR–60, the emergency spillway hydrograph criteria in the ''Minimum Emergency Spillway Hydrologic Criteria'' table in TR–60, or greater event as specified by the Department.

(ii) For an impoundment meeting or exceeding the size or other criteria of 30 CFR 77.216(a), a 100-year 6-hour event, or greater event as specified by the Department.

(iii) For an impoundment not meeting the requirements of Subsection (a)(9)(B)(i) or (ii) if this Section, a 25-year 6-hour event, or greater event as specified by the Department.

i. Oklahoma proposes to revise new paragraph (a)(11)(D) to allow qualified registered professional land surveyors to inspect any temporary or permanent impoundment that does not meet the SCS Class B or C criteria for dams in TR–60 or the size or other criteria of 30 CFR 77.216(a).

j. Oklahoma proposes to revise new paragraph (a)(12) to require impoundments meeting the SCS Class B or C criteria for dams in TR–60 or other criteria of 30 CFR 77.216 to be examined in accordance with 30 CFR 77.216–3.

k. Oklahoma proposes to revise paragraph (c)(2)(A) and (B) to read as follows:

(A) In the case of an impoundment meeting the SCS Class B or C criteria for dams in TR–60, or other size or other criteria of Section 77.216(a) of 30 CFR , it is designed to control the precipitation of the probable maximum precipitation of a 6-hour event, or greater event as specified by the Department, or

(B) In the case of an impoundment not included in Subsection (c)(2)(A) of this Section it shall be designed to control the precipitation of a 100-year 6-hour event, or greater event as specified by the Department.

10. OAC 460:20–43–29. Coal mine waste: general requirements (Surface Mining Activities)

Oklahoma proposes to revise paragraph (a) to include that coal mine waste be hauled or conveyed and placed for final placement in a controlled manner.

11. OAC 460:20–43–39. Backfilling and grading: thin overburden (Surface Mining Activities)

Oklahoma proposes to revise paragraph (a) to read as follows:

(a) Definition. Thin overburden means insufficient spoil and other waste materials available from the entire permit area to restore the disturbed area to its approximate original contour. Insufficient spoil and other waste materials occur where the overburden thickness times the swell factor, plus the thickness of other available waste materials, is less than the combined thickness of the overburden and the coal bed prior to removing the coal, so that after backfilling and grading the surface configuration of the reclaimed area would not:

12. OAC 460:20–45–12. Hydrologic balance: siltation structures (Underground Mining Activities)

Oklahoma proposes to combine paragraph (a)(1) with paragraph (a) and to redesignate existing paragraphs (a)(1)(A) and (a)(1)(B) as new paragraphs (a)(1) and (a)(2).

13. OAC 460:20–45–14. Impoundments (Underground Mining Activities)

a. Oklahoma proposes to add new paragraph (a)(1) to specify that impoundments meeting the Class B or C criteria for dams in the U.S. Department of Agriculture, Soil Conservation Service Technical Release No. 60 (210–VI–TR60, Oct. 1985) must comply with the ''Minimum Emergency Spillway Hydrologic Criteria'' table in TR–60 and the requirements of section 460:20–45–14.

b. Oklahoma proposes to redesignate existing paragraphs (a)(1) through (a)(12) as new paragraphs (a)(2) through (a)(13).

c. Oklahoma proposes to revise new paragraph (a)(2) to read as follows:

(2) Impoundments meeting the criteria of 30 CFR 77.216(a) shall comply with the requirements of 30 CFR Section 77.216 and this section. The plan required to be submitted to the District Manager of MSHA under 30 CFR Section 77.216 shall also be submitted to the Department as part of the permit application.

d. Oklahoma proposes to revise new paragraph (a)(4)(A) to include impoundments meeting the Class B or C criteria for dams in TR–60.

e. Oklahoma proposes to revise paragraph (a)(4)(B) to read as follows:

(B) Impoundments not included in Subsection (a)(4)(A) of this Section, except for a coal mine waste impounding structure, or located where failure would not be expected to cause loss of life or serious property damage shall have a minimum static safety factor of 1.3 for a normal pool with steady state seepage saturation conditions or meet the requirements of Section 460:20–31–9(c)(2).

f. The State proposes to revise new paragraph (a)(5) to require impoundments that meet the Class B or C criteria for dams in TR–60 to comply with the freeboard hydrograph criteria in the ''Minimum Emergency Spillway Hydrologic Criteria'' table in TR–60.

g. Oklahoma proposes to revise new paragraph (a)(6)(A) to require impoundments that meet the Class B or C criteria for dams in TR–60 or the size or other criteria of 30 CFR 77.216(a) to be stable under all conditions of construction and operation. These impoundments must also be designed based on accurate and adequate information on the foundation

conditions. In addition, the State requires sufficient foundation investigations and laboratory testing of foundation materials in order to determine the design requirements for foundation stability.

h. Oklahoma proposes to revise new paragraph (a)(9)(B)(i)–(iii) to read as follows:

(i) For an impoundment meeting the Class B or C criteria for dams in TR–60, the emergency spillway hydrograph criteria in the ''Minimum Emergency Spillway Hydrologic Criteria'' table in TR–60, or greater event as specified by the Department.

(ii) For an impoundment meeting or exceeding the size or other criteria of 30 CFR 77.216(a), a 100-year 6-hour event, or greater event as specified by the Department.

(iii) For an impoundment not included in Subsections (a)(9)(B)(i) or (ii), a 25-year 6-hour event, or greater event as specified by the Department.

i. Oklahoma proposes to revise new paragraph (a)(11)(D) to allow qualified registered professional land surveyors to inspect any temporary or permanent impoundment that does not meet the SCS Class B or C criteria for dams in TR–60 or the size or other criteria of 30 CFR 77.216(a).

j. Oklahoma proposes to revise new paragraph (a)(12) to require impoundments meeting the SCS Class B or C criteria for dams in TR–60 or other criteria of 30 CFR 77.216 to be examined in accordance with 30 CFR 77.216–3.

k. Oklahoma proposes to revise paragraph (c)(2)(A) and (B) to read as follows:

(A) In the case of an impoundment meeting the SCS Class B or C criteria for dams in TR–60, or the size or other criteria of Section 77.216(a) of 30 CFR , it shall be designed to control the precipitation of the probable maximum precipitation of a 6-hour event, or greater event as specified by the Department, or

(B) In the case of an impoundment not included in Subsection (c)(2)(A) of this Section it shall be designed to control the precipitation of a 100-year 6-hour event, or greater event as specified by the Department.

14. OAC 460:20–45–27. Disposal of excess spoil: preexisting benches (Underground Mining Activities)

Oklahoma proposes to revise paragraph (c) to include that fills be designed and constructed using current, prudent engineering practices.

15. OAC 460:20–45–29. Coal mine waste: general requirements (Underground Mining Activities)

Oklahoma proposes to revise paragraph (a) to include that coal mine waste be hauled or conveyed and placed for final placement in a controlled manner.

16. OAC 460:20–57–2. State inspections and monitoring

Oklahoma proposes to revise paragraph (h)(1)(C) to read as follows:

(C) Whether, and to what extent, there exist on the site impoundments, earthen structures or other conditions that pose, or may reasonably be expected to ripen into, imminent dangers to the health or safety of the public or significant environmental harms to land, air, or water resources;

III. Public Comment Procedures

We are reopening the comment period on the proposed Oklahoma program amendment to provide the public an opportunity to reconsider whether the proposed amendment is adequate in light of the additional materials submitted. Under the provisions of 30 CFR 732.17(h), we are seeking comments on whether the proposed amendment satisfies the applicable program approval criteria of 30 CFR 732.15. If we approve the amendment, it will become part of the Oklahoma program.

Written Comments

Your written comments must be specific and pertain only to the issues proposed in this rulemaking. You must explain the reason for any recommended change. In the final rulemaking, we will not necessarily consider or include in the Administrative Record comments received after the time indicated under **DATES** or at locations other than the Tulsa Field Office.

IV. Procedural Determinations

Executive Order 12866

The Office of Management and Budget (OMB) exempts this rule from review under Executive Order 12866 (Regulatory Planning and Review).

Executive Order 12988

The Department of the Interior has conducted the reviews required by section 3 of Executive Order 12988 (Civil Justice Reform) and has determined that, to the extent allowed by law, this rule meets the applicable standards of subsections (a) and (b) of that section. However, these standards are not applicable to the actual language of State regulatory programs and program amendments since each such program is drafted and published by a specific State, not by OSM. Under sections 503 and 505 of SMCRA (30 U.S.C. 1253 and 1255) and 30 CFR 730.11, 732.15, and 732.17(h)(10), decisions on State regulatory programs and program amendments must be based solely on a determination of whether the submittal is consistent with SMCRA and its implementing Federal regulations and whether the other requirements of 30 CFR Parts 730, 731, and 732 have been met.

National Environmental Policy Act

This rule does not require an environmental impact statement since section 702(d) of SMCRA (30 U.S.C. 1292(d)) provides that agency decisions on State regulatory program provisions do not constitute major Federal actions within the meaning of section 102(2)(C) of the National Environmental Policy Act (42 U.S.C. 4332(2)(C)).

Paperwork Reduction Act

This rule does not contain information collection requirements that require approval by OMB under the Paperwork Reduction Act (44 U.S.C. 3507 *et seq.*).

Regulatory Flexibility Act

The Department of the Interior has determined that this rule will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). The State submittal which is the subject of this rule is based upon corresponding Federal regulations for which an economic analysis was prepared and certification made that such regulations would not have a significant economic effect upon a substantial number of small entities. Therefore, this rule will ensure that existing requirements previously published by OSM will be implemented by the State. In making the determination as to whether this rule would have a significant economic impact, the Department relied upon the data and assumptions for the corresponding Federal regulations.

Unfunded Mandates

OSM has determined and certifies under the Unfunded Mandates Reform Act (2 U.S.C. 1502 *et seq.*) that this rule will not impose a cost of $100 million or more in any given year on local, state, or tribal governments or private entities.

List of Subjects in 30 CFR Part 936

Intergovernmental relations, Surface mining, Underground mining.

Dated: November 18, 1998.

Charles E. Sandberg,

Acting Regional Director, Mid-Continent Regional Coordinating Center.

[FR Doc. 98–31414 Filed 11–24–98; 8:45 am]

BILLING CODE 4310–05–P

POSTAL SERVICE

39 CFR Part 20

International Priority Airmail Service; Proposed Changes

AGENCY: Postal Service.

ACTION: Proposed rule.

SUMMARY: The Postal Service proposes to change the postage rates and conditions of service for International Priority Airmail service (IPA). In addition to adjusting rates, the Postal Service is changing country rate groups to be the same as International Surface Air Lift service (ISAL) and increasing the minimum weight from 10 to 11 pounds of mail. Also, acceptance of IPA will be extended to all post offices accepting bulk mail.

DATES: Comments on the proposed changes must be received on or before December 28, 1998.

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

FOR FURTHER INFORMATION CONTACT: Walter J. Grandjean, (202) 314–7256 or Dan Singer, (202) 314–3422.

SUPPLEMENTARY INFORMATION: International Priority Airmail service (IPA) is a volume airmail letter service. Mailers have the opportunity to benefit from work sharing with the Postal Service and gain improved speed of delivery for presorted mail, which the Postal Service does not have to sort.

The Postal Service recently adopted program changes to International Surface Air Lift Service (ISAL) on February 28, 1998, (63 FR 3642–3650) and is now proposing changes to IPA which will align it with ISAL in rate structure and preparation requirements. This will make it easier for mailers to participate in either service.

Minimum Weight

The Postal Service is increasing the minimum weight for direct country and mixed direct country package sacks from 10 to 11 pounds. This reflects the desired minimum sack which the Postal Service normally dispatches to other countries and matches the sack weights recently adopted in ISAL. This will cause the minimum weight for a mailing to be increased to 11 pounds. In addition, a package of mail will be defined as 10 or more pieces or 1 pound of mail to coincide with the definition used in ISAL. ''Bundles'' will be referred to as ''packages'' in the future.

Acceptance Cities

Since the inception of IPA, the Postal Service has limited the number of cities where IPA mailings could be deposited. This was intended to reduce the cost of maintaining an extensive transportation network, but many customers not located near an acceptance point could not use IPA. The Postal Service proposes a Full Service rate that will be available from all post offices where bulk mail is accepted and will make IPA accessible to all customers. Additionally, a drop shipment option is added.

Volume Discounts

The Postal Service proposes discounts for IPA based on the amount of postage spent by a mailer in the preceding postal fiscal year for both IPA and ISAL. For example, a mailer spending $2 million or more for IPA and ISAL during postal fiscal year 1996 (September 16, 1995–September 13, 1996) will receive a 5 percent discount on IPA mailings made during the next fiscal year, 1997 (September 14, 1996–September 12, 1997). Mailers spending over $5 million receive a 10 percent discount and a 15 percent discount for over $10 million. These discounts apply to full service and drop ship rates. The discount is calculated on the mailing statement.

Drop Ship Rates

The Postal Service is introducing drop ship rates for mailers willing to transport their mail to certain locations. The Postal Service avoids certain processing, handling, and transportation costs and these savings are being passed on to the mailer. Drop ship sites are located in the following locations: Jamaica, NY; Miami, FL; Franklin Park, IL; and San Francisco, CA.

Although exempt from the notice and comment requirements of the Administrative Procedure Act, S U.S.C. 553(b), (c) regarding proposed rulemaking by 39 U.S.C. 410 (a), the Postal Service invites comments on the following proposed revisions of Chapter 280 of the International Mail Manual, incorporated by reference in the Code of Federal Regulations. See 30 CFR 20.1.

List of Subjects in 39 CFR Part 20

Foreign relations, Incorporation by reference, International postal services.

Part 20—[AMENDED]

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

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

2. The International Mail Manual is amended to incorporate program changes to Subchapter 280 International Priority Airmail Service as follows:

280 INTERNATIONAL PRIORITY AIRMAIL SERVICE

281 Description

281.1 General

International Priority Airmail (IPA) service is as fast as or faster than regular international airmail service. It is available to bulk mailers of all LC and AO items that are prepared by the sender in accordance with the requirements of this subchapter. Separate rates are provided for presorted mail and nonpresorted mail with drop shipment and volume discounts.

281.2 Qualifying Mail

Any item of the LC or AO classification, as defined in 141.2, qualifies. Letters, letter packages, postal cards, aerogrammes, regular printed matter, books and sheet music, publishers' periodicals, matter for the blind, and small packets, which are prepared in compliance with the applicable mailing conditions in this subchapter, may be sent in this service. Items do not have to be of the same size and weight to qualify.

281.3 Minimum Quantity Requirements

281.31 Worldwide Nonpresort Mail

The mailer must have a minimum of 11 pounds of LC/AO mail in the total mailing. The minimum does not apply to each country destination.

281.32 Presort Mail

The mailer must have a minimum of 11 pounds of presorted LC/AO mail to a single rate group to qualify for the presort rate for that rate group.

Note: Mail that cannot be made up in direct country packages (284.521) or in direct country sacks (284.61) does not qualify for the presort rates and is subject to the worldwide nonpresort rates.

281.4 Dutiable Items

Dutiable items may be sent in LC letter packages or AO small packets in accordance with the applicable rules in this subchapter for those classes of mail. Parcel post (CP) items, either ordinary or insured, may not be mailed as International Priority Airmail.

281.5 Deposit

281.51 Full Service

Mailings must be deposited and accepted at a business mail entry unit of the post office where the mailer holds an advance deposit account or postage meter license.

281.52 Drop Shipment

To qualify for the drop shipment rates, the mailer must tender the mail to one of the locations in 281.53. The mailer must pay postage at the drop shipment location either through an advance deposit account or postage meter license at the serving post office.

As an alternative, mailers who are participating in a PVDS program (see DMM P750) may have the mail verified, accepted and paid for at the mailer's plant or at the origin post office serving the mailer's plant if authorized under DMM P750.2.2. Plant-verified drop shipment mail must be transported by the mailer to the drop shipment location and the mail accompanied by a clearance document Form 8125.

281.53 Drop Shipment Locations

Drop shipment rates are available from the following offices:

New York

Regular and plant-verified drop shipment:

AMC JFK BUILDING 250
JFK INTERNATIONAL AIRPORT
JAMAICA NY 11430–9998

California

Regular drop shipment:

SAN FRANCISCO P&DC
1300 EVANS AVE
SAN FRANCISCO CA 94188

Plant-verified drop shipment:

AMC SAN FRANCISCO
BLDG 660 RD 6
SAN FRANCISCO CA 94158–9998

Florida

Regular drop shipment:

MIAMI P&DC
2200 NORTHWEST 72 AVE
MIAMI FL 33152

Plant-verified drop shipment:

AMC MIAMI
MIAMI INTERNATIONAL AIRPORT
MIAMI FL 33159–9998

Illinois

Regular and plant-verified drop shipment:

CHICAGO O'HARE DROPSHIP ISAL SERVICE CENTER
INTERNATIONAL PROCESSING CENTER ANNEX
3333 N MOUNT PROSPECT RD
FRANKLIN PARK IL 60131

281.6 Special Services Not Available

Items sent in this service may not be registered.

282 Postage

282.1 Rates

282.11 General

There are two rate options for International Priority Airmail service: a presort rate option that has four rate groups and a worldwide nonpresort rate. For both options there are full service rates for mail deposited at offices other than the four drop shipment offices listed in 281.5, and drop ship rates for mail deposited at one of the four drop shipment offices. The per-piece rates and per-pound rates are shown in Exhibit 282.11. The per-piece rate of $0.10 or $0.25 applies to each piece regardless of its weight. The per-pound rate applies to the net weight (gross weight minus tare weight of sack) of the mail for the specific rate group. Fractions of a pound are rounded to the next whole pound for postage calculation.

EXHIBIT 282.11—INTERNATIONAL PRIORITY AIRMAIL RATES

Rate group	Piece rate	Pound rate	
		Full service	Dropship
1	$0.25	$5.00	$4.00
2	0.10	5.25	4.25
3	0.10	6.50	5.50
4	0.10	7.50	6.50
Worldwide	0.25	7.00	6.00

282.12 Volume Discount

Mailers who spend $2 million or more on IPA and ISAL in the preceding postal fiscal year may receive discounts off the rates shown in Exhibit 282.11 as follows:

a. $2 million to $5 million: 5% discount
b. over $5 million to $10 million: 10% discount
c. over $10 million: 15% discount

Mailers entitled to these discounts must place the full per piece rate on each piece of mail if payment is by postage meter or mailer-precanceled stamps. The discount is calculated on the statement of mailing.

282.13 Qualifying for Volume Discounts

To qualify for volume discounts, mailers must apply in writing to the Manager, Mail Order, International Business Unit, 475 L'Enfant Plaza, SW, Room 370–IBU, Washington, DC 20260–6500. The Manager evaluates all requests and informs the mailer and the post office(s) of mailing whether discounts are approved and the level of discount. Mailers must supply the following information:

a. Postal fiscal year for the qualifying mail.

b. Permit number(s) and post office(s) where the permits are held.

c. Total revenue for the postal fiscal year.

d. Post office(s) where the discount is to be claimed.

The combined IPA and ISAL revenue is counted toward the discounts. The Postal Service will count as revenue to qualify for the volume discounts only postage paid by the permit holder. If a permit holder has more than one account, or accounts in several cities, then these revenues may be combined to qualify for discounts. Agents who prepare mail for the owner of the mail and mail paid by the owner's permit may not be included in the revenue to qualify for the discounts, except for the initial year (Postal Fiscal Year 1997, September 14, 1996, through September 12, 1997). Customers may be required to substantiate their request by providing copies of all postage statements for the appropriate postal fiscal year. All decisions of the Manager, Mail Order are final.

282.14 Availability

IPA service is available to all foreign countries, as listed in Exhibit 284.522. The exhibit shows the rate group assigned to each country.

282.15 Presort Rates

To qualify for the presort Group 1, 2, 3, or 4 rates (see Exhibit 282.11), a mailing must consist of a minimum of 11 pounds to a specific rate group. This minimum applies to each rate group and not to the entire mailing (see 281.32). Within a rate group all mail addressed to an individual country must be sorted into direct country packages of 10 or more pieces (or 1 pound or more of mail) (284.521) and/or sacked in direct country sacks of 11 pounds or more (284.61). Mail that cannot be made up into direct country packages or direct country sacks must be sent at the worldwide nonpresort rates.

282.16 Separation by Rate Group

The mailer must specify the rate group on the back of Tag 115, International Priority Airmail, with the number 1, 2, 3, 4 or WW (Worldwide), and must physically separate the sacks by rate group at the time of mailing.

282.17 Computation of Postage

Postage is computed on PS Form 3652, Postage Statement—International Priority Airmail. Postage at the worldwide nonpresort rate is calculated by multiplying the number of pieces in the mailing by the applicable per-piece rate, multiplying the net weight (in whole pounds) of the entire mailing by the applicable per-pound rate, and then adding the two totals together. Postage at the presorted rates is calculated by multiplying the number of pieces in the mailing destined for countries in a specific rate group by the appropriate per-piece rate, multiplying the net weight (in whole pounds) of those pieces by the corresponding per-pound rate, and then adding the two totals together. Volume discounts are calculated on the postage statement.

282.2 Postage Payment Methods

282.21 General

282.211 Postage Meter or Permit Imprint

Postage must be paid by postage meter, permit imprint, or mailer precanceled stamps (see DMM P023.3.0) or a combination. Postage charges are computed on PS Form 3652.

282.212 Piece Rate Portion

The applicable per-piece postage must be affixed to each piece by meter unless postage is paid by permit imprint (see 282.23).

282.213 Pound Rate Portion

Postage for the pound rate portion must be paid either by meter stamp(s) attached to the postage statement or from the mailer's authorized permit imprint advance deposit account.

282.22 Postage Meter

282.221 Postage Endorsement

When postage is paid by meter or mailer precanceled stamps, each piece must be legibly endorsed with the words ''INTERNATIONAL PRIORITY AIRMAIL.''

282.222 Specifications for Endorsement

The endorsement required in 282.221 must appear on the address side of each piece and must be applied by a printing press, hand stamp, or other similar printing device. It must be printed above the name of the addressee and to the left or below the postage, or it may be printed adjacent to the meter stamp in either the postal inscription slug area or ad plate area. If the postal endorsement appears in the ad plate area, no other information may be printed in the ad plate. The endorsement may not be typewritten or hand drawn. The endorsement is not considered adequate if it is included as part of a decorative design or advertisement.

282.223 Unmarked Pieces

Unmarked pieces lacking the postage endorsement required by 282.221 are subject to the applicable LC/AO airmail single piece rates.

282.224 Drop Shipment of Metered Mail

Mailers who want to enter metered IPA mail at a post office other than where the meter is licensed must obtain a drop shipment authorization. To obtain an authorization, the mailer must submit a written request to the postmaster at the office where the mail will be entered. (see DMM D072).

282.23 Permit Imprint

Mailers may use a permit imprint for mailings that contain identical weight pieces. Any of the permit imprints shown in Exhibit 152.3 are acceptable. The postage charges are computed on PS Form 3652 and deducted from the advance deposit account. Permit imprints must not denote Priority Mail, bulk mail, nonprofit, or other domestic or special rate mail. Mailers may use permit imprint with nonidentical weight pieces only if authorized to use postage mailing systems under DMM P710, P720, or P730.

283 Weight and Size Limits

See 223 and 233 for the weight and size limits for LC items sent in this service. See 243, 253, and 263 for the weight and size limits for AO items sent in this service.

284 Preparation Requirements for Individual Items

284.1 Addressing

See 122.

284.2 Marking

284.21 Airmail

The sender should mark ''PAR AVION'' or ''AIR MAIL'' on the address side of each piece. Use of bordered airmail envelopes is optional and may be used for items sent in this service if the envelope contains the ''AIR MAIL'' endorsement.

284.22 Class of Mail

284.221 Printed Matter

Printed matter is endorsed as required by weight:

a. Items weighing more than 4 pounds must be marked to specify the type of printed matter: ''PRINTED MATTER,'' ''PRINTED MATTER—BOOKS,'' ''PRINTED MATTER—SHEET MUSIC,'' or ''PRINTED MATTER—PERIODICALS,'' as appropriate (see 244.211).

b. Items weighing 4 pounds or less do not require any printed matter endorsement but may be marked with the endorsements in 284.221a at the mailer's option. Unmarked printed matter items are subject to the mailing conditions for letters (see 220).

284.222 Letters/Letter Packages

Letters and letter packages that might be mistaken for another class of mail because of their weight or appearance should be marked ''LETTER'' on the address side (see 224.2).

284.223 Small Packets

Each small packet must be marked ''SMALL PACKET'' (see 264.21).

284.3 Sealing

Any item sent in this service may be sealed at the option of the sender.

284.4 Packaging

All items must be placed in envelopes or prepared in package form. See 224.4 for LC mail and 244.4 for AO mail.

284.5 Sorting Requirements for IPA

284.51 Worldwide Nonpresorted Mail

284.511 Working Packages

IPA mail paid at the nonpresorted rate must be made up into working packages. Letters and flats must be packaged separately, although nonidentical pieces may be commingled within each of these categories. Pieces that cannot be packaged because of their physical characteristics must be placed loose in the sack.

284.512 Facing of Nonpresorted Mail Within Package

All pieces in the working packages must be faced the same way.

284.52 Presorted Mail

284.521 Direct Country Packages

When there are ten or more pieces or 1 pound or more of mail for the same country (except Great Britain and Mexico), it must be made up into a country package. Great Britain and Mexico require a finer sortation (see 284.523). At the mailer's option, a finer breakdown by city or postal code may be made based on sortation information provided by the postal administration of the destination country.

284.522 Country Package Label

a. The label (facing slip) for country packages that contain ten or more pieces

to a specific country (except for Great Britain and Mexico) must be completed as follows:

Line 1: Foreign Exchange Office
Line 2: Country of Destination
Line 3: Mailer, Mailer Location

Example

1150 VIENNA FLUG
AUSTRIA
RBA COMPANY WASHINGTON DC

b. See Exhibit 284.522 for Direct Country Package Label and Tag 178, CN 35 Par Avion, for information.

284.523 Country Packages to Great Britain and Mexico

Country packages to Great Britain and Mexico must be made up as follows:

a. Great Britain. When there are 10 or more pieces or 1 pound or more of mail per separation, mail to Great Britain must be sorted into packages as follows:

Separation Exchange Office (Line 1 Package Label):

LONDON CITY LONDONTOWN
SCOTLAND GLASGOW FWD
NORTHERN IRELAND BELFAST FWD
ALL OTHER GREAT BRITAIN GREAT BRITAIN, GREAT BRITAIN

Example

LONDONTOWN
GREAT BRITAIN
MAILER, MAILER LOCATION

b. Mexico. Mail to Mexico must be sorted based on state separations. When a state separation contains ten or more pieces or 1 pound or more of mail, it must be packaged and labeled to the designated foreign exchange office shown in Exhibit 284.523. When there are less than ten pieces or 1 pound to one or more states in the grouping, package and label these pieces to the designated foreign exchange office listed for ''Remaining.'' When there are less than ten pieces or 1 pound to one or more states in the grouping, package and label these pieces to the designated foreign exchange office listed for ''Remaining.''

Example: MEXICO 506 DF MEXICO MAILER, MAILER LOCATION.

Exception: When there are less than ten pieces or 1 pound of mail to the Mexican states of Baja Calif Norte, Baja Calif Sur, Chihuahua, Distrito Federal (Mexico City), Guerrero, and Sonora, package the pieces separately and affix a facing slip labeled to the U.S. International Exchange Office listed in Exhibit 284.622.

284.524 Facing of Pieces Within Country Package

All pieces in the country package must be faced in the same direction and a facing slip identifying the contents of the package must be placed on the address side of the top piece of each package in such a manner that it will not become separated from the package.

Note: The pressure-sensitive labels and optional endorsement lines used domestically for presort mail are prohibited for International Priority Airmail.

284.53 Physical Characteristics and Requirements for Packages

284.531 Thickness

Packages of letter-size mail should be no thicker than approximately a handful of mail (4 to 6 inches thick).

284.532 Securing Packages

Each package must be securely tied. Placing rubber bands around the length and then the girth is the preferred method of securing packages of letter-size mail. Plastic strapping placed around the length and then the girth is the preferred method of securing packages of flat-size mail.

284.533 Separation of Packages

Letter-size and flat-size mail must be packaged separately. LC and AO mail classes may be commingled in a letter-size or flat-size mail package.

284.6 Sacking Requirements

284.61 Direct Country Sack (11 Pounds or More)

284.611 General

When there are 11 or more pounds of mail addressed to the same country (including Great Britain and Mexico), the mail must be packaged and enclosed in blue international airmail sacks and labeled to the country with Tag 178, Airmail Bag Label LC (CN 35/AV 8) (white). All types of mail, including letter-size packages, flat-size packages, and loose items for each destination, can be commingled in the same sack and counted toward the 11-pound minimum.

284.612 Direct Country Sack Tags

Direct country sacks must be labeled with Tag 178. The tag is white and specially coded to route the mail to a specific country and airport of destination. The blocks on the tag for date, weight, and dispatch information must be completed by the Postal Service and may not be completed by the mailer. The mailer must complete the ''To'' block showing the destination country. Tag 115, International Priority Airmail, must also be affixed to the Direct Country Sacks. Tag 115 is a ''Day-Glo'' pink tag that identifies the mail to ensure it receives priority handling. The mailer must designate on the back of Tag 115 the applicable rate group, using a number 1, 2, 3, 4, or WW (Worldwide).

284.62 Mixed Direct Country Package Sacks

284.621 General

The direct country packages containing 10 or more pieces or 1 pound or more of mail destined to a specific country that cannot be made up in direct country sacks must be enclosed in orange Priority Mail sacks unless other equipment is specified by the acceptance office.

284.622 Mixed Direct Country Sack Label

The sack label must be completed as follows. (See Exhibit 284.622 for list of U.S. International Exchange Offices.)

Line 1: Appropriate U.S. Exchange Office and Routing Code
Line 2: Contents—DRX
Line 3: Mailer, Mailer Location

Example

AMC SEATTLE WA 980
INT'L PRIORITY AIRMAIL—DRX
ABC STORE SEATTLE WA

284.63 Worldwide Nonpresort Mail Sacks

284.631 General

The working packages of mixed country mail and loose items must be enclosed in orange Priority Mail sacks unless other equipment is specified by the acceptance office. Nonpresorted letter-size mail may be presented in trays if authorized by the acceptance office.

Note: Working packages of mixed country mail cannot be enclosed in mixed direct country package sacks.

284.632 Worldwide Nonpresort Mail Sack Label

The sack label must be completed as follows:

Line 1: Appropriate U.S. Exchange Office and Routing Code
Line 2: Contents—WKG
Line 3: Mailer, Mailer Location

Example

AMC ATLANTA GA 300
INT'L PRIORITY AIRMAIL—WKG
CPA COMPANY ATLANTA GA

See Exhibit 284.622 for list of U.S. International Exchange Offices.

284.64 Tags and Weight Maximum for Sacks

284.641 Tag 115 and Tag 178

All IPA sacks (direct country, mixed direct country package sacks, and worldwide nonpresort mail sacks) must

be labeled with Tag 115, International Priority Airmail. Tag 115 is a ''Day-Glo'' pink tag that identifies IPA mail to ensure that it receives priority treatment. Tag 178 (see section 284.611) is a dispatching tag to be used only for direct country sacks. Tag 178 is white and specially coded to route the mail to a specific country and airport of destination. The Postal Service must complete the blocks on the tag for date, weight, and dispatch information. The mailer must complete only the ''To'' block showing the destination country. Postal tags and sacks are available from the post office.

284.642 Sack Weight Maximum

The maximum weight of the sack and contents must not exceed 66 pounds.

284.7 Customs Forms Requirements

284.71 Letters and Letter Packages

See 224.5.

284.72 Printed Matter

See 244.6.

284.73 Small Packets

See 264.5.

EXHIBIT 284.522—FOREIGN EXCHANGE OFFICE AND COUNTRY RATE GROUPS, INFORMATION FOR DIRECT COUNTRY PACKAGE LABEL (FACING SLIP), TAG 178, 3-LETTER COUNTRY EXCHANGE OFFICE CODE, AND EXCHANGE OFFICE

Rate group	Country	3-letter exchange office code	Exchange office
4	Afghanistan	KBL	Kabul.
1	Albania	TIA	Tirana.
4	Algeria	ALG	Algiers.
1	Andorra [1]		
4	Angola	LAD	Luanda.
2	Anguilla	AXA	The Valley.
2	Antigua and Barbuda	ANU	St. John's.
2	Argentina	BUE	Buenos Aires Avion.
4	Armenia	EVN	Yerevan.
2	Aruba	AUA	Oranjestad.
1	Ascension [1]		
3	Australia [2]	SYD	Sydney.
1	Austria	VIE	1150 Vienna Flug.
4	Azerbaijan	BAK	Baku.
1	Azores [1]		
2	Bahamas	NAS	Nassau.
4	Bahrain	BAH	Bahrain.
4	Bangladesh	DAC	Dhaka 17.
2	Barbados	BGI	Bridgetown.
1	Belarus	MOW	Moscow PCI–1.
1	Belgium	BRU	Brussels X.
2	Belize	BZE	Belize City.
4	Benin	COO	Cotonou.
2	Bermuda	BDA	Hamilton.
4	Bhutan [1]		
2	Bolivia	LPB	La Paz
2	Bonaire [1 3]		
1	Bosnia-Herzegovina	SJJ	Sarajevo.
4	Botswana	GBE	Gabrone.
2	Brazil	RIO	Rio de Janeiro.
2	British Virgin Islands	EIS	Roadtown Tortola
3	Brunei Darussalam	BWN	Bandar Seri Begawan.
1	Bulgaria	SOF	Sofia.
4	Burkina Faso	OUA	Ouagadougou.
4	Burma (Myanmar)	RGN	Rangoon.
4	Burundi	BJM	Bujumbura.
3	Cambodia	PNH	Phnom Penh.
4	Cameroon	DLA	Douala.
4	Cape Verde	SID	SAL.
2	Cayman Islands	GCM	Grand Cayman.
4	Central African Republic	BGF	Bangui.
4	Chad	NDJ	N'Djamena.
2	Chile	SCL	Santiago.
3	China	PEK	Beijing.
2	Colombia	BOG	Bogota Aeropuerto.
4	Comoros Islands [1]		
4	Congo, Dem. Rep. of the	FIH	Kinshasa CTT.
4	Congo, Rep. of the (Brazzaville)	BZV	Brazzaville.
4	Corsica [1]		
2	Costa Rica	SJO	San Jose.
4	Côte d'Ivoire	ABJ	Abidjan.
1	Croatia	ZAG	Zagreb.
2	Cuba	HAV	Havana.
	Curacao [3]	CUR	Willemstad.
4	Cyprus	NIC	Nicosia.
1	Czech Republic	PRG	Prague 120.
1	Denmark	CPH	Copenhagen PTM.

EXHIBIT 284.522—FOREIGN EXCHANGE OFFICE AND COUNTRY RATE GROUPS, INFORMATION FOR DIRECT COUNTRY PACKAGE LABEL (FACING SLIP), TAG 178, 3-LETTER COUNTRY EXCHANGE OFFICE CODE, AND EXCHANGE OFFICE—Continued

Rate group	Country	3-letter exchange office code	Exchange office
4	Djibouti	JIB	Djibouti.
2	Dominica	DOM	Roseau.
2	Dominican Republic	SDQ	Santo Domingo.
2	Ecuador	UIO	Quito.
4	Egypt	CAI	Cairo Int'l Airport.
2	El Salvador	SAL	San Salvador.
4	Equatorial Guinea	BSG	Bata.
4	Eritrea	ASM	Asmara.
1	Estonia	TLL	Tallinn.
4	Ethiopia	ADD	Addis Ababa.
2	Falkland Islands [1]		
1	Faroe Islands [1]		
3	Fiji	NAN	Nadi.
1	Finland	HEL	Helsinki.
1	France	PAR	Paris Aviation Passe.
2	French Guiana	CAY	Cayenne.
3	French Polynesia	PPT	Papeete.
4	Gabon	LBV	Libreville.
4	Gambia	BJL	Banjul.
4	Georgia, Republic of	TBS	Tbilisi.
1	Germany	FRA	Frankfurt am Main. Flughafen.
4	Ghana	ACC	Accra.
1	Gibraltar	GIB	Gibraltar.
1	Great Britain		
	London City	LON	Londontown.
	Northern Ireland	BFS	Belfast.
	Scotland	GLA	Glasgow.
	All Other		
	Great Britain	LON	Great Britain.
1	Greece	ATH	Athens.
1	Greenland [1]		
2	Grenada	GND	St. George's.
2	Guadeloupe	PTP	Pointe-a-Pitre.
2	Guatemala	GUA	Guatemala.
4	Guinea	CKY	Conakry.
4	Guinea-Bissau	BXO	Bissau.
2	Guyana	GEO	Georgetown.
2	Haiti	PAP	Port-au-Prince.
2	Honduras	TGU	Tegucigalpa.
3	Hong Kong	HKG	Victoria.
1	Hungary	BUD	Budapest 72 Trans.
1	Iceland	REK	Reykjavik.
4	India	DEL	Delhi Air.
3	Indonesia	JKT	Jakarta Soekarno-Hatta.
4	Iran	THR	Tehran.
4	Iraq	BGW	Baghdad.
1	Ireland	DUB	Dublin.
4	Israel	TLV	Tel Aviv-Yafo.
1	Italy	ROM	Rome Ferr.
2	Jamaica	KIN	Kingston.
3	Japan	TYO	Tokyo APT FWD.
4	Jordan	AMM	Amman.
4	Kazakhstan	ALA	Alma Ata.
4	Kenya	NBO	Nairobi.
3	Kiribati	TRW	Tarawa.
3	Korea, Dem. People's Rep. (North) [1]		
3	Korea, Republic of (South)	SEL	Seoul.
4	Kuwait	KWI	Kuwait.
1	Kyrgyzstan	MOW	Moscow PCI–1.
3	Laos	VTE	Vientiane.
1	Latvia	RIX	Riga.
4	Lebanon	BEY	Beirut.
4	Lesotho	MSU	Maseru.
4	Liberia	MLW	Monrovia.
4	Libya	TIP	Tripoli.
1	Liechtenstein [1]		
1	Lithuania	VNO	Vilnius.

EXHIBIT 284.522—FOREIGN EXCHANGE OFFICE AND COUNTRY RATE GROUPS, INFORMATION FOR DIRECT COUNTRY PACKAGE LABEL (FACING SLIP), TAG 178, 3-LETTER COUNTRY EXCHANGE OFFICE CODE, AND EXCHANGE OFFICE—Continued

Rate group	Country	3-letter exchange office code	Exchange office
1	Luxembourg	LUX	Luxembourg Ville.
3	Macao	HKG	Macau.
1	Macedonia	BEG	Belgrade.
4	Madagascar	TNR	Antananarivo.
1	Madeira Islands	FNC	Funchal.
4	Malawi	BLZ	Limbe C.S.O.
3	Malaysia	KUL	Kuala Lumpur.
4	Maldives	MLE	Male.
4	Mali	BKO	Bamako.
4	Malta	VLT	Valletta.
2	Martinique	FDF	Fort de France.
4	Mauritania	NKC	Nouakchott.
4	Mauritius	MRU	Mauritius.
2	Mexico See Exhibit 284.523		
4	Moldova	KIV	Kishinev.
1	Monaco	MCM	Monte Carlo.
3	Mongolia [1]		
2	Montserrat	MNI	Plymouth.
4	Morocco	CAS	Casablanca P/PAL.
4	Mozambique	MPM	CPI Maputo.
4	Namibia	WDH	Windhoek.
3	Nauru	INU	Nauru.
3	Nepal	KTM	Kathmandu.
1	Netherlands	AMS	Amsterdam EXP.
2	Netherlands Antilles [1 3]		
3	New Caledonia	NOU	Noumea.
3	New Zealand	AKL	Auckland.
2	Nicaragua	MGA	Managua.
4	Niger	NIM	Niamey.
4	Nigeria	LOS	Lagos.
1	Norway	OSL	Oslo Transit.
4	Oman	MCT	Muscat.
4	Pakistan	KHI	Karachi.
2	Panama	PTY	Panama City.
3	Papua New Guinea	POM	Port Moresby.
2	Paraguay	ASU	Asuncion.
2	Peru	LIM	Lima Transito.
3	Philippines	MNL	Manila.
3	Pitcairn Island [1]		
1	Poland	WAW	Warsaw.[3]
1	Portugal	LIS	Lisbon Province.
4	Qatar	DOH	Doha.
4	Reunion	RUN	St. Denis.
1	Romania	BUH	Bucharest.
1	Russia	MOW	Moscow PCI–1.
4	Rwanda	KGL	Kigali.
2	Saba [1 3]		
2	Saint Christopher and Nevis	SKB	Basseterre.
2	Saint Eustatius [1 3]		
4	Saint Helena [1]		
2	Saint Lucia	SLU	Castries.
2	Saint Maarten [3]	SXM	Philipsburg.
2	Saint Pierre and Miquelon [1]		
2	Saint Vincent and The Grenadines	SVD	Kingstown.
1	San Marino [1]		
1	Sao Tome and Principe [1]		
4	Saudi Arabia	DHA	Dhahran APT.
4	Senegal	DKR	Dakar Yoff.
1	Serbia-Montenegro (Yugoslavia)	BEG	Belgrade.
4	Seychelles	SEZ	Mahe Is.
4	Sierra Leone	FNA	Freetown.
3	Singapore	SIN	Singapore.
1	Slovak Republic (Slovakia)	BTS	Bratislava.
1	Slovenia	LJU	Ljubljana.
3	Solomon Islands	HIR	Honiara.
4	Somalia	MGQ	Mogadishu.
4	South Africa	JNB	Johannesburg.
1	Spain	MAD	Madrid Airport.

EXHIBIT 284.522—FOREIGN EXCHANGE OFFICE AND COUNTRY RATE GROUPS, INFORMATION FOR DIRECT COUNTRY PACKAGE LABEL (FACING SLIP), TAG 178, 3-LETTER COUNTRY EXCHANGE OFFICE CODE, AND EXCHANGE OFFICE—Continued

Rate group	Country	3-letter exchange office code	Exchange office
4	Sri Lanka	CMB	Colombo.
4	Sudan	KRT	Khartoum.
2	Suriname	PBM	Paramaribo.
4	Swaziland	MTS	Manzini.
1	Sweden	STO	Stockholm Flug.
1	Switzerland	GVA	Geneva 1.
4	Syria	DAM	Damascus.
3	Taiwan	TPE	Taipei.
4	Tajikistan	MOW	Moscow PCI–1.
4	Tanzania	DAR	Dar es Salaam.
3	Thailand	BKK	Bangkok.
4	Togo	LFW	Lome.
3	Tonga	NUK	Nukualofa.
2	Trinidad and Tobago	POS	Port of Spain.
4	Tristan da Cunha [1]		
4	Tunisia	TUN	Tunis.
1	Turkey	IST	Istanbul Hava Alani.
1	Turkmenistan	MOW	Moscow PCI–1.
2	Turks and Caicos Islands	TKI	Grand Turk.
3	Tuvalu [1]		
4	Uganda	KLA	Kampala
4	Ukraine	IEV	Kiev.
4	United Arab Emirates	DXB	Dubai.
2	Uruguay	MVD	Montevideo.
4	Uzbekistan	TAS	Tashkent.
3	Vanuatu	VLI	Port Vila.
4	Vatican City	VCY	Vatican City State.
2	Venezuela	CCS	Caracas.
3	Vietnam	SGN	Ho Chi Minh Ville.
3	Wallis and Futuna Islands [1]		
3	Western Samoa	APW	Apia.
4	Yemen	SAH	Sanaa.
4	Zambia	NLA	Ndola.
4	Zimbabwe	HRE	Harare.

Footnotes

[1] Direct country sacks are not made to these destinations. Prepare direct country packages (ten or more pieces) and include in mixed direct country package sacks labeled to the assigned U.S. exchange office listed in Exhibit 284.622.

[2] At the mailer's option, a finer sortation for IPA items addressed to Australia may be used. If this option is chosen, items addressed with postal codes beginning with 0, 1, 2, 4, and 9 and uncoded mail should be sorted and packaged to Sydney. Direct country sacks should be tagged to Sydney as well. Both the three-letter exchange office code, ''SYD,'' and the country name, Australia, should be entered in the ''TO'' block of Tag 178. Items addressed with postal codes beginning with 3, 5, 6, 7, and 8 should be sorted and packaged to Melbourne. Direct country sacks should be tagged to Melbourne as well. Both the three-letter exchange office code, ''MEL,'' and the country name, Australia, should be entered in the ''TO'' block of Tag 178.

[3] Netherlands Antilles includes Bonaire, Curacao, Saba, St. Eustatius, and St. Maarten.

EXHIBIT 284.523—MEXICO

State group	State name	State abbreviation	Package label (facing slip) line 1	Tag 116 3-letter exchange office code
1	Aguascalientes	AGS	20001 Aguascalientes AGS DIS	GDL.
	Colima	COL	28001 Colima COL DIS	GDL.
	Guanajuato	GTO	36501 Irapuato GTO DIS	GDL.
	Jalisco	JAL	CPA Occidente	GDL.
			Guadalajara DIS	GDL.
	Nayarit	NAY	63001 Tepic NAY DIS	GDL.
	Zacatecas	ZAC	98001 Zacatecas ZAC DIS	GDL.
	Remaining	CPA	Occidente Guadalajara DIS	GDL.
2	Campeche	CAM	24001 Campeche CAM DIS	MID.
	Tabasco	TAB	86001 Villahermosa TAB DIS	MID.
	Yucatan	YUC	97001 Merida YUC DIS	MID.
	Remaining		97001 Merida YUC DIS	MID.
3	Coahuila	COAH	CPA Noreste Monterrey NL DIS	MTY.
	Nuevo Leon	NL	CPA Noreste Monterrey NL DIS	MTY.
	San Luis Potosi	SLP	78001 San Luis Potosi SPL DIS	MTY.
	Tamulipas	TAM	87001 DC Victoria TAM DIS	MTY.

EXHIBIT 284.523—MEXICO—Continued

State group	State name	State abbreviation	Package label (facing slip) line 1	Tag 116 3-letter exchange office code
	Remaining	CPA	Noreste Monterrey NL DIS	MTY.
4	Chiapas	CHIS	29002 Tuxtla Gtz CHIS DIS	MEX.
	Hidalgo	HGO	42001 Pachuca HGO DIS	MEX.
	Mexico	MEX	Mexico 506 DF DIS	MEX.
	Michoacan	MICH	58001 Morelia MICH DIS	MEX.
	Morelos	MOR	62001 Cuernavaca MOR DIS	MEX.
	Oaxaca	OAX	68001 Oaxaca OAX DIS	MEX.
	Puebla	PUE	72001 Puebla PUE DIS	MEX.
	Queretaro	QRO	76001 Queretaro QRO DIS	MEX.
	Quintana Roo	QROO	77001 Chetumal QROO DIS	MEX.
	Tlaxcala	TLAX	90001 Tlaxcala TLAX DIS	MEX.
	Veracruz	VER	91701 Veracruz VER DIS	MEX.
	Remaining Mexico		506 DF DIS	MEX.
5	Durango	DGO	82001 Mazatlan SIN DIS	MZT.
	Sinaloa	SIN	82001 Mazatlan SIN DIS	MZT.
	Remaining 82001	SIN DIS	Mazatlan	MZT.
6	Distrito Federal	DF	Mexico 506 DF (Mexico City)	MEX.
7	Guerrero	GRO	39301 Acapulco de Juarez GRO DIS	ACA.
8	Baja Calif Norte	BCN	22001 Tijuana BCN DIS	N/A.
	Baja Calif Sur	BCS	23001 La Paz BCS DIS	N/A.
	Chihuahua	CHIH	32001 CD Juarez CHIH DIS	N/A.
	Sonora	SON	84001 Nogales SON DIS	N/A.

EXHIBIT 284.622—LABELING OF IPA MAIL TO USPS EXCHANGE OFFICES

IPA acceptance office 3-digit ZIP code prefix	U.S. exchange office and routing code for line 1
004–005, 010–098, 100–199, 250–267	AMC KENNEDY NY 003.
200–249, 254, 268, 283–285, 400–418, 420–427, 476–477	P&DC DULLES VA 201.
270–282, 286–326, 344, 350–397, 399	AMC ATLANTA GA 300.
424, 430–459, 460–516, 520–528, 530–532, 534–535, 537–567, 570–588, 600–620, 622–631, 633–641, 644–658, 660–662, 664–681, 683–693, 739.	AMC O'HARE 606.
700–708, 710–738, 740–799, 885	ISC DALLAS TX 753.
590–599, 821, 832–838, 970–986, 988–999	AMC SEATTLE WA 980
850, 852–853, 855–857, 859–860, 863–865, 870–875, 877–884, 889–891, 900–908, 910–928, 930–936	AMC LOS ANGELES CA 900.
800–816, 820, 822–831, 840–847, 893–898, 937–966	AMC SAN FRANCISCO CA 940.
967–969	P&DC HONOLULU 967.

Stanley F. Mires,

Chief Counsel, Legislative.

[FR Doc. 98–31438 Filed 11–24–98; 8:45 am]

BILLING CODE 7710–12–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 300

[FRL–6193–3]

National Oil and Hazardous Substance Pollution Contingency Plan; National Priorities List

AGENCY: Environmental Protection Agency.

ACTION: Notice of intent to delete the Williams Pipe Line Disposal Pit Superfund Site from the National Priorities List: request for comments.

SUMMARY: The Environmental Protection Agency (EPA) Region VIII announces its intent to delete the Williams Pipe Line Disposal Pit Superfund Site (Site) from the National Priorities List (NPL) and requests public comment on this action. The NPL constitutes Appendix B of 40 CFR part 300 which is the National Oil and Hazardous Substances Pollution Contingency Plan (NCP), which the EPA promulgated pursuant of Section 105 of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) of 1980, as amended, commonly referred to as Superfund. EPA and the state of South Dakota Department of Environment and Nature Resources (State) have determined all appropriate CERCLA response actions have been implemented and the Site poses no significant threat to public health and the environment. Therefore, no further response measures pursuant to CERCLA are appropriate. This determination does not apply to ongoing non-CERCLA petroleum assessment and cleanup work conducted under State authorities.

DATES: Comments may be submitted to EPA on or before December 28, 1998.

ADDRESSES: Comments may be mailed to: Mr. Dennis R. Jaramillo, U.S. Environmental Protection Agency, Region VIII, Mail Code 8EPR–SR, 999 18th Street, Suite 500, Denver, Co 80202–2466, Telephone: (303) 312–6580.

Comprehensive information on this site is available through the EPA Region VIII public docket. Located at the EPA Region VIII, Superfund Records Center which are available for viewing from 8 AM to 4 PM, Monday through Friday excluding holidays. Requests for documents should be directed to the

EPA Region VIII, Superfund Records Center.

The address for the Region VIII Superfund Records Center is: Superfund Records Center, U.S. Environmental Protection Agency, Region VIII, 999 18th Street, 5th Floor, Denver, Co 80202, Telephone: (303) 312–6473.

Background information from the Regional public docket is also available for viewing at the following locations:

Sioux Falls Library,
201 N. Main,
Sioux Falls, South Dakota 57105.
Contact: Mr. Doug Murdock.
South Dakota Department of Environment and Natural Resources (DENR),
Groundwater Quality Program,
Joe Foss Bldg.,
523 E. Capital,
Pierre, South Dakota 57501.
Contact: Mr. Mark Lawrensen.

FOR FURTHER INFORMATION CONTACT:
Dennis R. Jaramillo, (303) 312–6580.

SUPPLEMENTARY INFORMATION:

Table of Contents

I. Introduction

The Environmental Protection Agency (EPA), Region VIII announces its intent to delete the Williams Pipe Line Disposal Pit Superfund Site from the National Priorities List (NPL) and requests comments on this deletion. The NPL constitutes Appendix B of the National Oil and Hazardous Substance Pollution Contingency Plan (NCP), Title 40 of the Code of Federal Regulations (40 CFR), as amended. The EPA identifies sites that appear to present a significant risk to the public health, welfare, or to the environment and maintains the NPL as a list of those sites. Sites on the NPL may be the subject of remedial actions financed by the Hazardous Substance Trust Fund (fund). Pursuant to § 300.425(e)(3) of the NCP, any site deleted from the NPL remains eligible for fund-financed remedial actions in the unlikely event that future conditions at the site warrant such action.

EPA intends to delete the Site from the NPL. EPA will accept comments on this proposed deletion for thirty days following publication of this document in the **Federal Register**.

Section II of this document explains the criteria for deleting sites from the NPL. Section III discusses procedures that EPA is using for this action. Section IV discusses how the Williams Pipe Line Site meets the deletion criteria.

Deletion of sites from the NPL does not itself create, alter or revoke any individual's rights or obligations with regard to an individual site. It also does not alter the requirements under state orders.

II. NPL Deletion Criteria

The NCP establishes the criteria EPA uses to delete sites from the NPL. In accordance with 40 CFR 300.425(e), sites may be deleted from the NPL where no further response is appropriate. In making this determination, EPA will consider whether any of the following criteria have been met:

(i) EPA, in consultation with the state, has determined that that responsible or other parties have implemented all appropriate response actions required; or

(ii) All appropriate fund-financed responses under CERCLA have been implemented and EPA, in consultation with the state, has determined that no further response action by responsible parties is appropriate; or

(iii) Based on a remedial investigation, EPA, in consultation with the state, has determined that the release poses no significant threat to public health or the environment and, therefore taking remedial measures is not appropriate.

A five year-review for the Site is not warranted by EPA based on the Declaration portion of the No Action Record Of Decision (ROD), which states the five year review provision of CERCLA does not apply to a No Action remedy. If new information becomes available which indicates a need for further action, EPA may initiate remedial actions. Whenever there is a significant release from a site deleted from the NPL, the Site may be restored to the NPL without the application of the Hazard Ranking System.

III. Deletion Procedures

EPA, Region VIII will accept and evaluate public comments before making a final decision to delete the Site. The following procedures were used for the intended deletion of this Site:

(1) EPA, Region VIII has recommended deletion of the Site and has prepared the relevant documents;

(2) The State of South Dakota has concurred with EPA's recommendation for deletion;

(3) Concurrent with this National Notice of Intent to Delete, a notice has been published in a local newspaper and has been distributed to appropriate Federal, State and local officials, and other interested parties; and

(4) EPA Region VIII has made all relevant documents available in the Regional Office and local Site information repositories.

Comments received during the notice and comment period will be evaluated before making a final decision to delete. Region VIII will prepare a Responsiveness Summary, which will address the comments received during the pubic comments period, the deletion will occur after EPA publishes a Notice of Deletion in the **Federal Register**. The NPL will reflect any deletions in the next final update. Public notices and copies of the Responsive Summary will be made available by mail to local residents by EPA Region VIII.

IV. Basis for Intended Site Deletion

The following summary provided EPA's rationale for recommending deletion of the Superfund Site.

A. Site Background

The Site is located on the Williams Pipe Line 12th Street Terminal (Terminal) property at the intersection of 12th Street and Marion Road in Minnehaha County, Sioux Falls, South Dakota. The disposal Pit, or burn pond, was located in the northeast corner of the Terminal. The Terminal included an unlined pit about 40 feet in diameter and 7–9 feet deep. The Terminal also includes 42 above ground petroleum fuel tanks, a fuel loading rack, garages, an administration building, and other support structures.

In 1966, the Terminal was purchased by Williams Pipe Line Company from the Great Lakes Pipe Line Company. Historically bulk quantities of liquid fertilizers as well as petroleum products have been stored and conveyed at the Terminal including fuel oil, diesel fuel, unleaded gasoline, aviation gasoline, and jet fuel. Tanks and pipe racks at the Terminal were used to convey and store petroleum fuel to the loading racks where delivery vehicles were filled.

The burn pond was constructed in 1945 and used until 1987 to collect storm water runoff, often contaminated with spilled materials, from various areas of the Terminal. Petroleum products accumulating on the pond surface were periodically burned off.

The environmental investigations at the Terminal are regulated under both Federal and State authorities to address the petroleum releases throughout the entire Terminal. Petroleum releases are regulated by the State. In the mid-1980's investigations were performed under State authority and directed at examining the nature and extent of the contamination from petroleum releases, such as leaks or spills throughout the

Terminal. In March and November 1987, EPA conducted an investigation that identified Site related chemicals, including some CERCLA hazardous substances, in the soil and the groundwater near the burn pond. Based on these results, the Site was placed on the NPL on August 30, 1990 (55 FR 35502). In November 1988 Williams Pipe Line Company signed a Settlement Agreement with the State of South Dakota and the City of Sioux Falls for investigation and cleanup of petroleum spills throughout the Terminal. The response actions taken pursuant to the Settlement Agreement consisted of the installation of recovery wells and an interception trench.

Williams Pipe Line signed an Administrative Order on Consent on April 25, 1991 to conduct a CERCLA Remedial Investigation (RI) and Feasibility Study (FS). The purpose of the RI, which was conducted in two phases from 1991 to 1993, was to more fully investigate the nature and extent of the hazardous substances contamination in the burn pond area. Through the RI, arsenic and benzene were identified as the main contaminants of concern, however, benzene is a petroleum constituent and addressed at the Site under State authority. EPA issued a Record of Decision (ROD) for the Site on September 29, 1994. The selected remedy for the Site was No Action with a minimum of two years of quarterly groundwater monitoring of arsenic. The ROD determination that no action was warranted applies only to CERCLA and not to state authority or other regulations and statutes. For a detailed understanding of the selected remedy, refer to the ROD dated September 29, 1994.

B. Characterization of Risks

Based on the Base Line Risk Assessment (BRA), the RI concluded that there was no current or likely future exposure to groundwater contaminated from arsenic. Since no exposure exists or is likely, there is no unacceptable risk. As an added measure of confidence, the ROD required a minimum of two years of quarterly groundwater monitoring to assure that no unacceptable levels of arsenic were moving from the Terminal.

Williams Pipe Line completed ten quarters of groundwater sampling in December 1997. These groundwater sampling events show that all monitoring wells that were tested for arsenic are below the Maximum Contaminant Level (MCL) of 50 µg/l, with the exception of one on-site monitoring well, P–11. This well has shown a decline in arsenic levels over the ten quarters of groundwater monitoring, with the current arsenic level at 150 µg/l. The offsite monitoring wells show for the ten quarters of groundwater sampling that the arsenic present in P–11 is not migrating off-site, due in part to a collection trench installed under the 1988 Settlement Agreement addressing hydrocarbon spills. The off-site wells show that levels of arsenic concentration are at 2 µg/l.

EPA is satisfied that the monitoring conducted pursuant to the ROD met its objectives to assure that the arsenic was not migrating off-site, and that there would be no unacceptable risk in the future.

Notwithstanding the declining levels of arsenic in well P–11, its capture by the ongoing hydrocarbon collection system administered under the State Settlement Agreement, and monitoring results clearly demonstrating no migration of arsenic from P–11 to off-site monitoring wells, Williams Pipe Line and the State have amended their settlement agreement for the future monitoring of arsenic due to its current elevated level in well P–11.

V. Conclusion

One of the three criteria for deletion specifies that EPA may delete a site from the NPL if the remedial investigation has shown that the release poses no significant threat to public health or the environment and therefore, taking remedial measures is not appropriate. EPA, with concurrence of the State believes that this criterion for deletion has been met.

Subsequently, EPA is proposing deletion of this Site from the NPL. Documents supporting this action are available from the docket.

Dated: November 18, 1998.

William P. Yellowtail,

Regional Administrator, Region VIII.

[FR Doc. 98–31540 Filed 11–24–98; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF TRANSPORTATION

Bureau of Transportation Statistics

49 CFR Part 1420

[Docket No. BTS–98–4659]

RIN 2139–AA05

Revision to Reporting Requirements for Motor Carriers of Property; Extension of Comment Period

AGENCY: Bureau of Transportation Statistics, DOT.

ACTION: Extension of comment period.

SUMMARY: The Bureau of Transportation Statistics (BTS) is extending the comment period for its proposed revisions to the reporting requirements for motor carriers of property. As initially published in the **Federal Register** of November 3, 1998 (63 FR 59263), the comments were to be received by December 3, 1998. BTS is extending the comment period until January 15, 1999, in order to give all interested persons the opportunity to comment fully.

DATES: Written comments must be submitted by January 15, 1999.

ADDRESSES: Please direct comments to the Docket Clerk, Docket No. BTS–98–4659, Department of Transportation, 400 Seventh Street, SW., Room PL–401, Washington, DC 20590, from 10 a.m. to 5 p.m. ET, Monday through Friday, except Federal Holidays.

Comments should identify the regulatory docket number and be submitted in duplicate to the address listed above. Commenters wishing the Department to acknowledge receipt of their comments must submit with those comments a self-addressed stamped postcard on which the following statement is made: Comments on Docket BTS–98–4659. The Docket Clerk will date stamp the postcard and mail it back to the commenter.

If you wish to file comments using the Internet, you may use the U.S. DOT Dockets Management System website at http://dms.dot.gov. Please follow the instructions online for more information.

FOR FURTHER INFORMATION CONTACT: David Mednick, K–2, Bureau of Transportation Statistics, 400 Seventh Street, SW., Washington, DC 20590; (202) 366–8871; fax: (202) 366–3640; e-mail: david.mednick@bts.gov.

SUPPLEMENTARY INFORMATION:

I. Electronic Access

All comments submitted will be available for examination in the Rules Docket both before and after the closing date for comments. Internet users can access all comments received by the U.S. DOT Dockets, Room PL–401, at the address: http://dms.dot.gov. Please follow the instructions online for more information and help.

An electronic copy of this document may be downloaded using a modem and suitable communications software from the **Federal Register** Electronic Bulletin Board Service at (202) 512–1661. If you have access to the Internet, you can obtain an electronic copy at http://www.bts.gov/mcs/rulemaking.htm.

II. Extension of Comment Period

Several parties who have been actively involved in the proceedings relating to the proposed revisions have requested additional time for their organizations to review the proposal and prepare and coordinate their responses. BTS is therefore extending the comment period to January 15, 1999, a period that includes additional time to avoid a deadline occurring immediately after the holidays.

List of Subjects in 49 CFR Part 1420

Motor carriers, Reporting and classification.

Issued in Washington, DC, on November 12, 1998.

Robert A. Knisely,

Deputy Director.

[FR Doc. 98–31522 Filed 11–24–98; 8:45 am]

BILLING CODE 4910–FE–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

Endangered and Threatened Wildlife and Plants: Notice of Finding on a Petition To Delist the Wood Bison From the List of Threatened and Endangered Species

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of petition finding.

SUMMARY: The U.S. Fish and Wildlife Service (Service) announces a 90-day finding for a petition to delist the wood bison (*Bison bison athabascae*) pursuant to the Endangered Species Act of 1973, as amended. The Service finds that the petitioner did not supply substantial information to indicate that the delisting of wood bison may be warranted.

DATES: The finding announced in this document was made on November 12, 1998. Comments and information concerning this petition finding may be submitted until further notice.

ADDRESSES: Questions, comments, or information concerning this petition should be sent to the Office of Scientific Authority, U.S. Fish and Wildlife Service, Mail Stop ARLSQ–750, Washington, D.C. 20240. The petition, finding, and supporting information are available for public inspection, by appointment, during normal business hours at the Office of Scientific Authority, 4401 N. Fairfax Dr., Rm. 750, Arlington, Virginia.

FOR FURTHER INFORMATION CONTACT: Dr. Javier Alvarez, Office of Scientific Authority, U.S. Fish and Wildlife Service, Mail Stop ARLSQ–750, Washington, D.C. 20240 (phone: 703–358–1708; fax: 703–358–2276; e-mail: Javier__Alvarez@mail.fws.gov.

SUPPLEMENTARY INFORMATION:

Background

Section 4(b)(3)(A) of the Endangered Species Act (ESA) of 1973, as amended (16 U.S.C. 1531 *et seq.*), requires that the U.S. Fish and Wildlife Service (Service) make a finding on whether a petition to list, delist, or reclassify a species presents substantial scientific or commercial information to demonstrate that the petitioned action may be warranted. This finding is to be based on all information available to the Service at the time the finding is made. This finding is to be made within 90 days of receipt of the petition, and the finding is to be published promptly in the **Federal Register**.

The Service has made a 90-day finding on a petition to delist the wood bison (*Bison bison athabascae*) populations in Canada, currently listed as endangered under ESA. The petition was submitted by Mr. Gary A. Plumlee, Anderson, Indiana, and was received by the Service on May 14, 1998.

The document provided by the petitioner to substantiate his petition consisted primarily of a copy of the proposal submitted by the Government of Canada to the Tenth Meeting of the Conference of the Parties to the Convention on International Trade in Endangered Species (CITES), held in Harare, Zimbabwe, from 9–20 June, 1997. The proposal, which was adopted at the Tenth Conference, requested the transfer of wood bison from Appendix I to Appendix II of CITES to allow commercial trade of this subspecies. The information contained in the CITES proposal originated primarily from research and management conducted by Canadian federal, provincial and territorial governments as part of a recovery program for the wood bison.

The Service agrees that wood bison populations are capable of growing rapidly when protected from over-hunting. Historically found in the interior plains of northwestern North America (northwestern Saskatchewan, northern Alberta, northeastern British Columbia, and southwestern Northern Territories), the wood bison was almost extirpated by Europeans during the late 19th century. Of approximately 200,000 wood bison believed to exist in Canada in 1800, the population was reduced to about 250 animals at the beginning of this century. Under government protection (it currently has legal protection in British Columbia, Yukon Territory, and Northwest Territories; it is designated as threatened according to the Committee on the Status of Endangered Wildlife in Canada) this population has grown to an estimated 2,500 wood bison today, including 1,800 animals in seven wild herds, and around 700 held in captivity. An additional 2,300 animals exist in free-ranging populations that originate from wood bison exposed to hybridization with plains bison *(Bison bison bison)* and disease (tuberculosis and brucellosis). As a result of these increases in population, the Canadian government opened regulated hunting of wood bison in 1988, with an annual quota of 47 animals to be allocated among native peoples, local residents, and non-resident trophy hunters accompanied by native people.

The Service also agrees that illegal trade in this subspecies does not appear to be a significant problem. CITES records reveal that a very small number of live wood bison or their parts have entered international trade since it was included in Appendix I of CITES in 1973.

When referring to the downlisting of the wood bison from Appendix I to Appendix II of CITES, the petitioner incorrectly states that the wood bison was reclassified as threatened under CITES. CITES Appendix II is not equivalent to threatened under ESA. Moreover, although Parties to CITES consider the level of threat when listing species, the listing criteria are different. Listing criteria adopted by Parties to CITES in November 1994 (Resolution 9.24) clearly state that a species can be placed in CITES appendices only if it is threatened or has the potential to be threatened by trade. The Canadian proposal to downlist the subspecies to Appendix II was adopted in June 1997 based on these new criteria.

Although over-hunting and illegal trade are no longer considered threats to the species, recovery of the species is still limited by habitat availability and quality. Approximately 34 percent of the wood bison's historical range is no longer available because of agriculture and urban development, a problem that is expected to increase. A further 27 percent is temporarily unavailable because of the presence of disease. Several reintroduced populations are threatened by the risk of infection with tuberculosis and brucellosis, including the largest at Mackenzie Bison Sanctuary in the Northwestern Territories, which contains 1,300 of the remaining 1,800 free-ranging non-hybridized wood bison. Therefore, buffer zones are currently being established to separate diseased and

disease-free herds. This leaves only about 39 percent of the species' historical range available for recovery.

The official Canadian recovery plan developed by the Wood Bison Recovery Team calls for the establishment of four or more free-ranging herds of wood bison in suitable habitat in the original range, each herd containing or exceeding the minimum viable population (MVP) of 400 animals. The Canadian CITES proposal states that only the population at Mackenzie Bison Sanctuary exceeds the MVP, with the other four reestablished herds having ''the potential to meet or exceed that number by the year 2000.''

When evaluating petitions for delisting or downlisting of species under the ESA, the Service's guidelines state that a ''not-substantial information'' finding be made when already established recovery objectives have not been met (see page 14, section 2(a)(1) of Endangered Species Petition Management Guidance—U.S. Fish and Wildlife Service and National Marine Fisheries Service, July 1996). The Canadian recovery plan goals for the wood bison have not been met yet. Therefore, the Service finds that the petitioner did not supply substantial information to indicate that the petitioned action may be warranted. At such time when the free-ranging disease-free populations of wood bison meet the recovery plan criteria, the Service may initiate such a downlisting. In the meantime and within available resources, the Service will evaluate the advisability of downlisting the captive population of wood bison from endangered to threatened, with a special rule to allow the import to the United States of captive-bred wood bisons.

References Cited: 1997. Prop. 10.35. Proposal for the transfer of wood bison (*Bison bison athabascae*) from Appendix I to Appendix II of the Convention on International Trade in Endangered Species submitted by the Government of Canada at the Tenth Meeting of the Conferences of the Parties held in Harare, Zimbabwe, 9–20 June, 1997.

Author: The primary author of this document is Dr. Javier Alvarez (see **ADDRESSES** section).

Authority: The authority for this action is the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*).

Dated: November 12, 1998.

John G. Rogers,

Director.

[FR Doc. 98–31282 Filed 11–24–98; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

RIN 1018–AF04

Endangered and Threatened Wildlife and Plants; Extension of Comment Period and Notice of Public Hearings on Proposed Rule To Remove the Peregrine Falcon in North America From the List of Endangered and Threatened Wildlife

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Proposed rule; extension of comment period and notice of public hearings.

SUMMARY: The U.S. Fish and Wildlife Service (Service) gives notice that the comment period on the proposed rule to remove the peregrine falcon (*Falco peregrinus*) in North America from the list of Endangered and Threatened Wildlife will be extended and that two public hearings will be held. The extension and hearings will allow all interested parties to submit oral or written comments on the proposal.

DATES: The comment period for this proposal will be extended an additional 60 days from November 24, 1998 to January 23, 1999. Comments must be received by the closing date. Any comments received after the closing date may not be considered in the final decision on the proposal. The public hearings will be held from 7 p.m. to 9 p.m. on December 3, 1998 in Madison, Wisconsin and December 8, 1998, in Concord, New Hampshire. Both meetings will be preceded by an informational session from 6 p.m. to 7 p.m..

ADDRESSES: The public hearings will be held at the Madison Area Technical College, 3550 Anderson Street, Room 129D, Madison, Wisconsin and the New Hampshire Department of Fish and Game East-West Conference Room, 2 Hazen Drive, Concord, New Hampshire. Written comments should be sent to Diane Noda, Field Supervisor, U.S. Fish and Wildlife Service, Ventura Fish and Wildlife Office, 2493 Portola Road, Suite B, Ventura, California 93003. Comments and materials received will be available for public inspection, by appointment, during normal business hours at the above Service address.

FOR FURTHER INFORMATION CONTACT: Robert Mesta, at the above Ventura, California address, phone 805/644–1766, facsimile 805/644–3958.

SUPPLEMENTARY INFORMATION:

Background

On August 26, 1998, the U.S. Fish and Wildlife Service (Service) published a proposal in the **Federal Register** to remove the peregrine falcon (*Falco peregrinus*) in North America from the List of Endangered and Threatened Wildlife (63 FR 45446). The Service proposed this action because the available data indicate that this species has recovered following restrictions on organochlorine pesticides in the United States and Canada, protections provided by the Endangered Species Act of 1973, as amended (Act), and the implementation of successful management activities, including the reintroduction of captive-bred and relocated wild hatchling peregrine falcons. Currently, a minimum of 1,388 American peregrine falcon pairs are found in Alaska, Canada, and the Western United States, and a minimum of 174 peregrine falcon pairs are found in the Eastern United States. At least 31 peregrine falcon pairs occur in 6 Midwestern States not covered by the Eastern Peregrine Falcon Recovery Plan or the two recovery plans for the American peregrine falcon in the Western United States. Overall productivity goals were met or exceeded in four American peregrine falcon recovery plans, and most recovery goals for the eastern peregrine falcon population have been met.

If made final, the action proposed will remove the American peregrine falcon (*Falco peregrinus anatum*) as an endangered species and will remove the designation of endangered due to similarity of appearance for any free-flying peregrine falcons within the 48 conterminous States from the List of Endangered and Threatened Wildlife. The action proposed will remove all Endangered Species Act protections from all subspecies and populations of *Falco peregrinus* in North American. The proposed action will not affect protection provided to this species by the Migratory Bird Treaty Act (MBTA). The proposal also includes a proposed minimum 5-year post delisting monitoring program as required for species that are delisted due to recovery. Monitoring will include population trends, productivity, contaminant exposure, and take for falconry.

Pursuant to 50 CFR 424.16(c)(2), the Service may extend or reopen a comment period upon finding that there is good cause to do so. Full participation of the affected public in a species' listing or delisting, allowing the Service to consider the best scientific and commercial data available in making a

final determination on the proposed action, is deemed as sufficient cause.

Section 4(b)(5)(E) of the Act (16 U.S.C. 1531 *et seq.*), requires that a public hearing be held if it is requested within 45 days of the publication of a proposed rule. In response to two such requests, the Service will hold public hearings on the dates and at the addresses described in the **DATES** and **ADDRESSES** sections above. Anyone wishing to make an oral statement for the record is encouraged to provide a written copy of their statement and present it to the Service at the start of the hearing. In the event there is a large attendance, the time allotted for oral statements may have to be limited. Oral and written statements receive equal consideration. There are no limits to the length of written comments presented at the hearings or mailed to the Service. Legal notices announcing the dates, times, and locations of the hearings will be published in newspapers concurrently with the **Federal Register** notice.

Extension of the comment period will enable the Service to complete the peer review process for the proposed delisting action. The current comment period on this proposal closes on November 24, 1998. The Service is extending the public comment period. Written comments may be submitted until January 23, 1998, to the Service office in the **ADDRESSES** section.

Author. The primary author of this notice is Robert Mesta (see **ADDRESSES**).

Authority: The authority for this action is the Endangered Species Act of 1973, as amended (16 U.S.C. 1531–1544).

Dated: November 18, 1998.

Anne Badgley,

Regional Director, Fish and Wildlife Service.

[FR Doc. 98–31478 Filed 11–24–98; 8:45 am]

BILLING CODE 4310–55–P

Notices

Federal Register

Vol. 63, No. 227

Wednesday, November 25, 1998

This section of the FEDERAL REGISTER contains documents other than rules or proposed rules that are applicable to the public. Notices of hearings and investigations, committee meetings, agency decisions and rulings, delegations of authority, filing of petitions and applications and agency statements of organization and functions are examples of documents appearing in this section.

DEPARTMENT OF AGRICULTURE

Forest Service

Department of the Interior

Bureau of Land Management

Survey and Manage Strategy for National Forests and Bureau of Land Management Districts Within the Range of the Northern Spotted Owl

AGENCIES: Forest Service, USDA; Bureau of Land Management, USDI.

ACTION: Notice of intent to prepare an environmental impact statement.

SUMMARY: The Forest Service and the Bureau of Land Management (BLM) will prepare an environmental impact statement (EIS) to be used in considering a proposal to make changes in two of the mitigation measures first adopted in the Standards and Guidelines for Management of Habitat for Late-Successional and Old-Growth Forest Related Species Within the Range of the Northern Spotted Owl (Northwest Forest Plan), and then incorporated into subsequent planning documents of the Forest Service and BLM. These changes affect the Survey and Manage and Protection Buffer species provisions of the Standards and Guidelines and are based on new information that has been collected in the past four years of implementation. The purpose of these proposed changes is to update the conservation strategies in the Northwest Forest Plan and to continue to meet all of the objectives articulated in the Northwest Forest Plan. The selected alternative may result in amendment to agency land and resource management plans for National Forests and BLM Districts within the range of the northern spotted owl.

DATES: Comments concerning the scope of the analysis should be received in writing by December 24, 1998.

ADDRESSES: Send written comments concerning this proposal to Bill Torgersen, Project Manager, P.O. Box 3623, Portland, Oregon 97203.

FOR FURTHER INFORMATION CONTACT: Cynthia Henchell, EIS Team Leader, P.O. Box 3623, Portland, Oregon 97203, phone (503) 808–2490.

SUPPLEMENTARY INFORMATION: This EIS will evaluate the Survey and Manage and Protection Buffer species Standards and Guidelines as they are applied to National Forest System Lands (NFS) and public lands administered by the BLM within the range of the northern spotted owl. The selected alternative may result in an amendment to Land Management Plans (LMPs) for the Gifford Pinchot, Mount Baker-Snoqualmie, Mount Hood, Olympic, Rogue River, Siuslaw, Siskiyou, Six Rivers, Umpqua, and Willamette National Forests and portions of the Deschutes, Okanogan, Wenatchee, Winema, Klamath, Lassen, Mendocino, Modoc, and Shasta-Trinity National Forests implementing the Northwest Forest Plan.

The Record of Decision for this EIS would amend the BLM Resource Management Plans (RMPs) for the Salem, Eugene, Coos Bay, Roseburg, and Medford Districts, and the Klamath Falls Field Office of the Lakeview District in Oregon. In addition, the Record of Decision for this EIS would amend the plans for the Redding Field Office, Arcata Field Office, King Range National Conservation Area, and Ukiah Field Office within the grouping of independent Northern California Field Offices known as NORCAL.

New information, such as the range and abundance of species listed in Table C–3 of the Survey and Manage and Protection Buffer species Standards and Guidelines of the Northwest Forest Plan, continues to be compiled from surveys and analyzed following four years of implementation of these provisions. This new information indicates that adhering to some of the present Standards and Guidelines for Survey and Manage and Protection Buffer species may not fully meet both the need to protect old growth-related species and the need for forest products, which are the dual goals of the Northwest Forest Plan. The present Standards and Guidelines for Survey and Manage and Protection Buffer species require substantial reductions in the availability of resources from Federal lands; including recreation, timber, prescribed fire, mining, grazing and restoration activities, while providing little corresponding benefit to the species the provisions were designed to protect. Moreover, there is a need to clarify the Survey and Manage and Protection Buffer species (Standards and Guidelines to design an orderly and credible adaptive management process to change or revise the status of species and management of Survey and Manage and Protection Buffer species as we gain new insights to their needs.

The proposed action would alter certain procedures under the Survey and Manage provisions so that the agencies can more rapidly respond to new information concerning the population status and habitat requirements of species associated with late-successional and old-growth forest habitat of the Pacific Northwest. The proposed action would merge Protection Buffer species into the protective measures provided under the Survey and Manage provisions established under the Northwest Forest Plan. The proposed action may include the initial changes to species' categorization which would be made under the new adaptive management procedures to be adopted for the Survey and Manage mitigation measure, such as moving a species from one Component to another. These changes would be based on the information which has been developed since adoption of the Northwest Forest Plan.

Alternatives other than the proposal and the ''no action'' alternative have not been developed. The public is invited to propose alternatives for consideration during the scoping process.

The scoping process as defined in the Council of Environmental Quality's National Environmental Policy Act (NEPA) implementing regulations will be used to identify issues for developing a range of alternatives that consider the underlying need for this action. A scoping notice will be prepared and circulated to mailing lists of individuals and organizations previously expressing an interest in National Forest LMPs and BLM RMPs within the range of the northern spotted owl. The scoping notice along with background information will also be posted on the Internet: http://or.blm.gov/information.htm. A scoping meeting will not be held. For comments to be

most useful in this analysis, they should be submitted in writing before December 24, 1998.

The Forest Service and BLM will be joint lead agencies for this analysis. The two agencies will consult with the U.S. Fish and Wildlife Service and National Marine Fisheries Service pursuant to the Endangered Species Act. Other Federal agencies, such as the Pacific Northwest and Pacific Southwest Research Station, Bureau of Indian Affairs, National Park Service, Environmental Protection Agency (EPA), U.S. Army Corps of Engineers, Natural Resources Conservation Service, the U.S. Geological Survey Biological Resources Division, EPA Research Laboratory, and Tribal, local, and state governments will also be involved.

The responsible officials for NFS lands will be the Regional Forester, Pacific Northwest Region, P.O. Box 3623, Portland, Oregon 97208 and the Regional Forester, Pacific Southwest Region, 630 Sansome Street, San Francisco, CA 94111. The responsible official for public lands administered by the BLM will be the State Director for Oregon and Washington, P.O. Box 2965, Portland, Oregon 97208 and the State Director for California, 2135 Butano Drive, Sacramento, CA 95825.

The draft EIS is expected to be filed with the EPA approximately February 1999 and will be available for public review at that time. The comment period on the draft EIS will be 90 days from the date the EPA publishes the notice of availability in the **Federal Register.**

The Forest Service and BLM believe it is important to give reviewers notice of several court rulings related to public participation in the environmental review process. First, reviewers of draft EISs must structure their participation in the environmental review of the proposal so that it is meaningful and alerts an agency to the reviewer's position and contentions. *Vermont Yankee Nuclear Power Corp.* v. *NRDC,* 435 U.S. 519, 533 (1978). Also, environmental objections that could be raised at the draft EIS stage may be waived or dismissed by the courts. *City of Angoon* v. *Hodel,* 803 F.2nd 1016, 1022 (9th Cir. 1986) and *Wisconsin Heritages, Inc.* v. *Harris,* 490 F. Supp. 1334, 1338 (E.D. Wis. 1980). Because of these court rulings, it is important that those interested in this proposed action participate by the close of the 90-day comment period on the draft EIS so that substantive comments and objections are made available to the Forest Service and BLM at a time when the agencies can meaningfully consider substantive comments and objectives and respond to them in the final EIS.

To assist the Forest Service and BLM in identifying and considering issues and concerns on the proposed action, comments on the draft EIS should be as specific as possible. It is also helpful if comments refer to specific pages or chapters of the draft statement. Comments may also address the adequacy of the draft EIS or the merits of the alternatives formulated and discussed in the statement. Reviewers may wish to refer to the Council on Environmental Quality Regulations for implementing the procedural provisions of NEPA at 40 CFR 1503.3 in addressing these points.

It is expected that the final EIS will be filed with the EPA approximately October 1999. There will be two Records of Decisions issued; one for NFS lands and one for BLM public lands in Oregon, Washington and California. The decision for National Forest System Lands will be subject to Forest Service appeal regulations (36 CFR 217). The decision in regard to lands managed by the BLM would be subject to the protest procedures in BLM's planning regulations (43 CFR 1610.5–2).

Dated: November 16, 1998.

Robert W. Williams,

Regional Forester, R–6, Forest Service.

Dated: November 16, 1998.

William L. Bradley,

Deputy State Director, Resource Planning, Use & Protection, Bureau of Land Management.

[FR Doc. 98–31199 Filed 11–24–98; 8:45 am]

BILLING CODE 3410–11–M

BROADCASTING BOARD OF GOVERNORS

Sunshine Act Meeting

DATE AND TIME: November 30–December 1, 1998; 3:00 p.m. and 9:00 a.m.

PLACE: The Cohen Building, Room 3321, 330 Independence Ave., S.W., Washington, D.C. 20547.

Closed Meeting: The members of the Broadcasting Board of Governors (BBG) will meet in closed session to review and discuss a number of issues relating to U.S. Government-funded non-military international broadcasting. They will address internal procedural, budgetary, and personnel issues, as well as sensitive foreign policy issues relating to potential options in the U.S. international broadcasting field. This meeting is closed because if open it likely would either disclose matters that would be properly classified to be kept secret in the interest of foreign policy under the appropriate executive order (5 U.S.C. 552b. (c)(1)) or would disclose information the premature disclosure of which would be likely to significantly frustrate implementation of a proposed agency action. (5 U.S.C. 552b. (c)(9)(B)) In addition, part of the discussion will relate solely to the internal personnel and organizational issues of the BBG or the International Broadcasting Bureau. (5 U.S.C. 552b.(c)(2) and (6)).

CONTACT PERSON FOR MORE INFORMATION: Persons interested in obtaining more information should contact Brenda Massey or John Lindburg at (202) 401–3736.

Dated: November 23, 1998.

Marc B. Nathanson,

Chairman.

[FR Doc. 98–31669 Filed 11–23–98; 3:38 pm]

BILLING CODE 8230–01–M

COMMISSION ON CIVIL RIGHTS

Agenda and Notice of Public Meeting of the New York State Advisory Committee

Notice is hereby given, pursuant to the provisions of the rules and regulations of the U.S. Commission on Civil Rights, that a meeting of the New York State Advisory Committee to the Commission will convene at 1 p.m. and adjourn at 4:30 p.m. on December 11, 1998, in the Mayor's Conference Room, City Hall, Albany, New York 12207. The purpose of the meeting is to receive information on the status of civil rights in the State, to plan future activity, and to review the final draft of a report on section 8 housing.

Persons desiring additional information, or planning a presentation to the Committee, should contact Committee Chairperson M.D. (Lita) Taracido, 212–645–8999, or Ki-Taek Chun, Director of the Eastern Regional Office, 202–376–7533 (TDD 202–376–8116). Hearing-impaired persons who will attend the meeting and require the services of a sign language interpreter should contact the Regional Office at least five (5) working days before the scheduled date of the meeting.

The meeting will be conducted pursuant to the provisions of the rules and regulations of the Commission.

Dated at Washington, DC, November 16, 1998.

Carol-Lee Hurley,

Chief, Regional Programs Coordination Unit.

[FR Doc. 98–31537 Filed 11–24–98; 8:45 am]

BILLING CODE 6335–01–P

DEPARTMENT OF COMMERCE

Submission for OMB Review; Comment Request

The Department of Commerce (DOC) has submitted to the Office of Management and Budget (OMB) for clearance the following proposal for collection of information under provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35).

Agency: Office of the Secretary.

Title: Revision to the Commerce Acquisition Regulation (CAR) clause at 1352.217–109 Entitled ''Insurance Requirements.''

Agency Form Number: N/A.

OMB Approval Number: 0690–0010.

Type of Request: Extension of a currently approved collection.

Burden: 30 hours.

Number of Respondents: 30.

Average Hours Per Response: 1 hour.

Needs and Uses: The Department of Commerce requires in its contracts for construction, alteration and repair of ships each selected contractor to procure and maintain insurance as specified in the CAR clause 1352.217–109, ''Insurance Requirements.'' The clause also requires the contractor to submit proof of this insurance to the contracting officer before the work under the contract is authorized to start.

Affected Public: Businesses or other for-profit and not-for-profit institutions.

Frequency: On occasion.

Respondent's Obligation: Required to obtain or retain benefits.

OMB Desk Officer: David Rostker, (202) 395–3897.

Copies of the above information collection proposal can be obtained by calling or writing Linda Engelmeier, DOC Forms Clearance Officer, (202) 482–3272, Department of Commerce, Room 5327, 14th and Constitution Avenue, N.W., Washington, D.C. 20230.

Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to David Rostker, OMB Desk Officer, Room 10202, New Executive Office Building, 725 17th Street, N.W., Washington, D.C. 20503.

Dated: November 18, 1998.

Linda Engelmeier,

Departmental Forms Clearance Officer, Office of the Chief Information Officer

[FR Doc. 98–31439 Filed 11–26–98; 8:45 am]

BILLING CODE 3510–EC–P

DEPARTMENT OF COMMERCE

Submission for OMB Review; Comment Request

The Department of Commerce (DOC) has submitted to the Office of Management and Budget (OMB) for clearance the following proposal for collection of information under provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35).

Agency: Office of the Secretary.

Title: Department of Commerce Unique Solicitations: Requests for Proposals (RFPs) or Invitations for Bids (IFBs).

Agency Form Number: N/A.

OMB Approval Number: 0690–0008.

Type of Request: Extension of a currently approved collection.

Burden: 5,000.

Number of Respondents: 250.

Average Hours Per Response: 20 hours.

Needs and Uses: The Commerce Department is required by the Competition in Contracting Act (CICA) (Pub. L. 98–369) requires each agency to seek maximum competition when issuing contracts for supplies and services. The Department is required to issue solicitations which require prospective contractors to prepare and submit technical, business and cost proposals as part of the Federal acquisition process for awarding these contracts. In soliciting proposals, the Department collects, from each competing contractor, the information necessary to evaluate the proposals and make a decision as to which proposal offers the most benefit to the Government. There are seven official Commerce-unique clauses which place a paperwork burden on the contractor. The use of these clauses provide a less burdensome way for potential contractors to respond to the Government's request for information concerning the evaluation of bids and proposals; expedite solicitation and contract preparation; and facilitate contract negotiation, administration and review.

Affected Public: Businesses or other for-profit and not-for-profit institutions.

Frequency: On occasion.

Respondent's Obligation: Required to obtain or retain benefits.

OMB Desk Officer: David Rostker, (202) 395–3897.

Copies of the above information collection proposal can be obtained by calling or writing Linda Engelmeier, DOC Forms Clearance Officer, (202) 482–3272, Department of Commerce, Room 5327, 14th and Constitution Avenue, N.W., Washington, D.C. 20230.

Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to David Rostker, OMB Desk Officer, Room 10202, New Executive Office Building, 725 17th Street, N.W., Washington, D.C. 20503.

Dated: November 18, 1998.

Linda Engelmeier,

Departmental Forms Clearance Officer, Office of the Chief Information Officer.

[FR Doc. 98–31440 Filed 11–24–98; 8:45 am]

BILLING CODE 3510–EC–P

DEPARTMENT OF COMMERCE

Economic Development Administration

Notice of Petitions by Producing Firms for Determination of Eligibility To Apply for Trade Adjustment Assistance

AGENCY: Economic Development Administration (EDA), Commerce.

ACTION: To Give Firms an Opportunity To Comment.

Petitions have been accepted for filing on the dates indicated from the firms listed below.

LIST OF PETITION ACTION BY TRADE ADJUSTMENT ASSISTANCE FOR PERIOD 10/15/98–11/18/98

Firm name	Address	Date petition accepted	Product
Burley Design Cooperative, Inc	4020 Stewart Rd., Eugene, OR 97402	10/30/98	Bicycle trailers, TANDEMS and Rain Gear.
Ark Manufacturing, Inc	3780 Boone Rd., SE. Salem, OR 97301	10/21/98	Horse tack, and dog and cat equipment.
Tech Fab, Inc	1 W. Main St., South Hadley, MA 01075	10/22/98	Hand held air guns used for cleaning, blowing, drying and general maintenance.

LIST OF PETITION ACTION BY TRADE ADJUSTMENT ASSISTANCE FOR PERIOD 10/15/98–11/18/98—Continued

Firm name	Address	Date petition accepted	Product
Electro Technology, Inc	1830 Amos Dr., Muscle Shoals, AL 35661.	10/22/98	Custom electronic transformers.
A. W. Enterprises, Inc	6543 S. Laramie Ave., Bedford Park, IL 60638.	10/22/98	Leather, nylon, wood and vinyl cases.
Fotodyne, Incorporated	950 Walnut Ridge Dr., Hartland, WI 53029.	10/22/98	Chemical analysis and imaging instrumentation systems.
Circuits Engineering, Inc	1832 180th St., SE., Bothell, WA 98012 ..	10/26/98	Printed circuit boards.
Darius Enterprises, Inc	38 Lafayette St., Hudson Falls, NY 12839	10/27/98	Automobile engines.
Dixon Manufacturing, Inc	701 Clinton St., Arkadelphia, AR 71923 ..	10/28/98	School and nurses uniforms (dresses), and industrial aprons.
Precision Design, Inc	P.O. Box 2064, Weatherford, OK 73096	10/29/98	Control surface parts for airplanes, I.E. ailerons, flaps, gears doors and rudders.
Lube Systems, Inc	93 Stickles Pond Rd., Newton, NJ 07860	10/29/98	Industrial lubricating machinery.
Dick's Pattern	620 Cross St., Beloit, WI 53511	10/30/98	Patterns for the foundry industry.
E & F Electronics, Inc	55 S. State Ave., Indianapolis, IN 46201	10/30/98	Transformers and electronic coils.
Good Lad Company	431 East Tioga St., Philadelphia, PA 19134.	10/30/98	Children's clothing.
Perky Cap Company, Inc	186 Industrial Blvd., SE., Eatonton, GA 31024.	11/03/98	Caps, visors, curtains.
Mastercraft Mold, Inc	3301 W. Vernon Ave., Phoenix, AZ 85009.	11/03/98	Plastic injection molds and parts landscaping and gaming equipment.
Plastics Development, Inc	10360 SW. Spokane Court, Tualatin, OR 97062.	11/10/98	Custom injection molds—electronic, automotive, medical, sports, toy and transportation parts.
Cellini, Inc	215 Jefferson Blvd., Warwick, RI 02888 ..	11/13/98	Silver Jewelry.
Robison Solar Systems	404 Loomis Rd., Weatherford, OK 73096	11/16/98	Submersible pumps powered by solar modules.
Mackenzie Specialty Castings	19430 63rd Ave., NE, Arlington, WA 98223.	11/18/98	Syphon tubes, steel ingot molds and other castings.

The petitions were submitted pursuant to Section 251 of the Trade Act of 1974 (19 U.S.C. 2341). Consequently, the United States Department of Commerce has initiated separate investigations to determine whether increased imports into the United States of articles like or directly competitive with those produced by each firm contributed importantly to total or partial separation of the firm's workers, or threat thereof, and to a decrease in sales or production of each petitioning firm.

Any party having a substantial interest in the proceedings may request a public hearing on the matter. A request for a hearing must be received by Trade Adjustment Assistance, Room 7315, Economic Development Administration, U.S. Department of Commerce, Washington, D.C. 20230, no later than the close of business of the tenth calendar day following the publication of this notice.

The Catalog of Federal Domestic Assistance official program number and title of the program under which these petitions are submitted is 11.313, Trade Adjustment Assistance.

Dated: November 18, 1998.

Anthony J. Meyer,

Coordinator, Trade Adjustment and Technical Assistance.

[FR Doc. 98–31479 Filed 11–24–98; 8:45 am]

BILLING CODE 3510–24–M

DEPARTMENT OF COMMERCE

Bureau of Export Administration

Materials Technical Advisory Committee; Notice of Partially Closed Meeting

The Materials Technical Advisory Committee will meet December 17, 1998, 10:30 a.m., Herbert C. Hoover Building, Room 6029, 14th Street between Constitution & Pennsylvania Avenues, N.W., Washington, D.C. The Committee advises the Office of the Assistant Secretary for Export Administration with respect to technical questions that affect the level of export controls applicable to materials and related technology.

Agenda

General Session

1. Opening remarks by the Chairman.
2. Presentation of papers and comments by the public.
3. Discussion of Biological Weapons Convention protocol.

Executive Session

4. Discussion of matters properly classified under Executive Order 12958, dealing with U.S. export control programs and strategic criteria related thereto.

The General Session of the meeting will be open to the public and a limited number of seats will be available. Reservations are not required. To the extent time permits, members of the public may present oral statements to the Committee. Written statements may be submitted at any time before or after the meeting.

However, to facilitate distribution of public presentation materials to the Committee members, the materials should be forwarded prior to the meeting to the address below:

Ms. Lee Ann Carpenter, BXA MS: 3886C, U.S. Department of Commerce, 15 St. & Pennsylvania Ave., N.W., Washington, D.C. 20230

The Assistant Secretary for Administration, with the concurrence of the delegate of the General Counsel, formally determined on February 24, 1998, pursuant to section 10(d) of the Federal Advisory Committee Act, as

amended, that the series of meetings or portions of meetings of the Committee and of any Subcommittee thereof dealing with the classified materials listed in 5 U.S.C. 552(c)(1) shall be exempt from the provisions relating to public meetings found in section 10(a)(1) and (a)(3) of the Federal Advisory Committee Act. The remaining series of meetings or portions thereof will be open to the public. A copy of the Notice of Determination to close meetings or portions of meetings of the Committee is available for public inspection and copying in the Central Reference and Records Inspection Facility, Room 6020, U.S. Department of Commerce, Washington, D.C. For more information call Ms. Lee Ann Carpenter at (202) 482–2583.

Dated: November 19, 1998.

Lee Ann Carpenter,

Committee Liaison Officer.

[FR Doc. 98–31558 Filed 11–24–98; 8:45 am]

BILLING CODE 3510–33–M

DEPARTMENT OF COMMERCE

Foreign-Trade Zones Board

[Order No. 1009]

Approval of Manufacturing Activity Within Foreign-Trade Zone 226 Atwater, California; Pacesetter, Inc. (Modular Buildings)

Pursuant to its authority under the Foreign-Trade Zones Act of June 18, 1934, as amended (19 U.S.C. 81a–81u) (the Act), the Foreign-Trade Zones Board (the Board) adopts the following Order:

Whereas, Merced County, California, grantee of FTZ 226, has requested authority under § 400.32(b)(1) of the Board's regulations on behalf of Pacesetter, Inc., to manufacture modular buildings for export under zone procedures within FTZ 226, Atwater, California (filed 8–12–98, FTZ Docket 38–98);

Whereas, pursuant to § 400.32(b)(1), the Commerce Department's Assistant Secretary for Import Administration has the authority to act for the Board in making such decisions on new manufacturing/processing activity under certain circumstances, including situations where the proposed activity is for export only (§ 400.32(b)(1)(ii)); and,

Whereas, the FTZ Staff has reviewed the proposal, taking into account the criteria of § 400.31, and the Executive Secretary has recommended approval;

Now, therefore, the Assistant Secretary for Import Administration, acting for the Board pursuant to § 400.32(b)(1), concurs in the recommendation and hereby approves the request subject to the Act and the Board's regulations, including § 400.28, and further subject to a condition requiring that all foreign-status merchandise admitted to FTZ 226 for the Pacesetter, Inc., activity, must be exported.

Signed at Washington, DC, this 16th day of November 1998.

Robert S. LaRussa,

Assistant Secretary of Commerce for Import Administration, Alternate Chairman, Foreign-Trade Zones Board.

Attest:

Dennis Puccinelli,

Acting Executive Secretary.

[FR Doc. 98–31550 Filed 11–24–98; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

Foreign-Trade Zones Board

[Order No. 1007]

Grant of Authority for Subzone Status; Harris Corporation—Electronic Systems Sector (Telecommunications/ Information Systems), Brevard County, Florida

Pursuant to its authority under the Foreign-Trade Zones Act of June 18, 1934, as amended (19 U.S.C. 81a–81u), the Foreign-Trade Zones Board (the Board) adopts the following Order:

Whereas, the Foreign-Trade Zones Act provides for ''* * * the establishment * * * of foreign-trade zones in ports of entry of the United States, to expedite and encourage foreign commerce, and for other purposes,'' and authorizes the Foreign-Trade Zones Board to grant to qualified corporations the privilege of establishing foreign-trade zones in or adjacent to U.S. Customs ports of entry;

Whereas, the Board's regulations (15 CFR Part 400) provide for the establishment of special-purpose subzones when existing zone facilities cannot serve the specific use involved;

Whereas, the Canaveral Port Authority, grantee of Foreign-Trade Zone 136, has made application to the Board for authority to establish special-purpose subzone status at the telecommunications/information manufacturing facilities of Harris Corporation—Electronic Systems Sector, located at sites in Brevard County, Florida, (FTZ Docket 84–97, filed 12/22/97);

Whereas, notice inviting public comment has been given in the **Federal Register** (63 FR 2660, 1/16/98); and,

Whereas, the Board adopts the findings and recommendations of the examiner's report, and finds that the requirements of the FTZ Act and the Board's regulations are satisfied, and that approval of the application is in the public interest;

Now, therefore, the Board hereby grants authority for subzone status at the telecommunications/information systems manufacturing facilities of Harris Corporation—Electronic Systems Sector, located at sites in Brevard County, Florida (Subzone 136C), at the locations described in the application, and subject to the FTZ Act and the Board's regulations, including § 400.28.

Signed at Washington, DC, this 16th day of November 1998.

Robert S. LaRussa,

Assistant Secretary of Commerce for Import Administration, Alternate Chairman, Foreign-Trade Zones Board.

Attest:

Dennis Puccinelli,

Acting Executive Secretary.

[FR Doc. 98–31549 Filed 11–24–98; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

Foreign-Trade Zones Board

[Order No. 1010]

Expansion of Foreign-Trade Zone 1 New York, New York, Area

Pursuant to its authority under the Foreign-Trade Zones Act of June 18, 1934, as amended (19 U.S.C. 81a–81u), the Foreign-Trade Zones Board (the Board) adopts the following Order:

Whereas, the City of New York, New York, grantee of Foreign-Trade Zone 1, submitted an application to the Board for authority to expand FTZ 1 to include a new site in Staten Island, New York, within the New York Seaport Area Customs port of entry area (FTZ Docket 7–98; filed 2/5/98);

Whereas, notice inviting public comment was given in **Federal Register** (63 FR 7755, 2/17/98; 63 FR 23720, 4/30/98) and the application has been processed pursuant to the FTZ Act and the Board's regulations; and,

Whereas, the Board adopts the findings and recommendations of the examiner's report, and finds that the requirements of the FTZ Act and Board's regulations are satisfied, and that the proposal is in the public interest;

Now, Therefore, the Board hereby orders:

The application to expand FTZ 1 is approved, subject to the Act and the Board's regulations, including Section 400.28.

Signed at Washington, DC, this 16th day of November 1998.

Robert S. LaRussa,

Assistant Secretary of Commerce for Import Administration, Alternate Chairman, Foreign-Trade Zones Board.

Attest:

Dennis Puccinelli,

Acting Executive Secretary.

[FR Doc. 98–31551 Filed 11–24–98; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

Foreign-Trade Zones Board

[Docket 53–98]

Foreign-Trade Zone 216—Olympia, WA; Request for Export Manufacturing Authority, Darigold, Inc. (Dairy/Sugar Food Products)

An application has been submitted to the Foreign-Trade Zones Board (the Board) by the Port of Olympia, grantee of FTZ 216, pursuant to § 400.32(b)(1) of the Board's regulations (15 CFR Part 400), requesting authority on behalf of Darigold, Inc. (Darigold), to manufacture dairy products for export under FTZ procedures within FTZ 216. It was formally filed on November 19, 1998.

Darigold operates a 74,000 square foot dairy product manufacturing facility (37 employees) within FTZ 216-Site 13 located at 67 S.W. Chehalis Avenue in Chehalis, Washington, which recently received FTZ Board authority to process foreign-origin liquid whey permeate under FTZ procedures for export (Board Order 986, 63 FR 35909, 7–1–98). The Port of Olympia is now requesting authority on behalf of Darigold to manufacture dry milk/honey blends, sweetened butter, butter/oil blends, dry coffee whiteners, and ice cream for export. In this activity, about 50 percent of all ingredients used will be sourced from abroad, including whey protein isolate, anhydrous milkfat, caseinate, butter, whey and whey protein concentrate-34, whole and skim milk powder, sugar, honey, glucose, lactose, wheat bran and flour, corn flour, soy flour, rice flour, coconut oil, milk calcium, calcium carbonate, niacin, cocoa, vanilla, tapioca, vegetable oil (soy, canola, corn), and corn sweeteners. All of the finished products would be exported, and none of the foreign ingredients noted above would be entered for U.S. consumption.

FTZ procedures would exempt Darigold from U.S. dairy product and sugar quota requirements and Customs duty payments on the foreign ingredients used in this export activity. The application indicates that the savings from FTZ procedures would help improve the plant's international competitiveness.

The application has requested review under Section 400.32(b)(1) of the FTZ Board regulations based on the export only activity.

Public comment on the application is invited from interested parties. Submissions (original and three copies) shall be addressed to the Board's Executive Secretary at the address below. The closing period for their receipt is January 25, 1999. Rebuttal comments in response to material submitted during the foregoing period may be submitted during the subsequent 15-day period (to February 8, 1999).

A copy of the application will be available for public inspection at the following location: Office of the Executive Secretary, Foreign-Trade Zones Board, Room 3716, U.S. Department of Commerce, 14th Street & Pennsylvania Avenue, NW, Washington, DC 20230.

Dated: November 19, 1998.

Dennis Puccinelli,

Acting Executive Secretary.

[FR Doc. 98–31554 Filed 11–24–98; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–549–502]

Certain Welded Carbon Steel Pipes and Tubes From Thailand: Amended Final Results of Antidumping Duty Administrative Review

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

ACTION: Notice of Amended Final Results of Antidumping Duty Administrative Review; Certain Welded Carbon Steel Pipes and Tubes from Thailand.

SUMMARY: On October 16, 1998 the Department of Commerce (the Department) published the final results of the administrative review of the antidumping duty order on certain welded carbon steel pipes and tubes from Thailand (63 FR 55578). This review covers the following manufacturer/exporter of the subject merchandise to the United States: Saha Thai Steel Pipe Company, Ltd. (''Saha Thai''), and its affiliated exporter S.A.F. Pipe Export Co., Ltd. (''SAF''). The period of review (POR) is March 1, 1996 through February 28, 1997.

On October 16, 1998, pursuant to section 353.28(a) of the Department's regulations, Saha Thai, SAF, and two U.S. importers, Ferro Union, Inc., and Asoma Corporation (collectively, ''Saha Thai'') filed a ministerial error allegation regarding the Department's calculation of importer-specific assessment rates in the final results of the review. In addition, when reviewing Saha Thai's allegation, the Department identified a misstatement in the **Federal Register** notice of the final results. The Department is publishing these amended final results to correct these ministerial errors.

EFFECTIVE DATE: November 25, 1998.

FOR FURTHER INFORMATION CONTACT: John Totaro, AD/CVD Enforcement Group III, Office 7, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW, Washington, DC 20230; telephone: (202) 482–1374.

Applicable Statute

Unless otherwise indicated, all citations to the statute are references to the provisions effective January 1, 1995, the effective date of the amendments made to the Tariff Act of 1930 (hereinafter, ''the Act'') by the Uruguay Round Agreements Act (URAA). In addition, unless otherwise indicated, all citations to the Department's regulations are to the regulations codified at 19 CFR Part 353 (1997). Although the Department's new regulations, codified at 19 CFR Part 351 (1998) (''Final Regulations''), do not govern this administrative review, citations to those regulations are provided, where appropriate, as a statement of current Departmental practice.

Ministerial Errors in the Final Results of Review

Where U.S. sales are on an export price (EP) basis and the record does not contain entered value data, the Department's margin calculation program calculates the duty amount to be collected from each importer on a dollars-per-metric ton basis. Because Saha Thai's sales during the POR were all EP sales, the Department's margin calculation program intended to calculate the duty owed for assessment purposes using the methodology described above. Saha Thai alleged that the Department's margin calculation program contained a ministerial error because in calculating the unit duty for each importer, the Department inadvertently increased the quotient of its unit duty calculation by a factor of 100. We examined the margin calculation program, and we agree with Saha Thai that this is a clerical error

within the meaning of 19 CFR 353.28 (d), *i.e.*, an error in arithmetic functions of the calculation program. We have corrected the program so that the result of the unit duty calculation program is no longer multiplied by a factor of 100. This correction affects only the importer-specific assessment rates, not the margin calculated in the final results.

We also note one additional ministerial error not raised by the parties in this review. In the final results **Federal Register** notice, the Department stated that ''[f]or assessment purposes, we have calculated importer-specific duty assessment rates for the merchandise based on the ratio of the total amount of antidumping duties calculated for the examined sales during the POR to the total entered value of sales examined during the POR.'' 63 FR at 55590. This statement is incorrect, and does not reflect the margin calculation program disclosed to the parties with the final results of this review. As stated above, the record of this review does not contain data on the entered value of the sales examined during the POR. Therefore, for the final results of this review we calculated the duty amount to be collected from each importer on a unit basis, *i.e.*, a ratio of the total amount of antidumping duties calculated for the examined sales during the POR to the total quantity of sales examined during the POR, not a ratio of antidumping duties to the entered value of these sales.

Amended Final Results of Review

Upon correction of the ministerial errors described above, the margin remains unchanged from the final results published in the **Federal Register** on October 16, 1998. However, as discussed above, the importer-specific assessment rates will change from those disclosed to the parties with the final results. We will instruct the Customs Service accordingly.

Manufacturer/ Exporter	Period	Margin
Saha Thai	3/1/96–2/28/97	1.92%

The Department shall determine, and the U.S. Customs Service shall assess, antidumping duties on all appropriate entries. The Department shall issue appraisement instructions directly to the Customs Service. As a result of this review, we have determined that the importer-specific duty assessments rates are necessary. For assessment purposes, therefore, we have calculated importer-specific duty assessment rates for the merchandise based on the ratio of the total amount of antidumping duties calculated for the examined sales during the POR to the total quantity of sales examined during the POR.

Furthermore, the following deposit requirements shall be effective upon publication of this notice of final results of review for all shipments of certain welded carbon steel pipes and tubes from Thailand, entered, or withdrawn from warehouse, for consumption on or after the publication date, as provided for by section 751(a)(1) of the Tariff Act: (1) the cash deposit rate for the reviewed company will be the rate stated above; (2) for previously investigated companies not listed above, the cash deposit rate will continue to be the company-specific rate published for the most recent period; (3) if the exporter is not a firm covered in these reviews, or the original LTFV investigations, but the manufacturer is, the cash deposit rate will be the rate established for the most recent period for the manufacturer of the merchandise; and (4) if neither the exporter nor the manufacturer is a firm covered in these reviews, the cash deposit rate for this case will continue to be 15.67 percent, the ''All Others'' rate made effective by the LTFV investigation. These deposit requirements shall remain in effect until publication of the final results of the next administrative review.

This notice serves as a final reminder to importers of their responsibility under 19 CFR 353.26 to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during this review period. Failure to comply with this requirement could result in the Secretary's presumption that reimbursement of antidumping duties occurred and the subsequent assessment of double antidumping duties.

This notice also serves as a reminder to parties subject to administrative protective order (''APO'') of their responsibility concerning the disposition of proprietary information disclosed under APO in accordance with section 353.34(d) of the Department's regulations. Timely notification of return/destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to comply with the regulations and the terms of an APO is a sanctionable violation.

This amended administrative review and notice are in accordance with section 751(a)(1) of the Act (19 U.S.C. 1675(a)(1)) and sections 353.22 and 353.28(c) of the Department's regulations.

Dated: November 18, 1998.

Robert S. LaRussa,

Assistant Secretary for Import Administration.

[FR Doc. 98–31555 Filed 11–24–98; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

University of California at Los Angeles; Notice of Decision on Application for Duty-Free Entry of Scientific Instrument

This decision is made pursuant to Section 6(c) of the Educational, Scientific, and Cultural Materials Importation Act of 1966 (Pub. L. 89–651, 80 Stat. 897; 15 CFR part 301). Related records can be viewed between 8:30 A.M. and 5:00 P.M. in Room 4211, U.S. Department of Commerce, 14th and Constitution Avenue, N.W., Washington, D.C.

Docket Number: 98–004R. *Applicant:* University of California at Los Angeles, Los Angeles, CA 90095–1547. *Instrument:* YAG Pumped Dye Laser. *Manufacturer:* Spectron Laser Systems, United Kingdom. *Intended Use:* See notice at 63 FR 8164, February 18, 1998.

Comments: None received. *Decision:* Approved. No instrument of equivalent scientific value to the foreign instrument, for such purposes as it is intended to be used, is being manufactured in the United States. *Reasons:* The foreign instrument provides: (1) an internal modular three bar resonator design, (2) operation in ''tophat'' mode to minimize beam divergence and (3) an internal cavity telescope that compensates for the thermal loading on the laser rod. These capabilities are pertinent to the applicant's intended purposes and we know of no other instrument or apparatus of equivalent scientific value to the foreign instrument which is being manufactured in the United States.

Frank W. Creel,

Director, Statutory Import Programs Staff.

[FR Doc. 98–31552 Filed 11–24–98; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

Application for Duty-Free Entry of Scientific Instrument

Pursuant to Section 6(c) of the Educational, Scientific and Cultural Materials Importation Act of 1966 (Pub. L. 89–651; 80 Stat. 897; 15 CFR part

301), we invite comments on the question of whether an instrument of equivalent scientific value, for the purposes for which the instrument shown below is intended to be used, is being manufactured in the United States.

Comments must comply with 15 CFR 301.5(a)(3) and (4) of the regulations and be filed within 20 days with the Statutory Import Programs Staff, U.S. Department of Commerce, Washington, D.C. 20230. Application may be examined between 8:30 A.M. and 5:00 P.M. in Room 4211, U.S. Department of Commerce, 14th Street and Constitution Avenue, N.W., Washington, D.C.

Docket Number: 98–058. *Applicant:* University of Hawaii, 1000 Pope Road, MSB 317, Honolulu, HI 96822. *Instrument:* Directional Wave Buoy. *Manufacturer:* Datawell bv, The Netherlands. *Intended Use:* The instrument will be used in support of ongoing research regarding the refraction, diffraction and reflection of sea and swell around the Hawaiian Islands. Two ongoing projects include: examination of wave-driven sediment transport at Kailua Bay and evaluation of various wave modeling strategies to predict nearshore waves around island coasts. Both require directional wave information in the open ocean. Application accepted by Commissioner of Customs: November 3, 1998.

Frank W. Creel,

Director, Statutory Import Programs Staff.

[FR Doc. 98–31553 Filed 11–24–98; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

Export Trade Certificate of Review

ACTION: Notice of application to amend certificate.

SUMMARY: The Office of Export Trading Company Affairs (''OETCA''), International Trade Administration, Department of Commerce, has received an application to amend an Export Trade Certificate of Review. This notice summarizes the proposed amendment and requests comments relevant to whether the amended Certificate should be issued.

FOR FURTHER INFORMATION CONTACT: Morton Schnabel, Director, Office of Export Trading Company Affairs, International Trade Administration, (202) 482–5131. This is not a toll-free number.

SUPPLEMENTARY INFORMATION: Title III of the Export Trading Company Act of 1982 (15 U.S.C. 4001–21) authorizes the Secretary of Commerce to issue Export Trade Certificates of Review. A Certificate of Review protects the holder and the members identified in the Certificate from state and federal government antitrust actions and from private, treble damage antitrust actions for the export conduct specified in the Certificate and carried out in compliance with its terms and conditions. Section 302(b)(1) of the Act and 15 CFR 325.6(a) require the Secretary to publish a notice in the **Federal Register** identifying the applicant and summarizing its proposed export conduct.

Request for Public Comments

Interested parties may submit written comments relevant to the determination whether an amended Certificate should be issued. If the comments include any privileged or confidential business information, it must be clearly marked and a nonconfidential version of the comments (identified as such) should be included. Any comments not marked privileged or confidential business information will be deemed to be nonconfidential. An original and five copies, plus two copies of the nonconfidential version, should be submitted no later than 20 days after the date of this notice to: Office of Export Trading Company Affairs, International Trade Administration, Department of Commerce, Room 1800H, Washington, D.C. 20230. Information submitted by any person is exempt from disclosure under the Freedom of Information Act (5 U.S.C. 552). However, nonconfidential versions of the comments will be made available to the applicant if necessary for determining whether or not to issue the Certificate. Comments should refer to this application as ''Export Trade Certificate of Review, application number 88–2A015.''

Ferrous Scrap Export Association's (''FSEA'') original Certificate was issued on December 12, 1988 (53 FR 51294, December 21, 1988) and previously amended on February 28, 1989 (54 FR 9542, March 7, 1989). A summary of the application for an amendment follows.

Summary of the Application

Applicant: Ferrous Scrap Export Association, 1209 Orange Street, Wilmington, Delaware 19809.

Contact: Cara E. Maggioni, Attorney, *Telephone:* (202) 662–5162.

Application No.: 88–2A015.

Date Deemed Submitted: November 13, 1998.

Proposed Amendment: FSEA seeks to amend its Certificate to:

1. Add Metal Management, Inc., Chicago, IL as a new ''Member'' of the Certificate within the meaning of section 325.2(1) of the Regulations (15 CFR 325.2(1)); and

2. Delete Michael Schiavone & Sons, Inc., North Haven, CT; and Schiavone-Bonomo Corporation, Jersey City, NJ as ''Members'' of the Certificate.

Dated: November 19, 1998.

Morton Schnabel,

Director, Office of Export Trading Company Affairs.

[FR Doc. 98–31444 Filed 11–24–98; 8:45 am]

BILLING CODE 3510–DR–I

DEPARTMENT OF COMMERCE

National Institute of Standards and Technology

1999 Survey of Reference Materials

ACTION: Proposed collection; comment request.

SUMMARY: The Department of Commerce, 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 of proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A).

DATES: Written comments must be submitted on or before January 25, 1999.

ADDRESSES: Direct all written comments to Linda Engelmeier, Departmental Forms Clearance Officer, Department of Commerce, Room 5327, 14th and Constitution Avenue, NW, Washington, DC 20230.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the information collection instrument(s) and instructions should be directed to Alim A. Fatah, Ph.D., National Institute of Standards and Technology (NIST), Building 225, Room A323, Gaithersburg, MD 20899.

SUPPLEMENTARY INFORMATION:

1. Abstract

In 1999, the Department of Justice-supported by NIST's Office of Law Enforcement Standards (OLES) will undertake a scientific study to determine the status, current need for, and use of standard reference materials (SRM) and standard reference collections (SRC) within the Nation's crime laboratories. The new study will build upon a 1977 study entitled ''Standard Reference Collections of Forensic Science Materials: Status and

Needs. Since the report was issued, a number of SRMs have been developed and new technologies have placed evidentiary material under the scrutiny of district attorneys, defense teams, and the general public. The nations crime laboratories will be survey by mail and asked to identify the reference materials needed by the different disciplines or organizational sections within the laboratory ie. trace analysis, firearms, DNA, latent fingerprints etc. In addition, crime laboratories will be asked about their current reference collections source of these collections.

II. Method of Collection

Forensic science (crime) laboratories will be asked to complete and return a self-administered mail questionnaire.

III. Data

OMB Number: None.

Form Number: None.

Type of Review: Regular submission.

Affected Public: Federal, state forensic science laboratories.

Estimated Number of Respondents: 330.

Estimated Time Per Response: Approximately 2 hours.

Estimated Total Annual Cost to Public: $0 (no capital expenditures are required).

IV. Request for Comments

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden (including hours and cost) of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology.

Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval of this information collection; they also will become a matter of public record.

Dated: November 20, 1998.

Linda Engelmeier,

Departmental Forms Clearance Officer, Office of the Chief Information Officer.

[FR Doc. 98–31557 Filed 11–24–98; 8:45 am]

BILLING CODE 3510–13–P

COMMODITY FUTURES TRADING COMMISSION

Chicago Board of Trade: Proposed Amendments to the Wheat, Oats, and Soybean Futures Contracts Modifying Certain Delivery Specifications of the Wheat Futures Contract, Amending Rules Governing Load Out Against Warehouse Receipts for Wheat and Oats and Shipping Certificates for Corn and Soybeans, and Revising the Last Trading and Delivery Days for the Oats and Wheat Futures Contracts

AGENCY: Commodity Futures Trading Commission.

ACTION: Notice of proposed contract market rule change.

SUMMARY: The Chicago Board of Trade (CBT or Exchange) has submitted proposed amendments to its wheat futures contract which will modify the locational price differentials for delivery at Toledo and St. Louis, change the quality price differentials for U.S. No. 1 and U.S. No. 2 grade northern spring wheat, and reduce the speculative position limits for the March and May contract months during the last five trading days. In additional, the Exchange is proposing amendments that will modify the load-out provisions for the wheat, corn, oats and soybean futures contracts and which will change the last trading day and the last delivery day for all contract months for the wheat and oats futures contracts. The Commission has determined to request pubic comment on the proposed amendments based upon its finding that the proposed amendments are of major economic significance within the meaning of section 5a(a)(12) of the Commodity Exchange Act (Act) and that their publication is in the public interest and will assist the Commission in considering the views of interested persons.

DATES: Comments must be received on or before December 28, 1998.

ADDRESSES: Interested persons should submit their views and comments to Jean A. Webb, Secretary, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street, NW, Washington, DC 20581. In addition, comments may be sent by facsimile transmission to facsimile number (202) 418–5521 or by electronic mail to secretary@cftc.gov. Reference should be made to the CBT grain futures contracts' delivery specification proposals.

FOR FURTHER INFORMATION, CONTACT: Please contact Fred Linse of the Division of Economic Analysis, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street, NW, Washington, DC 20581, telephone (202) 418–5273, facsimile number (202) 418–5527, or electronically at flinse@cftc.gov.

SUPPLEMENTARY INFORMATION: The Commodity Futures Trading Commission (Commission), by letter dated December 19, 1996, issued a request to the Chicago Board of Trade (CBT) to undertake a study of the delivery specifications of its wheat futures contract and to submit its findings to the Commission by April 18, 1997, 120 days from the date of the Commission's request (see 61 FR 67998 (December 26, 1996)).[1] The CBT responded to the Commission's request by letter dated April 18, 1997, providing a status report to the Commission of its actions.[2] The Commission on July 8, 1997, solicited public comment on the delivery specifications of the CBT's wheat futures contract (62 FR 36499) to assist it in considering the concerns identified in the Commission's December 19, 1996 notification. The CBT on October 21, 1998, submitted to the Commission for its review proposed amendments to its wheat futures contract.

Current Contract Terms

The wheat futures contract's current terms provide for the delivery of warehouse receipts representing U.S. No. 1 or U.S. No. 2 grade soft red winter wheat, dark northern spring wheat, northern spring wheat, or hard red winter wheat in store at CBT-approved

[1] The request was made in conjunction with the Commission's notification to the CBT under Section 5a(a)(10) of the Act, 7 U.S.C. Sec. 7a(a)(10), that the delivery terms of the CBT corn and soybean futures contracts no longer accomplish the statutory objectives of ''permit[ting] the delivery of any commodity . . . at such point or points and at such quality and locational price differentials as will tend to prevent or diminish price manipulation, market congestion, or the abnormal movement of such commodity in interstate commerce.'' This request was based on the continuing diminution of the role of terminal markets in the cash market for grain, the increasing shift of the locus of the main channels of commodity flows away from the delivery points on the grain contracts, particularly the par delivery point of Chicago, and the resulting precipitous drop in regular warehouse storage capacity at the Chicago delivery point. For corn and soybeans, the Commission on November 7, 1997, issued an Order changing and supplementing under Section 5a(a)(10) of the Act, 7 U.S.C. 7a(a)(10), the delivery terms of those futures contracts (62 FR 60831 (November 13, 1997)), and, on May 7, 1998, approved further changes to the corn and soybeans futures contracts' delivery terms (63 FR 26575 (May 13, 1998)).

[2] The CBT reported that, although a Task Force appointed by the CBT Board of Directors had recommended certain changes to the delivery terms of the wheat futures contract, the Board had decided to refrain from acting on those recommendations at that time and determined instead to conduct market research to determine whether a broader review of the contract, not limited to its delivery terms, should be undertaken.

(regular) delivery warehouses located in Chicago, Toledo and St. Louis. (Only soft red winter wheat is deliverable at St. Louis.) U.S. No. 2 grade soft red winter wheat, U.S. No. 2 dark northern spring wheat, U.S. No. 2 hard red winter and U.S. No. 1 northern spring wheat are deliverable at par. U.S. No. 1 grade soft red winter wheat, dark northern spring wheat, and hard red winter wheat are deliverable at a premium of three cents per bushel. U.S. No. 2 grade northern spring wheat is deliverable at a discount of one cent per bushel. Currently, wheat is deliverable in Chicago at par, in Toledo at a discount of two cents per bushel, and in St. Louis at a premium of eight cents per bushel.

The oats futures contract calls for the delivery of warehouse receipts representing oats in store at regular warehouses in Chicago and Minneapolis/St. Paul.

Beginning in the year 2000, the corn and soybean futures contracts will call for the delivery of shipping certificates providing for the loading out of corn at regular shipping stations in Chicago and on the northern Illinois River and the loading out of soybeans at regular shipping stations in Chicago, St. Louis, and on the Illinois River.

Under the current delivery procedures for the wheat and oats futures contracts, warehouse receipt holders may require load out of wheat or oats from regular elevators into vessels, barges or rail cars. Regular warehouse operators must load out wheat and oats at specified daily rates, which differ depending upon the mode of transportation provided by warehouse receipt holders. Load out must begin on the third business day following receipt of loading orders from the receipt holder or on the day after the transportation equipment has been constructively placed, whichever occurs later. Regular warehouse operators are required to load out wheat and oats consecutively without giving preference to products owned by the operator over the products of others and without giving preference to one depositor over another. The operator must in-load products into the warehouse consecutively in the order in which they arrive at his warehouse at specified minimum daily rates pursuant to in-loading orders previously received so far as the warehouse capacity for grain and grade permits.

An operator of a regular shipping station for corn or soybeans is required to begin loading out product within three business days of the operator's receipt of loading orders and cancelled shipping certificates from a shipping certificate holder. A shipping station operator must load out corn or soybeans at the station's registered daily loading rate, giving preference to takers of futures delivery.

Proposed Amendments

The CBT is proposing to amend its wheat contract as follows:

(1) The locational price differential for delivery of wheat at Toledo would be changed to par from the two-cent-per-bushel discount currently applicable to deliveries at that location.

(2) The location price differential for delivery at St. Louis would be increased to a premium of 10 cents per bushel from the current 8 cents per bushel premium.

(3) The quality price differential for delivery of U.S. No. 1 grade northern spring wheat would be changed to a premium of 3 cents per bushel from par as presently specified in the contract.

(4) U.S. No. 2 grade northern spring wheat would be deliverable at par, rather than at a one cent per bushel discount as currently specified.

(5) Speculative position limits would be reduced during the last five trading days in the March and May contract months to 350 contracts and 220 contracts, respectively, from the existing spot month level of 600 contracts which applies uniformly to all contract months.

The CBT also has submitted proposed amendments that would delete all of these CBT's existing provisions relating to the in-loading of wheat and oats at regular warehouses. In addition, the proposed amendments would extend to wheat and oats for futures delivery the preferential treatment that receivers of corn and soybeans for futures delivery currently receive when load-out is ordered (over the warehouse or shipping station operator's cash commitments).

In addition, the proposed amendments would specify that, if a lineup for loading out grain into barges from a particular regular warehouse/shipping station includes both wheat and corn or soybeans or both oats and corn or soybeans, then the minimum daily rate for loading shall be equal to the highest loading rate applicable for any one commodity in the line-up.[3] To the extent that the proposed terms applicable to the soybean and corn futures contracts differ from the provisions of the Commission's Order of May 7, 1998, the Exchange's request for approval of the proposed rule changes also constitutes a request to the Commission to amend its Order accordingly. Publication of these proposals, therefore, also constitutes notice of the proposed amendment of the Commission's Order consistent with the proposed rule amendments.

Finally, the Exchange is proposing, for both the wheat and oats futures contracts, amendments which would change the last trading day for all contract months to the business day prior to the fifteenth calendar day of the month from the current last trading day which is the business day prior to the last seven business days of the month. Along with this amendment, the last delivery day for these contracts would be changed to the seventh business day following the last trading day rather the last business day of the month as currently specified.

The Exchange plans to implement the proposed amendments to the wheat and oats futures contracts beginning with the March 2000 contract month except for the proposed amendments to the loading provisions. The latter proposals, which relate to the corn and soybeans futures contracts as well as the wheat and oats futures contracts, would apply to all grain loaded out against outstanding warehouse receipts on and after January 1, 2000. In reviewing whether proposed amendments can be applied to the terms of existing contracts, the Commission considers the effect any such amendments may have on the value of existing positions. In this regard, the proposed amendments to the wheat and oats futures contracts will apply beginning with the March 2000 contract month which has not yet been listed for trading for either contract. However, the proposed amendments to the soybean and corn futures contracts will apply to certain currently-listed contract months that expire after January 1, 2000 (as well as to all outstanding warehouse receipts delivered on prior contract months for corn, soybeans, wheat and oats). Accordingly, the Commission is seeking public comment on what effect, if any, the proposed amendments would have on the value of existing positions in the subject contracts.

The CBT, in support of the proposed amendment to provide for par delivery of wheat at Toledo, states that, ''[P]ar recognizes that Toledo is the primary delivery point for the wheat futures contract and that it is a key pricing point for soft red winter wheat.'' With respect to the proposed increase in the premium for delivery at St. Louis, the Exchange states that the change ''maintains the current differential spread between Toledo and St. Louis.''

[3] For example, in St. Louis the minimum daily loading rate is 1 barge per day for soybeans and 3 barges per day for wheat. If both soybeans and wheat are in the line-up, the St. Louis warehouse/shipping station operator would be required to load a minimum of 3 barges per day total of beans and/or wheat.

The Exchange notes that the proposed increase in the quality grade differentials for U.S. No. 1 and U.S. No. 2 grade northern spring wheat ''will bring the grade differentials for Northern Spring Wheat in line with the grade differentials for Hard Red Winter, Soft Red Winter and Dark Northern Spring Wheat.''

With respect to the proposal to introduce lower speculative position limit levels during the last five trading days of the March and May wheat contract months, the Exchange states that, ''The purpose of the decrease in speculative position limits is to satisfy CFTC concerns on the adequacy of deliverable supply of wheat.'' The Exchange further notes that, ''while the decrease in the speculative position limits in the last five business days has the potential to reduce liquidity, the proposed [lower] limits would not have restrained positions held by speculators in the last five years.''

The Exchange states that the proposed last trading day for both wheat and oats is the same as that for grain futures contracts and thus ''will standardize the last trading day for CBOT commodities of wheat, corn, oats, soybeans, soybean meal and soybean oil.'' Finally, according to the Exchange, the proposed load-out requirements to give takers of delivery on the wheat and oats futures contracts preference in loading grain over the warehouse operator's non-futures delivery commitments ''will allow delivery wheat to be more accessible to takers of delivery and allow the futures to be more reflective of nearby cash grain prices.''

The Commission finds that the proposed changes in wheat differentials are of major economic significance and the publication of the CBT's proposed amendments as a whole is in the public interest and will assist the Commission in its consideration of the amendments. In particular, commenters are invited to analyze the following issues and to submit written data, views or comments relating to the CBT's proposals.

1. Would available deliverable supplies under the proposed contract terms for wheat be sufficient to prevent or diminish price manipulation, market congestion, or the abnormal movement of such commodity in interstate commerce?

2. Do the proposed locational price differentials for delivery of wheat at Toledo and St. Louis reflect cash market price differentials for wheat at such locations relative to cash market values at Chicago?

3. Do the proposed quality price differentials for delivery of U.S. No 1 and U.S. No. 2 grade northern spring wheat reflect cash market pricing relationships between such wheat and other deliverable classes and grades of wheat, particularly U.S. No. 2 grades soft red winter wheat?

4. Are the proposed amendments to the corn, wheat, soybeans and oats futures contracts concerning load out of grain against warehouse receipts and shipping certificates consistent with cash market practices for those commodities at the regular warehouse at the contracts' delivery points? If not, to what extent, if any, will the proposed load-out amendments limit deliverable supplies available for the wheat, oats, corn and soybean futures contracts?

5. In light of recently announced plans concerning changes [4] in the ownership and/or operational control of the wheat futures contract's delivery facilities, what effect, if any, will the increased concentration in the control of delivery capacity resulting from these changes have on the contract's susceptibility to price manipulation, market congestion or the abnormal movement of wheat in interstate commerce? To what extent do these changes reflect general trends in the cash market?

Copies of the proposed amendments will be a available for inspection at the Office of the Secretariat, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street, NW, Washington, D.C. 20581. Copies of the proposed amendments can be obtained through the Office of the Secretariat by mail at the above address or by telephone at (202) 418–5100.

Other materials submitted by the CBT may be available upon request pursuant to the Freedom of Information Act (5 U.S.C. 552) and the Commission's regulations thereunder (17 C.F.R. Part 145 (1987)), except to the extent they are entitled to confidential treatment as set forth in 17 C.F.R. 145.5 and 145.9. Requests for copies of such materials should be made to the FOI, Privacy and Sunshine Act Compliance Staff of the Office of the Secretariat at the Commission's headquaters in accordance with 17 C.F.R. 145.7 or 145.8.

[4] On March 25, 1998, Cargill, Inc. announced an agreement under which The Andersons, Inc. would lease Cargill's two grain handling facilities in Toledo/Maumee, Ohio and provide on-site management of those facilities, in addition to the Andersons' own grain-handling facilities in Toledo/Maumee. Cargill also announced that it would provide marketing services for grain originated from all facilities owned or leased by the Andersons in Toledo/Maumee. In addtion, on November 10, 1998, Cargill announced the purchase of all of Continental Grain Co.'s grain merchandising operations, including Continental's existing wheat futures delivery facilities located in Chicago and St. Louis.

Issued in Washington, DC, on November 19, 1998.

Jean A. Webb,

Secretary of the Commission.

[FR Doc. 98–31494 Filed 11–24–98; 8:45 am]

BILLING CODE 6351–01–M

COMMODITY FUTURES TRADING COMMISSION

Global Markets Advisory Committee Meeting

This is to give notice, pursuant to Section 10(a) of the Federal Advisory Committee Act, 5 U.S.C. App. 2, section 10(a), that the Commodity Futures Trading Commission's Global Markets Advisory Committee (''GMAC'') will conduct a public meeting on December 9, 1998 in the first floor hearing room (Room 1000) of the Commission's Washington, D.C. headquarters, Three Lafayette Centre, 1155 21st Street, N.W., Washington, D.C. 20581. The meeting will begin at 1:00 p.m. and last until 4:30 p.m. The agenda will consist of the following:

Agenda

1. Introductory Remarks—Commissioner Barbara P. Holum
2. Reports of GMAC Working Groups
   - A. Working Group I—Electronic Terminals—Comment on CFTC Federal Register Release
   - B. Working Group II—Impediments to Cross-Border Business—Report on Work Projects
   - C. Working Group III—IOSCO initiatives
3. Discussion
4. New Business

The meeting is open to the public. The Chairman of the Advisory Committee, Commissioner Barbara P. Holum, is empowered to conduct the meeting in a fashion that will, in her judgment, facilitate the orderly conduct of business. Any member of the public who wishes to file a written statement with the Advisory Committee should mail a copy of the statement to the attention of: The Global Markets Advisory Committee, c/o Commissioner Barbara P. Holum, Commodity Futures Trading Commission, Three Lafayette Centre, 115 21st Street, N.W., Washington, D.C. 20581, before the meeting. Members of the public who wish to make oral statements should inform Commissioner Holum in writing at the foregoing address at least three business days before the meeting. Reasonable provision will be made, if time permits, for an oral presentation of no more than five minutes each in duration.

Issued by the Commission in Washington, D.C. on November 20, 1998.

Jean A. Webb,

Secretary of the Commission.

[FR Doc. 98–31631 Filed 11–24–98; 8:45 am]

BILLING CODE 6351–01–M

DEPARTMENT OF DEFENSE

Office of the Secretary

Proposed Collection; Comment Request

AGENCY: Defense Finance and Accounting Service.

ACTION: Notice.

SUMMARY: In compliance with Section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995, the Defense Finance and Accounting Service announces the proposed public information collection and seeks public comment on the provisions thereof. Comments are invited on: (a) whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed information collection; (c) ways to enhance the quality, utility and clarity of the information to be collected; and (d) ways to minimize the burden of the information collection on respondents, including through the use of automated collection techniques or other forms of information technology.

DATES: Consideration will be given to all comments received by January 25, 1999.

ADDRESSES: Written comments and recommendations on the proposed information collection should be sent to the Denver Center, Defense Finance and Accounting Service, DFAS–DE/FJPD, Attn: Carolyn Crane, 6760 East Irvington Place, Denver, CO 80279–3000.

FOR FURTHER INFORMATION CONTACT: To request more information on this proposed information collection or to obtain a copy of the proposal and associated collection instruments, please write to the above address, or call Carolyn Crane, 303–676–7818.

Title, Associated Form, and OMB Number: Dependency Statement—Ward of a Court.

Needs and Uses: A military member may claim a ward of a court for monetary allowances. Pursuant to 37 U.S.C. 401, 403 and 406, the member must provide over one-half of the claimed ward's monthly expenses. DoDFMR 7000.14, Volume 7A defines the definition of dependent and directs that dependency be proved. This form may be prepared by the military member or may be prepared by another individual who may be a member of the public.

Affected Public: Individuals.

Annual Burden Hours: 187.5 hours.

Number of Respondents: 150.

Responses per Respondent: 1 (new form may be required if circumstances change).

Average Burden per Response: 1.25 hours.

Frequency: On occasion.

SUPPLEMENTARY INFORMATION:

Summary of Information Collection

When military members apply for benefits, they will complete this form, Dependency Statement—Ward of a Court. While members would normally complete this form, they could also be completed by others considered members of the public. Dependency claim examiners will use information from these forms to determine the degree of benefits. This collection will also decrease the possibility of monetary allowances being approved on behalf of ineligible dependents, and alleviate the opportunity for fraud, waste and abuse.

Dated: November 19, 1998.

Patricia L. Toppings,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc 98–31418 Filed 11–24–98; 8:45 am]

BILLING CODE 5000–04–M

DEPARTMENT OF DEFENSE

Office of the Secretary

TRICARE; the Civilian Health and Medical Program of the Uniformed Services (CHAMPUS); Specialized Treatment Services (STS) Program

AGENCY: Office of the Secretary, DoD.

ACTION: Notice.

SUMMARY: This notice is to advise interested parties that Walter Reed Army Medical Center (WRAMC), Washington, DC, located in TRICARE Region 1 has been designated a Multi-Regional Specialized Treatment Services Facility (STSF) for Liver Transplantation and a National STSF for Renal Transplantation. The application for the STSF designation was submitted by WRAMC and approved by the Assistant Secretary of Defense (Health Affairs). The Lead Agent for Region 1 will ensure that the STSF maintains the quality and standards required for specialized treatment services. The designation covers the following Diagnosis Related Groups:

480—Liver Transplant

302—Kidney Transplant

Travel and lodging for the patient and, if stated to be medically necessary by a referring physician, for one non-medical attendant, will be reimbursed by WRAMC in accordance with the provisions of the Joint Federal Travel Regulation. DOD beneficiaries who reside in the Multi-Regional STS Catchment Area for liver transplant which includes TRICARE Regions 1, 2, and 5 must be evaluated by WRAMC before receiving TRICARE/CHAMPUS cost sharing for liver transplantation that falls under Diagnosis Related Group 480. DOD beneficiaries who reside in the National STS Catchment Area must be evaluated by WRAMC before receiving TRICARE/CHAMPUS cost sharing for kidney transplantation that falls under Diagnosis Related Group 302. Evaluation in person is preferred, and travel and lodging expenses for the evaluation will be reimbursed as stated above. It is possible to conduct the evaluation telephonically if the patient is unable to travel to WRAMC. If the procedures cannot be performed at WRAMC, the facility will provide a medical necessity review prior to issuance of a Nonavailability Statement.

The STS Multi-Regional Catchment Area for liver transplant covering TRICARE Regions 1, 2, and 5 includes all zip codes within those TRICARE Regions. The STS National Catchment Area for kidney transplant is defined as the continental United States (i.e., 48 contiguous states and the District of Columbia excluding Alaska and Hawaii).

EFFECTIVE DATE: March 1, 1999.

FOR FURTHER INFORMATION CONTACT:

Ms. Kendra Drew, WRAMC, at (202) 782–4302, or Captain D. Michael Jones, TRICARE Region 1 Lead Agent Office, at (202) 782–1483; or Lieutenant Colonel Teresa Sommese, TRICARE Management Activity, (703) 681–3628, extension 5029; or Mr. Tariq Shahid, TRICARE Management Activity, (303) 676–3801.

SUPPLEMENTARY INFORMATION: In FR DOC 93–27050, appearing in the **Federal Register** on November 5, 1993 (Vol. 58, FR 58955–58964), the final rule on the STS Program was published. Included in the final rule was a provision that a notice of all military and civilian STS facilities be published in the **Federal Register** annually. This notice is issued under the authority of 10 U.S.C. 1105 and 32 CFR 199.4(a)(10).

Dated: November 19, 1998.

L.M. Bynum,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 98–31419 Filed 11–24–98; 8:45 am]

BILLING CODE 5000–04–M

DEPARTMENT OF DEFENSE

Office of the Secretary

TRICARE; the Civilian Health and Medical Program of the Uniformed Services (CHAMPUS); Specialized Treatment Services (STS) Program

AGENCY: Office of the Secretary, DoD.

ACTION: Notice.

SUMMARY: This notice is to advise interested parties that Keesler Medical Center, Keesler Air Force Base, Biloxi, Mississippi, has been designated a regional Specialized Treatment Services Facility (STSF) for TRICARE Region Four. The application for this STSF designation was submitted by the Lead Agent for TRICARE Region Four and approved by the Assistant Secretary of Defense (Health Affairs). The Lead Agent will ensure that the STSF maintains the quality and standards required for specialized treatment services. This designation covers the following Diagnostic Related Groups:

001—Craniotomy, Age Greater than 17, Except for Trauma
003—Craniotomy, Age, 0–17
004—Spinal Procedures
049—Major Head and Neck Procedures
191—Pancreas, Liver and Shunt Procedures with CC
209—Major Joint and Limb Reattachment Procedures of Lower Extremity
286—Adrenal and Pituitary Procedures
357—Uterine and Adnexa Procedures for Ovarian or Adnexal Malignancy
491—Major joint and Limb Reattachment Procedures of Upper Extremity

Keesler Medical Center continues to be an STS facility for Cardiac Surgery (DRG 104, DRG 105, DRG 106, DRG 107, DRG 108, DRG 110, DRG 111, DRG 112, DRG 124, DRG 125); Complicated Obstetrics (DRG 370, DRG 372, DRG 383); and Neonatal care (DRG 604, DRG 607, DRG 611, DRG 612, DRG 613, DRG 617, DRG 618, DRG 622, DRG 626, DRG 636).

Travel and lodging for the patient and, if stated to be medically necessary by a referring physician, for one nonmedical attendant, will be reimbursed by Keesler Medical Center in accordance with the provisions of the Joint Federal Travel Regulation. DoD beneficiaries who reside in the Regional STS Catchment Area for TRICARE Region Four must be evaluated by Keesler Medical Center before receiving TRICARE/CHAMPUS cost sharing for procedures that fall under the above Diagnosis Related Groups. Evaluation in person in preferred, and travel and lodging expenses for the evaluation will be reimbursed as stated above. It is possible to conduct the evaluation telephonically if the patient is unable to travel to Keesler Medical Center. If the procedure cannot be performed at Keesler Medical Center, the facility will provide a medical necessity review prior to issuance of a Nonavailability Statement.

The Regional STS Catchment Area covering TRICARE Region four is defined by zip codes in the Defense Medical Information System STS Facilities Catchment Area Directory. The Catchment Area includes zip codes within TRICARE Region Four that fall within a 200 mile radius of Keesler Medical Center.

EFFECTIVE DATE: March 1, 1999.

FOR FURTHER INFORMATION CONTACT: Captain David Johnson, Keesler Medical Center, (228) 377–7685; or Colonel Joe Taylor, Office of the Lead Agent, TRICARE Region Four, (228) 377–9643; or Lieutenant Colonel Teresa Sommese, TRICARE Management Activity, (703) 681–3628, extension 5029; or Mr. Tariq Shahid, TRICARE Management Activity, (303) 676–3801.

SUPPLEMENTARY INFORMATION: In FR DOC 93–27050, appearing in the **Federal Register** on November 5, 1993 (Vol. 58, FR 58955–58964), the final rule on the STS Program was published. Included in the final rule was a provision that a notice of all military and civilian STS facilities be published in the **Federal Register** annually. This notice is issued under the authority of 10 U.S.C. 1105 and 32 CFR 199.4(a)(10).

Dated: November 19, 1998.

L.M. Bynum,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 98–31420 Filed 11–24–98; 8:45 am]

BILLING CODE 5000–04–M

DEPARTMENT OF DEFENSE

Office of the Secretary

TRICARE; the Civilian Health and Medical Program of the Uniformed Services (CHAMPUS); Specialized Treatment Services (STS) Program

AGENCY: Office of the Secretary, DoD.

ACTION: Notice.

SUMMARY: This notice is to advise interested parties that St. Joseph Hospital, 5665 Peachtree Dunwoody Road NE, Atlanta, GA 30342; The Medical University of South Carolina, 171 Ashley Avenue, Charleston, SC 29425; Tampa General Hospital, Davis Island, P.O. Box 1289, Tampa FL 33601; St. Thomas Hospital, 3401 West End Avenue, Suite 120, Nashville, TN 37203; The University of Alabama at Birmingham, Transplant Center, 102 Mortimer Jordan Hall, 1825 University Boulevard, Birmingham, AL 35294–2010; Egleston Children's Hospital, 1405 Clifton Road NE, Atlanta, GA 30322–1101; and Jackson Memorial Hospital, 1611 NW 12th Avenue, Miami, FL 33136–1094, have been designated as Regional Specialized Treatment Services Facilities (STSFs) for various Transplant procedures. The application for the STSF designation for these facilities was submitted by the Humana Military Health Services, Inc. (HMHS) in coordination with the Lead Agents for TRICARE Regions 3 and 4 and approved by the Assistant Secretary of Defense (Health Affairs). The HMHS will oversee that these STSFs maintain the quality and standards required for specialized treatment services. This designation covers the following Diagnosis Related Groups:

103—Heart Transplant (Medical University of South Carolina, University of Alabama-Birmingham, Egleston Children's Hospital, Jackson Memorial Hospital, St. Joseph Hospital, St. Thomas Hospital, and Tampa General Hospital)
480—Liver Transplants (Medical University of South Carolina, University of Alabama-Birmingham, Egleston Children's Hospital, and Jackson Memorial Hospital)
495—Lung Transplant (University of Alabama-Birmingham)
495—Heart-Lung Transplant (University of Alabama-Birmingham)

As part of the STS program within TRICARE Regions 3 and 4, HMHS will assume responsibility for transportation, food and lodging for patients within a radius ranging from over 40 miles and up to 200 miles from designated STS Transplantation Centers. Under this plan, HMHS will reimburse patients the mileage allowance for travel, pay up to the per diem allowed by the government for food and lodging, or the actual cost, whichever is less, and will adjust per diems and mileage allowances according to government regulations. Whenever possible, HMHS will also make lodging arrangements for the patients and one non-medical attendant.

DoD beneficiaries who reside in the catchment areas of the designated STS facilities must be evaluated by the appropriate facility prior to receiving TRICARE/CHAMPUS cost sharing for procedures that fall under the above Diagnosis Related Groups. Evaluation in person is preferred, and travel and lodging expenses for the evaluation will be reimbursed as stated above. It may be possible to conduct the evaluation telephonically if the patient is unable to travel to the appropriate facility. If a needed procedure cannot be performed by one of the above facilities, HMHS will provide a medical necessity review prior to issuance of a Nonavailability Statement or other similar authorizations. The Catchment Area for each transplant STS includes zip codes within TRICARE Regions 3 and 4 that fall within a 200 mile radius of the facility.

EFFECTIVE DATE: March 1, 1999.

FOR FURTHER INFORMATION CONTACT: Richard Mancini, Director of Network Development, Humana Military Healthcare Services, Inc., 500 West Main St., Louisville, KY 40202, telephone (502) 580–1538; LCDR Leesa Kent, Office of the Lead Agent, TRICARE Region 3, (706) 787–3016; Colonel Joe Taylor, Office of the Lead Agent, TRICARE Region 4, (228) 377–9643; Lt. Col. Teresa Sommese, TRICARE Management Activity, (703) 681–3628, extension 5029; or Mr. Tariq Shahid, TRICARE Management Activity, (303) 676–3801.

SUPPLEMENTARY INFORMATION: In FR DOC 93–27050, appearing in the **Federal Register** on November 5, 1993 (Vol. 58, FR 58955–58964), the final rule on the STS Program was published. Included in the final rule was a provision that a notice of all military and civilian STS facilities be published in the **Federal Register** annually. This notice is issued under the authority of 10 U.S.C. 1105 and 32 CFR 199.4(a)(10).

Dated: November 19, 1998.

L.M. Bynum,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 98–31421 Filed 11–24–98; 8:45 am]

BILLING CODE 5000–04–M

DEPARTMENT OF DEFENSE

Office of the Secretary

TRICARE; the Civilian Health and Medical Program of the Uniformed Services (CHAMPUS); Specialized Treatment Services (STS) Program

AGENCY: Office of the Secretary, DoD.

ACTION: Notice.

SUMMARY: This notice is to advise interested parties that David Grant Medical Center (DGMC), Fairfield, California, has been designated a regional Specialized Treatment Services Facility (STSF) for Neurosurgery, General Surgery, Cardiovascular Surgery, Orthopedic Surgery and Gynecology for TRICARE Region 10. The application for this STSF designation was submitted by the Lead Agent for TRICARE Region 10 and approved by the Assistant Secretary of Defense (Health Affairs). The Lead Agent will ensure that the STSF maintains the quality and standards required for specialized treatment services. This designation covers the following Diagnostic Related Groups:

001–Craniotomy, Age Greater than 17, Except for Trauma
003–Craniotomy, Age 0–17
004–Spinal Procedures
049–Major Head and Neck Procedures
110–Major Cardiovascular Procedures with CC
111–Major Cardiovascular Procedures without CC
191–Pancreas, Liver and Shunt Procedures with CC
209—Major Joint and Limb Reattachment Procedures of Lower Extremity
286–Adrenal and Pituitary Procedures
357–Uterine and Adnexa Procedures for Ovarian or Adnexal Malignancy
491–Major Joint and Limb Reattachment Procedures of Upper Extremity

DoD beneficiaries who reside in the DGMC STS Catchment Area for TRICARE Region 10 must be evaluated by DGMC before receiving TRICARE/CHAMPUS cost sharing for the procedures that fall under the above Diagnostic Related Groups. Travel and lodging for the patient and, if stated to be medically necessary by a referring physician, for one nonmedical attendant, will be reimbursed by DGMC in accordance with the provisions of the Joint Federal Travel Regulation. Although evaluation in person is preferred, it is possible to conduct the evaluation telephonically if the patient is unable to travel to DGMC. If the procedure cannot be performed at DGMC, the facility will provide a medical necessity review prior to issuance of a Nonavailability Statement. The DGMC STS Catchment Area covering TRICARE Region 10 is defined by zip codes in the Defense Medical Information System STS Facilities Catchment Area Directory. The Catchment Area includes zip codes within TRICARE Region 10 in California that fall within a 200 mile radius of DGMC.

EFFECTIVE DATE: March 1, 1999.

FOR FURTHER INFORMATION CONTACT: Colonel Steve Jennings, DGMC, (707) 423–7828; or Lieutenant Colonel Pamela Cygan, Office of the Lead Agent, TRICARE Region 10, (707) 424–6533; or Lieutenant Colonel Teresa Sommese, TRICARE Management Activity, (703) 681–3628, extension 5029; or Mr. Tariq Shahid, TRICARE Management Activity, (303) 676–3801.

SUPPLEMENTARY INFORMATION: In FR DOC 93–27050, appearing in the **Federal Register** on November 5, 1993 (Vol. 58, FR 58955–58964), the final rule on the STS Program was published. Included in the final rule was a provision that a notice of all military and civilian STS facilities be published in the **Federal Register** annually. This notice is issued under the authority of 10 U.S.C. 1105 and 32 CFR 199.4(a)(10).

Dated: November 19, 1998.

L.M. Bynum,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 98–31422 Filed 11–24–98; 8:45 am]

BILLING CODE 5000–04–M

DEPARTMENT OF DEFENSE

Office of the Secretary

TRICARE; the Civilian Health and Medical Program of the Uniformed Services (CHAMPUS); Specialized Treatment Services (STS) Program

AGENCY: Office of the Secretary, DoD.

ACTION: Notice.

SUMMARY: This notice is to advise interested parties that Naval Medical Center, San Diego (NMCSD), has been designated a regional Specialized Treatment Services Facility (STSF) for TRICARE Region Nine. The application for this STSF designation was submitted by the Lead Agent for TRICARE Region Nine and approved by the Assistant Secretary of Defense (Health Affairs). The Lead Agent will ensure that the STSF maintains the quality and standards required for specialized treatment services. This designation covers the following Diagnostic Related Groups:

001—Craniotomy, Age Greater than 17, Except for Trauma
003—Craniotomy, Age 0–17
004—Spinal Procedures
049—Major Head and Neck Procedures
104—Cardiac Valve Procedure with Cardiac Catheterization
105—Cardiac Valve Procedure without Cardiac Catheterization

106—Coronary Bypass with Cardiac Catheterization
107—Coronary Bypass without Cardiac Catheterization
110—Major Cardiovascular Procedures with CC
111—Major Cardiovascular Procedures without CC
191—Pancreas, Liver and Shunt Procedures with CC
209—Major Joint and Limb Reattachment Procedures of Lower Extremity
286—Adrenal and Pituitary Procedures
357—Uterine and Adnexa Procedures for Ovarian or Adnexal Malignancy
491—Major Joint and Limb Reattachment of Upper Extremity

DoD beneficiaries who reside in the NMCSD STS Catchment Area for TRICARE Region Nine must be evaluated by NMCSD before receiving TRICARE/CHAMPUS cost sharing for the procedures that fall under the above Diagnostic Related Groups. Travel and lodging for the patient and, if stated to be medically necessary by a referring physician, for one nonmedical attendant, will be reimbursed by NMCSD in accordance with the provisions of the Joint Federal Travel Regulation. Although evaluation in person is preferred, it is possible to conduct the evaluation telephonically if the patient is unable to travel to NMCSD. If the procedure cannot be performed at NMCSD, the TRICARE Managed Care Support Contractor for Region Nine will provide a medical necessity review prior to issuance of a Nonavailability Statement or other similar authorizations. The NMCSD Catchment Area covering TRICARE Region Nine is defined by zip codes in the Defense Medical Information System STS Facilities Catchment Area Directory. The Catchment Area includes zip codes within TRICARE Region Nine in California and Yuma, Arizona, that fall within a 200 mile radius of NMCSD.

EFFECTIVE DATE: March 1, 1999.

FOR FURTHER INFORMATION CONTACT: LT Karen Leahy, NMCSD, (619) 532–5344; or Major Kelly Wolgast, Office of the Lead Agent, TRICARE Region Nine, (619) 532–6169; or Lt. Col. Teresa Sommese, TRICARE Management Activity, (703) 681–3628, extension 5029; or Mr. Tariq Shahid, TRICARE Management Activity, (303) 676–3801.

SUPPLEMENTARY INFORMATION: In FR DOC 93–27050, appearing in the **Federal Register** on November 5, 1993 (Vol. 58, FR 58955–58964), the final rule on the STS Program was published. Included in the final rule was a provision that a notice of all military and civilian STS facilities be published in the **Federal Register** annually. This notice is issued under the authority of 10 U.S.C. 1105 and 32 CFR 199.4(a)(10).

Dated: November 19, 1998.

L.M. Bynum,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 98–31423 Filed 11–24–98; 8:45 am]

BILLING CODE 5000–04–M

DEPARTMENT OF DEFENSE

Office of the Secretary

TRICARE; the Civilian Health and Medical Program of the Uniformed Services (CHAMPUS); Specialized Treatment Services (STS) Program

AGENCY: Office of the Secretary, DoD.

ACTION: Notice.

SUMMARY: This notice is to advise interested parties that National Naval Medical Center (NNMC), Bethesda, Maryland, Walter Reed Army Medical Center (WRAMC), Washington, DC. and Malcolm Grow Medical Center (MGMC), Andrews Air Force Base, Maryland, have been designated as the components of a Regional Specialized Treatment Services Facility (STSF) for General Surgery and Orthopedic Surgery for TRICARE Region 1. NNMC and WRAMC have been designated as the components of a Regional STSF for Neurosurgery, Otorhinolaryngology Surgery, and Gynecologic Oncology Surgery for TRICARE Region 1. The application for the STSF designation for these facilities was submitted by the Lead Agent for TRICARE Region 1 and approved by the Assistant Secretary of Defense (Health Affairs). The Lead Agent will ensure that these facilities maintain the quality and standards required for specialized treatment services. The designation covers the following Diagnosis Related Groups:

General Surgery

191—Pancreas, Liver and Shunt Procedures with CC
286—Adrenal and Pituitary Procedures (adrenal only)

Orthopedic Surgery

209—Major joint/limb reattachment procedures lower extremity
491—Major joint/limb reattachment procedures upper extremity

Neurosurgery

001—Craniotomy, age greater than 17 except for trauma
003—Craniotomy, age 0–17
004—Spinal procedures
286—Adrenal and pituitary procedures (pituitary only)

Otorhinolaryngology Surgery

049—Major Head and Neck procedures

Gynecologic Oncology Surgery

357—Uterine and Adnexa procedures for Ovarian or Adnexal Malignancy

Travel and lodging for the patient and, if stated to be medically necessary by a referring physician, for one nonmedical attendant, will be reimbursed by NNMC, WRAMC, or MGMC in accordance with the provisions of the Joint Federal Travel Regulation. DOD beneficiaries who reside in the STS catchment area for TRICARE Region 1 must be evaluated by NNMC, WRAMC, or MGMC before receiving TRICARE/CHAMPUS cost sharing for General Surgery and Orthopedic Surgery procedures that fall under the above Diagnosis Related Groups. These Region 1 beneficiaries must be evaluated by NNMC or WRAMC before receiving TRICARE/CHAMPUS cost sharing for Neurosurgery, Otorhinolaryngology Surgery, and Gynecologic Oncology Surgery procedures that fall under the above Diagnosis Related Groups. Evaluation in person is preferred, and travel and lodging expenses for the evaluation will be reimbursed as stated above. It is possible to conduct the evaluation telephonically if the patient is unable to travel to NNMC, WRAMC, or MGMC. If the procedure cannot be performed at NNMC, WRAMC, or MGMC, the facility will provide a medical necessity review prior to issuance of a Nonavailability Statement.

The STS Catchment Area covering TRICARE Region 1 is defined by zip codes in the Defense Medical Information System STS Facilities Catchment Area Directory. The Catchment Area includes zip codes within TRICARE Region 1 in the states of Delaware, Maryland, New Jersey, New York, Pennsylvania, Virginia, and the District of Columbia that fall within a 200 mile radius of the midpoint of a line between WRAMC and NNMC.

EFFECTIVE DATE: March 1, 1999.

FOR FURTHER INFORMATION CONTACT: CDR W. Isley (NNMC) at (301) 295–6195, Ms. Kendra Drew (WRAMC) at (202) 782–4302, Capt. R. Warwar (MGMC) at (301) 981–2475, CAPT D. Michael Jones (TRICARE Region 1 Lead Agent Office) at (202) 782–1483, Lt. Col. Teresa Sommese, (TRICARE Management Activity) at (703) 681–3628, extension 5029; or Mr. Tariq Shahid, (TRICARE Management Activity) at (303) 676–3801.

SUPPLEMENTARY INFORMATION: In FR DOC 93–27050, appearing in the **Federal Register** on November 5, 1993 (Vol. 58,

FR 58955–58964), the final rule on the STS Program was published. Included in the final rule was a provision that a notice of all military and civilian STS facilities by published in the **Federal Register** annually. This notice is issued under the authority of 10 U.S.C. 1105 and 32 CFR 199.4(a)(10).

Dated: November 19, 1998.

L.M. Bynum,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 98–31424 Filed 11–24–98; 8:45 am]

BILLING CODE 5000–04–M

DEPARTMENT OF DEFENSE

Office of the Secretary

Renewal of the Telecommunications Service Priority System Oversight Committee (TSPOC)

ACTION: Notice.

SUMMARY: This TSPOC has been renewed in consonance with the public interest, and in accordance with the provisions of Pub. L. 92–463, the ''Federal Advisory Committee Act.''

The TSPOC provides advice and recommendations to the Secretary of Defense regarding the priority treatment of national security and emergency preparedness telecommunications services. Functions include evaluating the currency of policies, procedures and system documentation requirements, and assessing the adequacy of the system in the light of technological advances.

The TSPOC will continue to be composed of 18 members, both federal, state and local government, and non-government individuals, who are experts in telecommunications services. Efforts will be made to ensure that there is a fairly balanced membership in terms of the functions to be performed and the interest groups represented.

For further information, contact: Ms. Debbie Bea, National Communications System, telephone: 703–607–4933.

Dated: November 19, 1998.

L.M. Bynum,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 98–31415 Filed 11–24–98; 8:45 am]

BILLING CODE 5000–04–M

DEPARTMENT OF DEFENSE

Office of the Secretary

Defense Intelligence Agency, Science and Technology Advisory Board Closed Panel Meeting

AGENCY: Department of Defense, Defense Intelligence Agency.

ACTION: Notice.

SUMMARY: Pursuant to the provisions of Subsection (d) of Section 10 of Public Law 92–463, as amended by Section 5 of Public Law 94–409, notice is hereby given that a closed meeting of the DIA Science and Technology Advisory Board has been scheduled as follows:

DATES: 2 December 1998 (0800 am to 1600 pm).

ADDRESSES: The Defense Intelligence Agency, 200 MacDill BLVD, Washington, D.C. 20340–5100.

FOR FURTHER INFORMATION CONTACT: Maj Donald R. Culp, Jr., USAF, Executive Secretary, DIA Science and Technology Advisory Board, Washington, D.C. 20340–1328 (202) 231–4930.

SUPPLEMENTARY INFORMATION: The entire meeting is devoted to the discussion of classified information as defined in Section 552b(c)(I), Title 5 of the U.S. Code, and therefore will be closed to the public. The Board will receive briefings on and discuss several current critical intelligence issues and advise the Director, DIA, on related scientific and technical matters.

Dated: November 19, 1998.

L.M. Bynum,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 98–31416 Filed 11–24–98; 8:45 am]

BILLING CODE 5000–04–M

DEPARTMENT OF DEFENSE

Office of the Secretary

Defense Science Board Task Force on Globalization and Security

ACTION: Notice of advisory committee meetings.

SUMMARY: The Defense Science Board Task Force on Globalization and Security will meet in closed session on December 17–18, 1998, January 21–22, February 18–19, March 11–12, and April 7–8, 1999 at Strategic Analysis Inc. (SAI), 4001 N. Fairfax Drive, Arlington, Virginia.

The mission of the Defense Science Board is to advise the Secretary of Defense through the Under Secretary of Defense for Acquisition and Technology on scientific and technical matters as they affect the perceived needs of the Department of Defense. At these meetings the Task Force will develop advice to provide to the DepSecDef and USD (A&T) regarding transformations to the industrial base serving the DoD—assessing the significant benefits to the Department and the risks that our adversaries will be able to learn about our technology.

In accordance with Section 10(d) of the Federal Advisory Committee Act, Public Law No. 92–463, as amended (5 U.S.C. App. II (1994)), it has been determined that these DSB Task Force meetings concern matters listed in 5 U.S.C. 552b(c)(1) (1994), and that, accordingly, these meetings will be closed to the public.

Dated: November 19, 1998.

L.M. Bynum,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 98–31417 Filed 11–24–98; 8:45 am]

BILLING CODE 5000–04–M

DEPARTMENT OF ENERGY

[FE Docket No. 98–76–NG]

Office of Fossil Energy; Chevron U.S.A. Inc.: Order Granting Long-Term Authorization to Import Natural Gas From Canada

AGENCY: Office of Fossil Energy, DOE.

ACTION: Notice of order.

SUMMARY: The Office of Fossil Energy (FE) of the Department of Energy gives notice that it has issued an order granting Chevron U.S.A. Inc. (Chevron) long-term authorization to import from Canada up to 1,500 thousand cubic feet per day of natural gas from November 1, 1997, through October 31, 2001. This natural gas may be imported from Canada at the pipeline connection of TransCanada PipeLines Limited and North Country Gas Pipeline near Champlain, New York (Napierville, Quebec) at the United States/Canada border.

This order may be found on the FE web site at http://www.fe.doe.gov and on our electronic bulletin board at (202) 586–7853. It is also available for inspection and copying in the Office of Natural Gas & Petroleum Import and Export Activities docket room, 3E–042, Forrestal Building, 1000 Independence Avenue, S.W., Washington, D.C., 20585, (202) 586–9478. The docket room is open between the hours of 8:00 a.m. and 4:30 p.m., Monday through Friday, except Federal holidays.

Issued in Washington, DC, November 16, 1998.

John W. Glynn,

Manager, Natural Gas Regulation, Office of Natural Gas & Petroleum Import and Export Activities, Office of Fossil Energy.

[FR Doc. 98–31525 Filed 11–24–98; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP99–61–001]

ANR Pipeline Company; Notice of Proposed Changes in FERC Gas Tariff

November 19, 1998.

Take notice that on November 16, 1998, ANR Pipeline Company (ANR) tendered for filing as part of its FERC Gas Tariff, Second Revised Volume No. 1, Second Revised Sheet No. 111A, to be effective November 2, 1998.

ANR states that this filing is made in compliance with the Commission's Order dated October 20, 1998 in the captioned proceeding.

ANR states that copies of the filing have been mailed to all affected customers and state regulatory commissions.

Any person desiring to protest this filing should file a protest with the Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, D.C. 20426, in accordance with Section 385.211 of the Commission's Rules and Regulations. All such protests must be filed as provided in Section 154.210 of the Commission's Regulations. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceedings. Copies of this filing are on file with the Commission and are available for public inspection in the Public Reference Room.

Linwood A. Watson, Jr.,

Acting Secretary.

[FR Doc. 98–31467 Filed 11–24–98; 8:45 am]

BILLING CODE 6717–01–M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP99–64–001]

Canyon Creek Compression Company; Notice of Compliance Filing

November 19, 1998.

Take notice that on November 16, 1998, Canyon Creek Compression Company (Canyon) tendered for filing as part of its FERC Gas Tariff, Third Revised Volume No. 1, certain tariff sheets to be effective November 2, 1998.

Canyon states that these tariff sheets were filed in compliance with the Commission's order issued October 30, 1998, in Docket No. RP99–64–000.

Canyon requests waiver of the Commission's Regulations to the extent necessary to permit the tendered tariff sheets to become effective November 2, 1998, pursuant to Order No. 587–H.

Canyon states that copies of the filing are being mailed to Canyon's customers and interested state regulatory agencies and all parties set out on the official service list in Docket No. RP99–64.

Any person desiring to protest this filing should file a protest with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, D.C. 20426, in accordance with Section 385.211 of the Commission's Rules and Regulations. All such protests must be filed as provided in Section 154.210 of the Commission's Regulations. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceedings. Copies of this filing are on file with the Commission and are available for public inspection in the Public Reference Room.

Linwood A. Watson, Jr.,

Acting Secretary.

[FR Doc. 98–31468 Filed 11–24–98; 8:45 am]

BILLING CODE 6717–01–M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. TM99–2–32–000]

Colorado Interstate Gas Company; Notice of GRI Filing

November 19, 1998.

Take notice on November 16, 1998, Colorado Interstate Gas Company (CIG), tendered for filing FERC Gas Tariff, First Revised Volume No. 1, Twelfth Revised Sheet No. 10 and Twenty-Fifth Revised Sheet No. 11. CIG requests that the proposed tariff sheets be made effective on January 1, 1999.

CIG states the purpose of this filing is to permit CIG to collect Gas Research Institute (GRI) charges associated with its transportation pursuant to the Commission order issued September 29, 1998 in Docket No. RP98–235–000.

CIG states that copies of the filing were served upon the company's jurisdictional firm customers and interested state commissions.

Any person desiring to be heard or to protest said filing should file a motion to intervene or a protest with the Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, D.C. 20426, in accordance with Sections 385.214 or 385.211 of the Commission's Rules and Regulations. All such motions or protests must be filed in accordance with Section 154.210 of the Commission's Regulations. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceedings. Any person wishing to become a party must file a motion to intervene. Copies of this filing are on file with the Commission and are available for public inspection in the Public Reference Room.

Linwood A. Watson, Jr.,

Acting Secretary.

[FR Doc. 98–31476 Filed 11–24–98; 8:45 am]

BILLING CODE 6717–01–M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP99–89–001]

Columbia Gas Transmission Corporation; Notice of Compliance Filing

November 19, 1998.

Take notice that on November 16, 1998, Columbia Gas Transmission Corporation (Columbia) tendered for filing to become part its FERC Gas Tariff, Second Revised Volume No. 1, the following revised tariff sheet, with a proposed effective date of November 16, 1998:

Substitute Original Sheet No. 28B

Columbian states that on October 14, 1998, it filed sheets in Docket No. RP99–89–000, proposing to initiate interruptible parking and lending services under new Rate Schedule PAL. On November 12, 1998, the Commission accepted the filed sheets subject to Columbia filing revised tariff sheets as discussed in the body of the order. Specifically, Columbia was required to file revised sheets to provide for the maximum Rate Schedule PAL rate to track seasonal fluctuations in the maximum ITS rate. The instant filing is in compliance with the order, wherein Columbia has revised Sheet No. 28B by adding a summer maximum Rate Schedule PAL rate equivalent to the maximum summer base ITS rate of 14.08 cents.

Columbia states that copies of its filing have been mailed to all firm customers, interruptible customers, affected state commissions and parties on the official service list in this proceeding.

Any person desiring to protest this filing should file a protest with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, in accordance with Section 385.211 of the Commission's Rules and Regulations. All such protests must be filed as provided in Section 154.210 of the Commission's Regulations. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceedings. Copies of this filing are on file with the Commission and are available for public inspection in the Public Reference Room.

Linwood A. Watson, Jr.,

Acting Secretary.

[FR Doc. 98–31473 Filed 11–24–98; 8:45 am]

BILLING CODE 6717–01–M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP99–22–002]

Dynegy Midstream Pipeline, Inc.; Notice of Compliance Filing

November 19, 1998.

Take notice that on November 16, 1998, Dynegy Midstream Pipeline, Inc. (DMP), tendered for filing as part of its FERC Gas Tariff, First Revised Volume No. 1, the following tariff sheets, with an effective date of February 1, 1999:

Substitute First Revised Sheet Nos. 64, 65, 68 and 70

DMP states that it is submitting these tariff sheets to comply with the October 30, 1998 order issued in the above reference proceeding. DMP proposes a February 1, 1999 effective date for these sheets to correspond to the effective date of the other tariff provisions implementing the intraday nomination and scheduling GISB standards.

Any person desiring to protest this filing should file a protest with the Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, D.C. 20426, in accordance with Section 385.211 of the Commission's Rules and Regulations. All such protest must be filed as provided in Section 154.210 of the Commission's Regulations. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceedings. Copies of this filing are on file with the Commission and are available for public inspection in the Public Reference Room.

Linwood A. Watson, Jr.,

Acting Secretary.

[FR Doc. 98–31456 Filed 11–24–98; 8:45 am]

BILLING CODE 6717–01–M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP99–41–001]

El Paso Natural Gas Company; Notice of Compliance Filing

November 19, 1998.

Take notice that on November 16, 1998, El Paso Natural Gas Company (El Paso) tendered for filing to become part of its FERC Gas Tariff, Second Revised Volume No. 1–A, the following tariff sheets, with an effective date of November 1, 1998:

Sub Fourth Revised Sheet No. 202A
Fifth Revised Sheet No. 210
Sub Third Revised Sheet No. 210.01
Substitute Third Revised Sheet No. 211
Substitute First Revised Sheet No. 211A

El Paso states that the filing is being made in compliance with the Commission's order issued October 30, 1998 at Docket No. RM99–41–000.

El Paso states that the tariff sheets are being filed to revise intra-day tariff provisions in compliance with the Commission's order in this proceeding.

Any person desiring to protest this filing should file a protest with the Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, D.C. 20426, in accordance with Section 385.211 of the Commission's Rules and Regulations. All such protests must be filed as provided in Section 154.210 of the Commission's Regulations. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceedings. Copies of this filing are on file with the Commission and are available for public inspection in the Public Reference Room.

Linwood A. Watson, Jr.,

Acting Secretary.

[FR Doc. 98–31462 Filed 11–24–98; 8:45 am]

BILLING CODE 6717–01–M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP99–80–001]

Granite State Gas Transmission, Inc.; Notice of Proposed Changes in FERC Gas Tariff

November 19, 1998.

Take notice that on November 16, 1998, Granite State Gas Transmission, Inc. (Granite State), tendered for filing with the Commission the original and revised tariff sheets listed below in its FERC Gas Tariff, Third Revised Volume No. 1, for effectiveness on November 2, 1998:

Second Revised Sheet No. 144
Second Revised Sheet No. 201
Original Sheet No. 201A
Second Revised Sheet No. 202
Second Revised Sheet No. 272
Second Revised Sheet No. 273
Second Revised Sheet No. 274
Original Sheet No. 274A
Original Sheet No. 274B
Second Revised Sheet No. 275
Original Sheet No. 275A
Second Revised Sheet No. 276
Original Sheet No. 276A
Eighth Revised Sheet No. 289

Granite State states that on October 8, 1998, it filed certain revised tariff sheets purporting to comply with the requirements of the Commission's Order No. 587–H. Granite State's filing was rejected in a Letter Order issued October 28, 1998 which directed Granite State to refile tariff sheets correctly conforming with Gas Industry Standards Board Version 1.3 in the matter of intra-day nomination changes and other related nomination procedures. According to Granite State, the instant filing is in compliance with the directives in the Commission's Letter Order of October 28, 1998 respecting the prior filing.

Granite State states that copies of its filing have been served on its firm and interruptible customers and on the regulatory agencies of the states of Maine, Massachusetts and New Hampshire.

Any person desiring to protest this filing should file a protest with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, in accordance with Section 385.211 of the Commission's Rules and Regulations. All such protests must be filed as provided in Section 154.210 of the Commission's Regulations. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceedings. Copies of this filing are on file with the

Commission and are available for public inspection in the Public Reference Room.

Linwood A. Watson, Jr.,

Acting Secretary.

[FR Doc. 98–31472 Filed 11–24–98; 8:45 am]

BILLING CODE 6717–01–M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 2634–007]

Great Northern Paper, Inc.; Notice Establishing Procedures for Relicensing and a Deadline for Submission of Final Amendments

November 19, 1998.

The license for the Storage Project, FERC No. 2634, located on Ragged Stream, Caucomgomoc Stream, and the West Branch and South Branch of the Penobscot River in Somerset and Piscataquis Counties, Maine, will expire on April 30, 2000. On April 28, 1998, an application for new major license was filed. The following is an approximate procedural schedule that will be followed in processing the application:

Date	Action
November 30, 1998	Commission notifies applicant that its application has been accepted and specifies the need for additional information and due date.
November 30, 1998	Commission issues public notice of the accepted application establishing dates for filing motions to intervene and protests.
March 31, 1999	Commission's deadline for applicant for filing a final amendment, if any, to its application.
September 30, 1999	Commission notifies all parties and agencies that the application is ready for environmental analysis.

Upon receipt of all additional information and the information filed in response to the public notices of the application, the Commission will evaluate the application in accordance with applicable statutory requirements and take appropriate action on the application.

Any questions concerning this notice should be directed to William Diehl, P.E. at (202) 219–2813, or his e-mail address, william.diehl@ferc.fed.us.

Linwood A. Watson, Jr.,

Acting Secretary.

[FR Doc. 98–31452 Filed 11–24–98; 8:45 am]

BILLING CODE 6717–01–M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP99–149–000]

Kentucky West Virginia Gas Company, L.L.C.; Notice of Proposed Changes in FERC Gas Tariff

November 19, 1998.

Take notice that on November 16, 1998, Kentucky West Virginia Gas Company, L.L.C. (Kentucky West) tendered for filing as part of its FERC Gas Tariff, Third Revised Volume No. 1, the following revised tariff sheets to become effective January 1, 1999:

First Revised Sheet No. 162A
Original Sheet No. 162B

Kentucky West states that the purpose of this filing is to comply with the January 21, 1998, ''Stipulation and Agreement Concerning Gas Research Institute (GRI) Funding'' which the Commission approved on April 29, 1998 in Docket No. RP97–149–003, et al. (83 FERC ¶61,093). Specifically, a voluntary contribution mechanism provision has been added to Section 28 of Kentucky West's General Terms and Conditions to allow customers to make voluntary contributions to GRI in such amounts and for such GRI projects as specified by the customers. Kentucky West's filing is consistent with the Stipulation and Agreement, in that the voluntary contribution mechanism is not a pipeline rate, rate provision, or term or condition of service.

Any person desiring to protest this filing should file a protest with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, in accordance with Section 385.211 of the Commission's Rules and Regulations. All such protests must be filed as provided in Section 154.210 of the Commission's Regulations. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceedings. Copies of this filing are on file with the Commission and are available for public inspection in the Public Reference Room.

Linwood A. Watson, Jr.,

Acting Secretary.

[FR Doc. 98–31474 Filed 11–24–98; 8:45 am]

BILLING CODE 6717–01–M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. TM99–1–46–000]

Kentucky West Virginia Gas Company, L.L.C.; Notice of Proposed Changes in FERC Gas Tariff

November 19, 1998.

Take notice that on November 16, 1998, Kentucky West Virginia Gas Company, L.L.C. (Kentucky West) tendered for filing as part of its FERC Gas Tariff, Third Revised Volume No. 1, the following revised tariff sheets to become effective January 1, 1999:

Fifth Revised Sheet No. 4
Fifth Revised Sheet No. 5
Third Revised Sheet No. 162

Kentucky West states that the purpose of this filing is to comply with the ''Order Approving the Gas Research Institute's 1999 Research, Development and Demonstration Program and 1999–2003 Five Year Plan'' issued on September 29, 1998 in Docket No. RP98–235–000. The Commission authorized pipeline companies to collect the Gas Research Institute (GRI) funding unit from their customers. The 1999 GRI unit surcharge approved by the Commission is (1) $0.2300 per dekatherm (Dth) per month demand surcharge for high load factor customers, (2) $0.1420 per Dth month demand surcharge for low load factor customers, (3) $0.0075 per Dth commodity/usage surcharge and (4) $0.0180 per Dth for a small customer

surcharge. Also, on Sheet No. 162 the listing of the GRI charges were changed to a tariff sheet designation.

Any person desiring to be heard or to protest said filing should file a motion to intervene or a protest with the Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, D.C. 20426, in accordance with Sections 385.214 or 385.211 of the Commission's Rules and Regulations. All such motions or protests must be filed in accordance with Section 154.210 of the Commission's Regulations. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceedings. Any person wishing to become a party must file a motion to intervene. Copies of this filing are on file with the Commission and are available for public inspection in the Public Reference Room.

Linwood A. Watson, Jr.,

Acting Secretary.

[FR Doc. 98–31475 Filed 11–24–98; 8:45 am]

BILLING CODE 6717–01–M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP99–65–001]

Kern River Gas Transmission; Notice of Compliance Filing

November 19, 1998.

Take notice that on November 16, 1998, 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 become effective November 2, 1998:

Substitute Second Revised Sheet No. 90
Substitute Fifth Revised Sheet No. 94
Substitute Third Revised Sheet No. 94–A
Substitute Second Revised Sheet No. 96
Substitute Second Revised Sheet No. 97

Kern River states that the purpose of this filing is to comply with the Commission's letter order dated October 30, 1998, in Docket No. RP99–65–000. The letter order was issued in response to Kern River's October 2, 1998 filing submitted in compliance with Order No. 587–H.

Kern River states that a copy of this filing has been served each person designated on the official service list compiled by the Secretary in this proceeding.

Any person desiring to protest this filing should file a protest with the Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, D.C. 20426, in accordance with Section 385.211 of the Commission's Rules and Regulations. All such protests must be filed as provided in Section 154.210 of the Commission's Regulations. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceedings. Copies of this filing are on file with the Commission and are available for public inspection in the Public Reference Room.

Linwood A. Watson, Jr.,

Acting Secretary.

[FR Doc. 98–31469 Filed 11–24–98; 8:45 am]

BILLING CODE 6717–01–M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP99–67–002]

Mississippi River Transmission Corporation; Notice of Proposed Changes in FERC Gas Tariff

November 19, 1998.

Take notice that on November 16, 1998, Mississippi River Transmission Corporation (MRT) tendered for filing as part of its FERC Gas Tariff, Third Revised Volume No. 1, the revised tariff sheets listed on Appendix A to the filing. These tariff sheets are proposed to be effective on November 1, 1998.

MRT states that the purpose of this filing is to comply with the Commissions Letter Order dated October 30, 1998 in the above-referenced docket.

Any person desiring to protest this filing should file a protest with the Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, D.C. 20426, in accordance with Section 385.211 of the Commission's Rules and Regulations. All such protests must be filed as provided in Section 154.210 of the Commission's Regulations. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceedings. Copies of this filing are on file with the Commission and are available for public inspection in the Public Reference Room.

Linwood A. Watson, Jr.,

Acting Secretary.

[FR Doc. 98–31470 Filed 11–24–98; 8:45 am]

BILLING CODE 6717–01–M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP99–40–001]

Mojave Pipeline Company; Notice of Compliance Filing

November 19, 1998.

Take notice that on November 16, 1998, Mojave Pipeline Company (Mojave) tendered for filing as part of its FERC Gas Tariff, Second Revised Volume No. 1, the following tariff sheets, with an effective date of November 1, 1998:

Substitute Second Revised Sheet No. 202
First Revised Sheet No. 218
Substitute First Revised Sheet No. 219
Original Sheet No. 219A
Original Sheet No. 219B

Mojave states that the filing is being made in compliance with the Commission's order issued October 30, 1998 at Docket No. RP99–40–000.

Mojave states that the tariff sheets are being filed to revise intra-day tariff provisions in compliance with the Commission's order in this proceeding.

Any person desiring to protest this filing should file a protest with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, in accordance with Section 385.211 of the Commission's Rules and Regulations. All such protests must be filed as provided in Section 154.210 of the Commission's Regulations. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceedings. Copies of this filing are on file with the Commission and are available for public inspection in the Public Reference Room.

Linwood A. Watson, Jr.,

Acting Secretary.

[FR Doc. 98–31461 Filed 11–24–98; 8:45 am]

BILLING CODE 6717–01–M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP99–55–001]

Natural Gas Pipeline Company of America; Notice of Compliance Filing

November 19, 1998.

Take notice that on November 16, 1998, Natural Gas Pipeline Company of America (Natural) tendered for filing as part of its FERC Gas Tariff, Sixth Revised Volume No. 1, certain tariff sheets to be effective November 2, 1998.

Natural states that these tariff sheets were filed in compliance with the Commission's order issued October 30, 1998, in Docket No. RP99–55–000.

Natural requests waiver of the Commission's Regulations to the extent necessary to permit the tendered tariff sheets to become effective November 2, 1998, pursuant to Order No. 587–H.

Natural states that copies of the filing are being mailed to Natural's customers and interested state regulatory agencies and all parties set out on the official service list in Docket No. RP99–55.

Any person desiring to protest this filing should file a protest with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, in accordance with Section 385.211 of the Commission's Rules and Regulations. All such protests must be filed as provided in Section 154.210 of the Commission's Regulations. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceedings. Copies of this filing are on file with the Commission and are available for public inspection in the Public Reference Room.

Linwood A. Watson, Jr.,

Acting Secretary.

[FR Doc. 98–31464 Filed 11–24–98; 8:45 am]

BILLING CODE 6717–01–M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP99–68–001]

NorAm Gas Transmission Company; Notice of Proposed Changes in FERC Gas Tariff

November 19, 1998.

Take notice that on November 16, 1998, NorAm Gas Transmission Company (NGT) tendered for filing as part of its FERC Gas Tariff, Fourth Revised Volume No. 1, revised tariff sheets listed on Appendix A to this filing. These tariff sheets are proposed to be effective on November 1, 1998.

NGT states that the purpose of this filing is to comply with the Commissions Letter Order in the above-referenced docket.

Any person desiring to protest this filing should file a protest with the Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, D.C. 20426, in accordance with Section 385.211 of the Commission's Rules and Regulations. All such protests must be filed as provided in Section 154.210 of the Commission's Regulations. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceedings. Copies of this filing are on file with the Commission and are available for public inspection in the Public Reference Room.

Linwood A. Watson, Jr.,

Acting Secretary.

[FR Doc. 98–31471 Filed 11–24–98; 8:45 am]

BILLING CODE 6717–01–M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP98–399–001]

Northern Border Pipeline Company; Notice of Tariff Filing

November 19, 1998.

Take notice that on November 16, 1998, Northern Border Pipeline Company (Northern Border) tendered for filing to become part of its FERC Gas Tariff, First Revised Volume No. 1, the following tariff sheets to be effective December 15, 1998:

Substitute Fourth Revised Sheet Number 246
Substitute First Revised Sheet Number 248J
Fourth Revised Sheet Number 249
Fourth Revised Sheet Number 257

Northern Border states that the filing is in compliance with the Commission's order, issued October 30, 1998, in the above-reference docket. Northern Border further states that the October 30, 1998 order required Northern Border to resubmit the above-referenced revised tariff sheets to include specific Gas Industry Standards Board (GISB) business standard language or to incorporate the entire GISB definition by reference and reflect certain pagination changes.

Any person desiring to protest this filing should file a protest with the Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, D.C. 20426, in accordance with § 385.211 of the Commission's Rules and Regulations. All such protest must be filed as provided in § 154.210 of the Commission's Regulations. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceedings. Copies of this filing are on file with the Commission and are available for public inspection in the Public Reference Room.

Linwood A. Watson, Jr.,

Acting Secretary.

[FR Doc. 98–31454 Filed 11–24–98; 8:45 am]

BILLING CODE 6717–01–M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP99–75–000]

Northern Natural Gas Company; Notice of Application

November 19, 1998.

Take notice that on November 13, 1998, Northern Natural Gas Company (Northern), 1111 South 103rd Street, Omaha, Nebraska 68124, filed an application pursuant to Section 7(b) of the Natural Gas Act (NGA) and the Commission's Regulations thereunder, requesting authority for Northern: (1) To abandon, by certain pipeline facilities with appurtenances, (2) abandon, by relocation in some instances, certain small volume meter stations with appurtenances, and (3) abandon certain services rendered thereby, located primarily within the State of Kansas, as well as some within the States of Iowa, Nebraska, and Texas, all as more fully set forth in the application on file with the Commission and open to public inspection.

Northern states that the subject facilities are primarily old 1930's vintage pipeline which were constructed using techniques and equipment in use at that time, including acetylene welding and Dresser couplings. Northern asserts that the subject facilities have experienced corrosion and leakage and that the pipeline segments have either been inactive or operating at a reduced pressure. Northern further asserts that current transportation requirements can be served by its existing B, C, D, and E-lines, thereby making abandonment rather than repair or replacement more economically and operationally feasible. Northern states that the subject proposal will not adversely effect capacity since current flows can be diverted to its existing lines.

Any person desiring to be heard or to make any protest with reference to said application should on or before December 10, 1998, file with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, a petition to intervene or a protest in accordance with the requirements of the Commission's Rules of Practice and Procedure (18 CFR 385.214 or 385.211)

and Regulations under the Natural Gas Act (18 CFR 157.10). All protests filed with the Commission will be considered by it in determining the appropriate action to be taken but will not serve to make the protestants parties to the proceeding. Any person wishing to become a party to a proceeding or to participate as a party in any hearing therein must file a petition to intervene in accordance with the Commission's Rules.

Take further notice that, pursuant to the authority contained in and subject to the jurisdiction conferred upon the Federal Energy Regulatory Commission by Sections 7 and 15 of the Natural Gas Act and the Commission's Rules of Practice and Procedure, a hearing will be held without further notice before the Commission or its designee on this application if no petition to intervene is filed within the time required herein, if the Commission on its own review of the matter finds that a grant of the certificate is required by the public convenience and necessity. If a petition for leave is timely filed, or if the Commission on its own motion believes that a formal hearing is required, further notice of such hearing will be duly given.

Under the procedure provided for, unless otherwise advised, it will be unnecessary for Northern to appear or be represented at the hearing.

Linwood A. Watson, Jr.,

Acting Secretary.

[FR Doc. 98–31451 Filed 11–24–98; 8:45 am]

BILLING CODE 6717–01–M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP99–31–001]

Northern Natural Gas Company; Notice of Compliance Filing

November 19, 1998.

Take notice that on November 16, 1998, Northern Natural Gas Company (Northern), submits this filing in compliance with the Commission's October 30, 1998 Letter Order.

Northern further states that copies of the filing have been mailed to each of its customers and interested State Commissions.

Any person desiring to protest this filing should file a protest with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, in accordance with Section 385.211 of the Commission's Rules and Regulations. All such protests must be filed as provided in Section 154.210 of the Commission's Regulations. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceedings. Copies of this filing are on file with the Commission and are available for public inspection in the Public Reference Room.

Linwood A. Watson, Jr.,

Acting Secretary.

[FR Doc. 98–31458 Filed 11–24–98; 8:45 am]

BILLING CODE 6717–01–M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP99–70–000]

Northwest Pipeline Corporation; Notice of Request Under Blanket Authorization

November 19, 1998.

Take notice that on November 12, 1998, Northwest Pipeline Corporation (Northwest), 295 Chipeta Way, Salt Lake City, Utah 84158, filed in Docket No. CP99–70–000, a request pursuant to Sections 157.205 and 157.216 of the Commission's Regulations under the Natural Gas Act (18 CFR 157.205 and 157.212) for authorization to abandon by removal its Green Circle Farms and Lambert Farms Meter Stations in Benton and Yakima Counties, Washington, respectively, under Northwest's blanket certificate issued in Docket No. CP82–433–000, pursuant to Section 7(c) of the Natural Gas Act, all as more fully set forth in the request which is on file with the Commission and open to public inspection.

Northwest proposes to abandon the Green Circle Farms and Lambert Farms Meter Stations because no deliveries have been made in many years to either meter station. By letter dated September 8, 1998, Cascade Natural Gas Corporation, the local distribution company downstream of the meter stations, confirmed that it does not object to Northwest abandoning and removing these two meter stations.

Northwest states the cost of removing the meter stations is estimated to be approximately $6,400. Northwest relates that all removed facilities will be scrapped. Northwest states it has sent a copy of this prior notice request to the Washington Utilities and Transportation Commission.

Any person or the Commission's staff may, within 45 days after issuance of the instant notice by the Commission, filed with the Federal Energy Regulatory Commission, 888 First Street, N.E., Washington D.C. 20426, pursuant to Rule 214 of the Commission's Procedural Rules (18 CFR 385.214) a motion to intervene or notice of intervention and pursuant to Section 157.205 of the Regulations under the Natural Gas Act (18 CFR 157.205) a protest to the request. If no protest is filed within the time allowed therefor, the proposed activity shall be deemed to be authorized effective the day after the time allowed for filing a protest. If a protest is filed and not withdrawn within 30 days after the time allowed for filing a protest, the instant request shall be treated as an application for authorization pursuant to Section 7 of the Natural Gas Act.

Linwood A. Watson, Jr.,

Acting Secretary.

[FR Doc. 98–31448 Filed 11–24–98; 8:45 am]

BILLING CODE 6717–01–M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP99–25–002]

Northwest Pipeline Corporation; Notice of Compliance Filing

November 19, 1998.

Take notice that on November 16, 1998, Northwest Pipeline Corporation (Northwest) tendered for filing as part of its FERC Gas Tariff, Third Revised Volume No. 1, the following tariff sheets, to become effective November 2, 1998:

Substitute First Revised Sheet No. 225–A.01
Substitute Original Sheet No. 225–G
Substitute Fourth Revised Sheet No. 228

Northwest states that the purpose of this filing is comply with the Commission's Order Accepting Tariff Sheets, Subject to Conditions, issued October 30, 1998 in Docket No. RP99–25–000 (Order). The Order was issued in response to Northwest's October 1, 1998 filing submitted in compliance with Order No. 587–H.

Northwest states that a copy of this filing has been served upon each person designated on the official service list compiled by the Secretary in this proceeding.

Any person desiring to protest this filing should file a protest with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, in accordance with Section 385.211 of the Commission's Rules and Regulations. All such protests must be filed as provided in Section 154.210 of the Commission's Regulations. Protests will be considered by the Commission

in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceedings. Copies of this filing are on file with the Commission and are available for public inspection in the Public Reference Room.

Linwood A. Watson, Jr.,

Acting Secretary.

[FR Doc. 98–31457 Filed 11–24–98; 8:45 am]

BILLING CODE 6717–01–M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP99–46–001]

PG & E Gas Transmission, Northwest Corporation; Notice of Compliance Filing

November 19, 1998.

Take notice that on November 13, 1998, PG&E Gas Transmission, Northwest Corporation (PG&E GT–NW) tendered for filing as part of its FERC Gas Tariff, First Revised Volume No. 1–A, the following tariff sheets, with an effective date of November 2, 1998:

Third Revised Sheet No. 81A.01
Substitute Original Sheet No. 81A.01a
Substitute Original Sheet No. 81A.01b
Third Revised Sheet No. 81A.02
Substitute Third Revised Sheet No. 84A

PG&E GT–NW states that these tariff sheets are being filed in compliance with the Commission's October 30, 1998 letter order in this docket.

PG&E GT–NW further states that a copy of this filing has been served upon PG&E GT–NW's jurisdictional customers, interested state regulatory agencies and all parties on the Commission's official service list for this proceeding.

Any person desiring to protest this filing should file a protest with the Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, D.C. 20426, in accordance with Section 385.211 of the Commission's Rules and Regulations. All such protests must be filed as provided in Section 154.210 of the Commission's Regulations. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceedings. Copies of this filing are on file with the Commission and are available for public inspection in the Public Reference Room.

Linwood A. Watson, Jr.,

Acting Secretary.

[FR Doc. 98–31463 Filed 11–24–98; 8:45 am]

BILLING CODE 6717–01–M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP99–73–000]

Questar Pipeline Company; Notice of Request Under Blanket Authorization

November 19, 1998.

Take notice that on November 12, 1998, Questar Pipeline Company (Questar), 180 East 100 South, P.O. Box 45360, Salt Lake City, Utah 84145–0360, filed in Docket No. CP99–73–000 a request pursuant to Sections 157.205 and 157.216 of the Commission's Regulations under the Natural Gas Act (18 CFR 157.205, 157.216) for authorization to abandon its Jurisdictional Lateral (J.L.) No. 61, located in Summit County, Utah, by sale to JN Exploration and Production Company (JN), an independent producer, under Questar's blanket certificate issued in Docket No. CP82–491–000, pursuant to Section 7(c) of the Natural Gas Act, all as more fully set forth in the request that is on file with the Commission and open to public inspection.

Questar proposes to abandon J.L. No. 61 by sale to JN, which is located in Sections 25 and 26, Township 3 North, Range 7 East, Summit County, Utah. Questar states that J.L. No. 61 comprises 630 feet of 3.5-inch O.D. lateral and 4,976 feet of 4.5-inch O.D. lateral (a total of 1.06 miles of 3.5-inch and 4.5-inch diameter lateral) and includes a 10-inch drip assembly and a 400 bbl. liquid tank located near the main-line junction. Questar also proposes to abandon to JN the private land-owner rights of way and easement grants associated with J.L. No. 61.

Questar declares that JN intends to utilize J.L. No. 61 as a gathering lateral to accommodate new development in the area and enhance JN's ability to more effectively serve the needs of its customers in the North Pineview Field. Questar states that the abandonment of J.L. No. 61 to JN will also improve Questar's operating efficiencies in the area by eliminating the need for them to maintain this facility, which is not conveniently located for Questar's operating personnel. Questar asserts that the proposal will not result in a reduction or abandonment of transportation service on Questar's transmission system.

Any person or the Commission's staff may, within 45 days after issuance of the instant notice by the Commission, file pursuant to Rule 214 of the Commission's Procedural Rules (18 CFR 385.214) a motion to intervene or notice of intervention and pursuant to Section 157.205 of the Regulations under the Natural Gas Act (18 CFR 157.205) a protest to the request. If no protest is filed within the time allowed therefor, the proposed activity shall be deemed to be authorized effective the day after the time allowed for filing a protest. If a protest is filed and not withdrawn within 30 days after the time allowed for filing a protest, the instant request shall be treated as an application for authorization pursuant to Section 7 of the Natural Gas Act.

Linwood A. Watson, Jr.,

Acting Secretary.

[FR Doc. 98–31450 Filed 11–24–98; 8:45 am]

BILLING CODE 6717–01–M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP99–72–000]

Southern Natural Gas Company; Notice of Request Under Blanket Authorization

November 19, 1998.

Take notice that on November 12, 1998, Southern Natural Gas Company (Southern), Post Office Box 2563, Birmingham, Alabama 35202–2563, filed in Docket No. CP99–72–000 a request pursuant to Sections 157.205 and 157.211 of the Commission's Regulations under the Natural Gas Act (18 CFR 157.205, 175.211) for authorization to construct and operate a new delivery point for service to Oglethorpe Company (Oglethorpe), under Southern's blanket certificate issued in Docket No. CP82–406–000, pursuant to Section 7 of the Natural Gas Act, all as more fully set forth in the request that is on file with the Commission and open to public inspection.

Southern proposes to construct and operate certain measurement and other appurtenant facilities in order to provide transportation service to Oglethorpe at a new delivery point at approximate Mile Post 9.0 on Southern Ocmulgee—Atlanta Line in Monroe County, Georgia. Southern states that the estimated cost of the construction and installation of the facilities is approximately $1,042,000. Southern also states the Oglethorpe has complied with all of the requirements under Section 36 of the General Terms and Conditions of Southern's FERC Gas Tariff for the installation of the direct delivery connection by Southern and will reimburse Southern for the cost of

constructing, installing and operating the proposed facilities.

Southern states that it will transport gas on behalf of Oglethorpe under its Rate Schedule IT, and that the installation of the proposed facilities will have no adverse effect on its ability to provide firm deliveries.

Any person or the Commission's staff may, within 45 days after issuance of the instant notice by the Commission, file pursuant to Rule 214 of the Commission's Procedural Rules (18 CFR 385.214) a motion to intervene or notice of intervention and pursuant to Section 157.205 of the Regulations under the Natural Gas Act (18 CFR 157.205) a protest to the request. If no protest is filed within the time allowed therefor, the proposed activity shall be deemed to be authorized effective the day after the time allowed for filing a protest. If a protest is field and not withdrawn within 30 days after the time allowed for filing a protest, the instant request shall be treated as an application for authorization pursuant to Section 7 of the Natural Gas Act.

Linwood A. Watson, Jr.,

Acting Secretary.

[FR Doc. 98–31449 Filed 11–24–98; 8:45 am]

BILLING CODE 6717–01–M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP99–56–001]

Stingray Pipeline Company; Notice of Compliance Filing

November 19, 1998.

Take notice that on November 16, 1998, Stingray Pipeline Company (Stingray) tendered for filing as part of its FERC Gas Tariff, Third Revised Volume No. 1, certain tariff sheets to be effective November 2, 1998.

Stingray states that these tariff sheets were filed in compliance with the Commission's order issued October 30, 1998, in Docket No. RP99–56–000.

Stingray requests waiver of the Commission's Regulations to the extent necessary to permit the tendered tariff sheets to become effective November 2, 1998, pursuant to Order No. 587–H.

Stingray states that copies of the filing are being mailed to Stingray's customers and interested state regulatory agencies and all parties set out on the official service list in Docket No. RP99–56.

Any person desiring to protest this filing should file a protest with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, in accordance with Section 385.211 of the Commission's Rules and Regulations. All such protests must be filed as provided in Section 154.210 of the Commission's Regulations. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceedings. Copies of this filing are on file with the Commission and are available for public inspection in the Public Reference Room.

Linwood A. Watson, Jr.,

Acting Secretary.

[FR Doc. 98–31465 Filed 11–24–98; 8:45 am]

BILLING CODE 6717–01–M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP99–68–000]

Tennessee Gas Pipeline Company; Notice of Request Under Blanket Authorization

November 19, 1998.

Take notice that on November 12, 1998, Tennessee Gas Pipeline Company (Applicant), P.O. Box 2511, Houston, Texas, 77252, filed in Docket No. CP99–68–000 a request pursuant to Sections 157.205 and 157.211 of the Commission's Regulations under the Natural Gas Act (18 CFR 157.205 and 157.212) for approval to construct and operate a new delivery point for service to New York State Electric & Gas (NYSEG) acting as agent for Herkimer County Industrial Development Agency (Herkimer IDA), under Applicant's blanket certificate issued in Docket No. CP82–413–000, pursuant to Section 7(c) of the Natural Gas Act (NGA), all as more fully set forth in the request which is on file with the Commission and open to public inspection.

Applicant proposes to construct and operate a new delivery point located in Herkimer County, New York to provide up to 1920 Mcf of natural gas per day to NYSEG pursuant to an existing interruptible transportation agreement. Applicant specifically proposes to install, own, operate, and maintain two two-inch hot taps, 88 feet of two-inch diameter interconnection pipe to the edge of Applicant's right-of-way, and electronic gas measurement equipment. Applicant indicates that NYSEG will install and maintain the metering facilities, which will be owned by Herkimer IDA. It is further indicated that NYSEG will install, operate, and maintain ten feet of two-inch interconnecting pipe from the edge of Applicant's right-of-way to NYSEG's measurement building. Applicant asserts that NYSEG will reimburse Applicant $64,200 for this project.

Any person or the Commission's Staff may, within 45 days of the issuance of the instant notice by the Commission, file pursuant to Rule 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.214), a motion to intervene and pursuant to Section 157.205 of the regulations under the Natural Gas Act (18 CFR 157.205), a protest to the request. If no protest is filed within the time allowed therefor, the proposed activities shall be deemed to be authorized effective the day after the time allowed for filing a protest. If a protest is filed and not withdrawn 30 days after the time allowed for filing a protest, the instant request shall be treated as an application for authorization pursuant to Section 7 of the Natural Gas Act.

Linwood A. Watson, Jr.,

Acting Secretary.

[FR Doc. 98–31447 Filed 11–24–98; 8:45 am]

BILLING CODE 6717–01–M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP99–60–001]

Trailblazer Pipeline Company; Notice of Compliance Filing

November 19, 1998.

Take notice that on November 16, 1998, Trailblazer Pipeline Company (Trailblazer) tendered for filing as part of its FERC Gas Tariff, Third Revised Volume No. 1, certain tariff sheets to be effective November 2, 1998.

Trailblazer states that these tariff sheets were filed in compliance with the Commission's order issued October 30, 1998, in Docket No. RP99–60–000.

Trailblazer requests waiver of the Commission's Regulations to the extent necessary to permit the tendered tariff sheets to become effective November 2, 1998, pursuant to Order No. 587–H.

Trailblazer states that copies of the filing are being mailed to Trailblazer's customers and interested state regulatory agencies and all parties set out on the official service list in Docket No. RP99–60.

Any person desiring to protest this filing should file a protest with the Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, D.C. 20426, in accordance with Section 385.211 of the Commission's Rules and Regulations. All such protests must be filed as provided in Section 154.210 of the Commission's Regulations. Protests

will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceedings. Copies of this filing are on file with the Commission and are available for public inspection in the Public Reference Room.

Linwood A. Watson, Jr.,

Acting Secretary.

[FR Doc. 98–31466 Filed 11–24–98; 8:45 am]

BILLING CODE 6717–01–M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP99–39–001]

TransColorado Gas Transmission Company; Notice of Compliance Filing

November 19, 1998.

Take notice that on November 16, 1998, TransColorado Gas Transmission Company, (TransColorado) tendered for filing as part of its FERC Gas Tariff, Original Volume No. 1, the following tariff sheets, with an effective date of November 1, 1998:

Substitute Fifth Revised Sheet No. 203
Sub Second Revised Sheet No. 203.01
Substitute First Revised Sheet No. 231A
Original Sheet No. 231B

TransColorado states that the tariff sheets are being filed to revise intra-day tariff provisions in compliance with the Commission's order in this proceeding.

Any person desiring to protest this filing should file a protest with the Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, D.C., 20426, in accordance with Section 385.211 of the Commission's Rules and Regulations. All such protests must be filed as provided in Section 154.210 of the Commission's Regulations. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceedings. Copies of this filing are on file with the Commission and are available for public inspection in the Public Reference Room.

Linwood A. Watson, Jr.,

Acting Secretary.

[FR Doc. 98–31460 Filed 11–24–98; 8:45 am]

BILLING CODE 6717–01–M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP99–32–001]

Transwestern Pipeline Company; Notice of Compliance Filing

November 19, 1998.

Take notice that on November 16, 1998, Transwestern Pipeline Company (Transwestern), tendered for filing to become part of Transwestern's FERC Gas Tariff, Second Revised Volume No. 1, the following tariff sheet to be effective November 1, 1998:

Substitute Third Revised Sheet No. 81E

Transwestern states that the instant filing is made in compliance with the Commission's Letter Order accepting tariff sheets, subject to conditions, issued on October 30, 1998 in Docket No. RP99–32–000 (October 30 Order).

Transwestern states that copies of the filing were served upon Transwestern's customers and interested State Commissions.

Any person desiring to protest this filing should file a protest with the Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, D.C. 20426, in accordance with § 385.211 of the Commission's Rules and Regulations. All such protests must be filed as provided in § 154.210 of the Commission's Regulations. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceedings. Copies of this filing are on file with the Commission and are available for public inspection in the Public Reference Room.

Linwood A. Watson, Jr.,

Acting Secretary.

[FR Doc. 98–31459 Filed 11–24–98; 8:45 am]

BILLING CODE 6717–01–M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP99–21–001]

Venice Gathering System, L.L.C.; Notice of Compliance Filing

November 19, 1998.

Take notice that on November 16, 1998, Venice Gathering System, L.L.C. (VGS), tendered for filing as part of its FERC Gas Tariff, Original Volume No. 1, the following tariff sheets:

Substitute First Revised Sheet Nos. 79, 80 and 83
Substitute Original Sheet Nos. 84 and 85

VGS states that it is submitting these tariff sheets to comply with the October 30, 1998 order issued in the above reference proceeding. VGS proposes a February 1, 1999 effective date for these sheets to correspond to the effective date of the other tariff provisions implementing the intraday nomination and scheduling GISB standards.

Any person desiring to protest this filing should file a protest with the Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, D.C. 20426, in accordance with Section 385.211 of the Commission's Rules and Regulations. All such protests must be filed as provided in Section 154.210 of the Commission's Regulations. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceedings. Copies of this filing are on file with the Commission and are available for public inspection in the Public Reference Room.

Linwood A. Watson, Jr.,

Acting Secretary.

[FR Doc. 98–31455 Filed 11–24–98; 8:45 am]

BILLING CODE 6717–01–M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. TM99–4–76–000]

Wyoming Interstate Company, Ltd.; Notice of GRI Filing

November 19, 1998.

Take notice on November 16, 1998, Wyoming Interstate Company, Ltd. (WIC), tendered for filing as part of its FERC Gas Tariff, First Revised Volume No. 1, First Revised Sheet No. 5.3, and Second Revised Volume No. 2, First Revised Sheet No. 4B, with an effective date of January 1, 1999.

WIC states the purpose of this filing is to permit WIC to collect Gas Research Institute (GRI) charges associated with WIC transportation pursuant to the Commission order issued September 29, 1998 in Docket No. RP98–235–000.

WIC states that copies of the filing were served upon the company's jurisdictional firm customers.

Any person desiring to be heard or to protest said filing should file a motion to intervene or a protest with the Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, D.C. 20426, in accordance with Sections 385.214 or 385.211 of the Commission's Rules and Regulations. All such motions

or protests must be filed in accordance with Section 154.210 of the Commission's Regulations. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceedings. Any person wishing to become a party must file a motion to intervene. Copies of this filing are on file with the Commission and are available for public inspection in the Public Reference Room.

Linwood A. Watson, Jr.,

Acting Secretary.

[FR Doc. 98–31477 Filed 11–24–98; 8:45 am]

BILLING CODE 6717–01–M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. EG98–110–000, et al.]

Lakota Ridge, L.L.C., et al.; Electric Rate and Corporate Regulation Filings

November 13, 1998.

Take notice that the following filings have been made with the Commission:

1. Lakota Ridge, L.L.C.

[Docket No. EG98–110–000]

Take notice that on November 4, 1998, Lakota Ridge, L.L.C. tendered for filing an amended application to its August 31, 1998, submittal for determination of exempt wholesale generator status in the above-referenced docket.

Comment date: November 30, 1998, in accordance with Standard Paragraph E at the end of this notice. The Commission will limit its consideration of comments to those that concern the adequacy or accuracy of the application.

2. Shaokatan Hills, L.L.C.

[Docket No. EG98–111–000]

Take notice that on November 4, 1998, Shaokatan Hills, L.L.C. tendered for filing an amended application to its August 31, 1998, submittal for determination of exempt wholesale generator status in the above-referenced docket.

Comment date: November 30, 1998, in accordance with Standard Paragraph E at the end of this notice. The Commission will limit its consideration of comments to those that concern the adequacy or accuracy of the application.

3. Rockingham Power, LLC

[Docket No. EG99–16–000]

Take notice that on November 5, 1998, Rockingham Power, LLC, 1000 Louisiana, Suite 5800, Houston, Texas filed with the Federal Energy Regulatory Commission an Application for Determination of Exempt Wholesale Generator Status pursuant to Part 365 of the Commission's Regulations.

Rockingham Power, LLC is a limited liability company, organized under the laws of the State of Delaware, and engaged directly and exclusively in owning and operating the Rockingham Power, LLC electric generating facility (the Facility) to be located in Rockingham County, North Carolina, and selling electric energy and related ancillary services at wholesale from the Facility, as well as selling at wholesale electric energy from sources other than the Facility. The Facility will consist of five gas turbine generators, each nominally rated at approximately 160 MW, for a total of 800 MW, a metering station, and associated transmission interconnection components.

Comment date: December 4, 1998, in accordance with Standard Paragraph E at the end of this notice. The Commission will limits its consideration of comments to those that concern the adequacy or accuracy of the application.

4. Gauley River Power Partners, L.P.

[Docket No. EG99–17–000]

Take notice that on November 5, 1998, Gauley River Power Partners, L.P. (GRPP) filed with the Federal Energy Regulatory Commission an application for determination of exempt wholesale generator status pursuant to Part 365 of the Commission's regulations.

GRPP, a Vermont limited partnership, is a wholly-owned subsidiary of Catamount Energy Corporation, which in turn is a wholly-owned subsidiary of Central Vermont Public Service Corp., both Vermont corporations.

GRPP will operate a hydroelectric project with an installed capacity of 80 MW to be located on the Gauley River in Nicholas County, West Virginia and owned by the City of Summersville, West Virginia. The Facility consists of one penstock, 17 feet in diameter, connected to the existing outlet of one Howell-Burger valve conduit of the Army Corps of Engineers' Summersville Dam; a powerhouse containing two 40 MW Francis hydraulic turbines with a combined installed capacity of 80 MW; a valve house with one Howell-Bunrger valve; and a tailrace. The Facility will also include a step-up transformer, associated breakers and metering equipment and an approximately 10-mile-long 69 kV transmission line that is required to connect the Facility to the transmission system of the Appalachian Power Company.

Comment date: December 4, 1998, in accordance with Standard Paragraph E at the end of this notice. The Commission will limit its consideration of comments to those that concern the adequacy or accuracy of the application.

5. Southern Energy New England, L.L.C.

[Docket No. EG99–18–000]

On November 9, 1998, Southern Energy New England, L.L.C. (Southern New England), 900 Ashwood Parkway, Suite 500, Atlanta, Georgia 30338–4780, filed with the Federal Energy Regulatory Commission an application for determination of exempt wholesale generator status pursuant to Part 365 of the Commission's regulations.

Southern New England is a Delaware limited liability company that intends to acquire: (a) an indirect 100% ownership interest in the Canal Station, a two-unit generation facility with installed capacity of 1131 MW located in Sandwich, Massachusetts, (b) an indirect 1.4325% interest (amounting to approximately 8.9 MW per year of capacity) in the William F. Wyman Unit 4 generating facility located in Yarmouth, Maine, (C) an indirect 100% interest in two diesel-fueled generating facilities with a total capacity of 13.8 MW located on Martha's Vineyard, Massachusetts, and (d) an indirect 100% ownership interest in a 113 MW generation facility located in Cambridge, Massachusetts. Southern New England is engaged directly, or indirectly through one or more affiliates, and exclusively in the business of owning or operating, or both owning and operating, all or part of one or more eligible facilities and selling electric energy at wholesale.

Comment date: December 4, 1998, in accordance with Standard Paragraph E at the end of this notice. The Commission will limit its consideration of comments to those that concern the adequacy or accuracy of the application.

6. Southern Energy Canal, L.L.C.

[Docket No. EG99–19–000]

On November 9, 1998, Southern Energy Canal, L.L.C. (Southern Canal), 900 Ashwood Parkway, Suite 500, Atlanta, Georgia 30338–4780, filed with the Federal Energy Regulatory Commission an application for determination of exempt wholesale generator status pursuant to Part 365 of the Commission's regulations.

Southern Canal is a Delaware limited liability company that intends to acquire: (a) a 100% ownership interest in the Canal Station, a two-unit generation facility with installed capacity of 1131 MW located in

Sandwich, Massachusetts, (b) a 1.4325% undivided interest (amounting to approximately 8.9 MW per year of capacity) in the William F. Wyman Unit 4 generating facility located in Yarmouth, Maine, and (C) a 100% interest in two diesel-fueled generating facilities with a total capacity of 13.8 MW located on Martha's Vineyard, Massachusetts. Southern Canal is engaged directly and exclusively in the business of owning or operating, or both owning and operating, all or part of one or more eligible facilities and selling electric energy at wholesale.

Comment date: December 4, 1998, in accordance with Standard Paragraph E at the end of this notice. The Commission limit its consideration of comments to those that concern the adequacy or accuracy of the application.

7. Southern Energy Kendall, L.L.C.

[Docket No. EG99–20–000]

On November 9, 1998, Southern Energy Kendall, L.L.C. (Southern Kendall), 900 Ashwood Parkway, Suite 500, Atlanta, Georgia 30338–4780, filed with the Federal Energy Regulatory Commission an application for determination of exempt wholesale generator status pursuant to Part 365 of the Commission's regulations.

Southern Kendall is a Delaware limited liability company that intends to acquire a 100% ownership interest in a 113 MW generation facility located in Cambridge, Massachusetts. Southern Kendall is engaged directly and exclusively in the business of owning or operating, or both owning and operating, all or part of one or more eligible facilities and selling electric energy at wholesale.

Comment date: December 4, 1998, in accordance with Standard Paragraph E at the end of this notice. The Commission will limit its consideration of comments to those that concern the adequacy or accuracy of the application.

8. Commonwealth Electric Company and Cambridge Electric Light Company

[Docket No. ER99–275–000]

Take notice that on November 4, 1998, Commonwealth Electric Company (Commonwealth) and Cambridge Electric Light Company (Cambridge), tendered for filing a corrected Service Agreement between Southern Company Energy Marketing, L.P., replacing the Service Agreement inadvertently filed on October 22, 1998, in the above-referenced docket.

Comment date: November 24, 1998, in accordance with Standard Paragraph E at the end of this notice.

9. Boston Edison Company

[Docket No. ER99–333–000]

Take notice that on October 27, 1998, Boston Edison Company (Boston Edison) filed, for informational purposes only, amended true-up to actual reports for calendar years 1995 and 1996 regarding charges to Cambridge Electric Light Company for the use of Station 509. Boston Edison's charges for the use of Station 509 are governed by its FERC Rate Schedule No. 101. A report for calendar year 1995 charges was previously accepted for filing in Docket No. ER97–2067–000. A report for calendar year 1996 charges was previously accepted for filing in Docket No. ER98–1985–000.

Comment date: November 30, 1998, in accordance with Standard Paragraph E at the end of this notice.

10. Southwestern Public Service Company, Northern States Power Company, Northeast Utilities Service Company, and California Power Exchange Corporation

[Docket Nos. ER99–482–000, ER99–480–000, ER99–477–000, and ER99–380–000]

Take notice that the following informational filings have been made with the Commission and are available for public inspection and copying in the Commission's Public Reference Room:

On October 30, 1998, Southwestern Public Service Company filed certain information as required by a Commission order issued in Docket No. ER95–1129–000.

On October 30, 1998, Northern States Power Company (Minnesota) and Northern States Power Company (Wisconsin) filed certain information as required by a Commission order issued in Docket No. ER98–2640–000.

On October 30, 1998, Northeast Utilities Service Company filed certain information as required by Commission orders issued in Docket Nos. ER96–780–000 and ER96–2525–000.

On October 30, 1998, California Power Exchange Corporation filed certain information as required by Commission orders issued in Docket Nos. ER98–2095–000 and ER98–4014–000.

11. Sierra Pacific Power Company

[Docket No. ER99–546–000]

Take notice that on November 9, 1998, Sierra Pacific Power Company (Sierra), tendered for filing Service Agreements (Service Agreements) with the following entities for Point-to-Point Transmission Service under Sierra's Open Access Transmission Tariff (Tariff), for Non Firm Point-to-Point Transmission Service Constellation Power Source, Inc., PacifiCorp Power Marketing, Inc., for Short-Term Firm Point-to-Point Transmission Service Constellation Power Source, Inc.

Sierra filed the executed Service Agreements with the Commission in compliance with Sections 13.4 and 14.4 of the Tariff and applicable Commission regulations. Sierra also submitted revised Sheet Nos. 148 and 148A (Attachment E) to the Tariff, which is an updated list of all current subscribers.

Sierra requests waiver of the Commission's notice requirements to permit and effective date of November 10, 1998 for Attachment E, and to allow the Service Agreements to become effective according to their terms.

Copies of this filing were served upon the Public Service Commission of Nevada, the Public Utilities Commission of California and all interested parties.

Comment date: November 25, 1998, in accordance with Standard Paragraph E at the end of this notice.

12. Duquesne Light Company

[Docket No. ER99–553–000]

Take notice that on November 9, 1998, Duquesne Light Company (Duquesne), tendered for filing under Duquesne's pending Market-Based Rate Tariff, (Docket No. ER98–4159–000) executed Service Agreement at Market-Based Rates with Cinergy Services, Inc., (Customer).

Duquesne has requested the Commission waive its notice requirements to allow the Service Agreement to become effective as of November 1, 1998.

Copies of this filing were served upon Customer.

Comment date: November 27, 1998, in accordance with Standard Paragraph E at the end of this notice.

13. Duquesne Light Company

[Docket No. ER99–554–000]

Take notice that on November 9, 1998, Duquesne Light Company (Duquesne), tendered for filing under Duquesne's pending Market-Based Rate Tariff, (Docket No. ER98–4159–000) executed Service Agreement at Market-Based Rates with First Energy Corporation (Customer).

Duquesne has requested the Commission waive its notice requirements to allow the Service Agreement to become effective as of November 1, 1998.

Copies of this filing were served upon Customer.

Comment date: November 27, 1998, in accordance with Standard Paragraph E at the end of this notice.

14. Duquesne Light Company

[Docket No. ER99–555–000]

Take notice that on November 9, 1998, Duquesne Light Company (Duquesne), tendered for filing under Duquesne's pending Market-Based Rate Tariff, (Docket No. ER98–4159–000) executed Service Agreement at Market-Based Rates with FirstEnergy Trading and Power Marketing, Inc., (Customer).

Duquesne has requested the Commission waive its notice requirements to allow the Service Agreement to become effective as of November 1, 1998.

Copies of this filing were served upon Customer.

Comment date: November 27, 1998, in accordance with Standard Paragraph E at the end of this notice.

15. Duquesne Light Company

[Docket No. ER99–556–000]

Take notice that on November 9, 1998, Duquesne Light Company (Dusquesne), tendered for filing under Duquesne's market-based rate tariff, (Docket No. ER98–4159–000), an executed Service Agreement with Koch Energy Trading, Inc., (Customer).

Duquesne has requested the Commission waive its notice requirements to allow the Service Agreement to become effective as of August 24, 1998.

Copies of this filing were served upon the Customer.

Comment date: November 27, 1998, in accordance with Standard Paragraph E at the end of this notice.

16. Duquesne Light Company

[Docket No. ER99–557–000]

Take notice that on November 9, 1998, Duquesne Light Company (Duquesne), tendered for filing under Duquesne's pending Market-Based Rate Tariff, (Docket No. ER98–4159–000) executed Service Agreement at Market-Based Rates with Merchant Energy Group of the Americas, Inc., (Customer).

Duquesne has requested the Commission waive its notice requirements to allow the Service Agreement to become effective as of November 1, 1998.

Copies of this filing were served upon Customer.

Comment date: November 27, 1998, in accordance with Standard Paragraph E at the end of this notice.

17. Duquesne Light Company

[Docket No. ER99–558–000]

Take notice that on November 9, 1998, Duquesne Light Company (Duquesne), tendered for filing under Duquesne's pending Market-Based Rate Tariff, (Docket No. ER98–4159–000) an executed Service Agreement at Market-Based Rates with Strategic Energy Ltd. (Customer).

Duquesne has requested the Commission waive its notice requirements to allow the Service Agreement to become effective as of November 1, 1998.

Copies of this filing were served upon Customer.

Comment date: November 27, 1998, in accordance with Standard Paragraph E at the end of this notice.

18. Duquesne Light Company

[Docket No. ER99–559–000]

Take notice that on November 9, 1998, Duquesne Light Company (Duquesne), tendered for filing under Duquesne's pending Market-Based Rate Tariff, (Docket No. ER98–4159–000) an executed Service Agreement at Market-Based Rates with WPS Energy Services, Inc. (Customer).

Duquesne has requested the Commission waive its notice requirements to allow the Service Agreement to become effective as of November 1, 1998.

Copies of this filing were served upon Customer.

Comment date: November 27, 1998, in accordance with Standard Paragraph E at the end of this notice.

19. Niagara Mohawk Power Corporation

[Docket No. ER99–560–000]

Take notice that on November 9, 1998, Niagara Mohawk Power Corporation (NMPC), tendered for filing with the Federal Energy Regulatory Commission an executed Transmission Service Agreement between NMPC and Duke Energy Trading and Marketing, L.L.C. (DETM). This Transmission Service Agreement specifies that DETM has signed on to and has agreed to the terms and conditions of NMPC's Open Access Transmission Tariff as filed in Docket No. OA96–194–000. This Tariff, filed with FERC on July 9, 1996, will allow NMPC and DETM to enter into separately scheduled transactions under which NMPC will provide transmission service for DETM as the parties may mutually agree.

NMPC requests an effective date of November 4, 1998. NMPC has requested waiver of the notice requirements for good cause shown.

NMPC has served copies of the filing upon the New York State Public Service Commission and DETM.

Comment date: November 27, 1998, in accordance with Standard Paragraph E at the end of this notice.

20. Niagara Mohawk Power Corporation

[Docket No. ER99–561–000]

Take notice that on November 9, 1998, Niagara Mohawk Power Corporation (NMPC), tendered for filing with the Federal Energy Regulatory Commission an executed Transmission Service Agreement between NMPC and Duke Energy Trading and Marketing, L.L.C., (DETM). This Transmission Service Agreement specifies that DETM has signed on to and has agreed to the terms and conditions of NMPC's Open Access Transmission Tariff as filed in Docket No. OA96–194–000. This Tariff, filed with FERC on July 9, 1996, will allow NMPC and DETM to enter into separately scheduled transactions under which NMPC will provide transmission service for DETM as the parties may mutually agree.

NMPC requests an effective date of November 4, 1998. NMPC has requested waiver of the notice requirements for good cause shown.

NMPC has served copies of the filing upon the New York State Public Service Commission and DETM.

Comment date: November 27, 1998, in accordance with Standard Paragraph E at the end of this notice.

21. Niagara Mohawk Power Corporation

[Docket No. ER99–562–000]

Take notice that on November 9, 1998, Niagara Mohawk Power Corporation (NMPC), tendered for filing with the Federal Energy Regulatory Commission an executed Transmission Service Agreement between NMPC and North American Energy Conservation, Inc. This Transmission Service Agreement specifies that North American Energy Conservation, Inc., has signed on to and has agreed to the terms and conditions of NMPC's Open Access Transmission Tariff as filed in Docket No. OA96–194–000. This tariff, filed with FERC on July 9, 1996, will allow NMPC and North American Energy Conservation, Inc., to enter into separately scheduled transactions under which NMPC will provide transmission service for North American Energy Conservation, Inc., as the parties may mutually agree.

NMPC requests an effective date of November 4, 1998. NMPC has requested waiver of the notice requirements for good cause shown.

NMPC has served copies of the filing upon the New York State Public Service Commission and North American Energy Conservation, Inc.

Comment date: November 27, 1998, in accordance with Standard Paragraph E at the end of this notice.

22. Niagara Mohawk Power Corporation

[Docket No. ER99–563–000]

Take notice that on November 9, 1998, Niagara Mohawk Power Corporation (NMPC), tendered for filing with the Federal Energy Regulatory Commission an executed Transmission Service Agreement between NMPC and North American Energy Conservation, Inc. This Transmission Service Agreement specifies that North American Energy Conservation, Inc., has signed on to and has agreed to the terms and conditions of NMPC's Open Access Transmission Tariff as filed in Docket No. OA96–194–000. This Tariff, filed with FERC on July 9, 1996, will allow NMPC and North American Energy Conservation, Inc., to enter into separately scheduled transactions under which NMPC will provide transmission service for North American Energy Conservation, Inc., as the parties may mutually agree.

NMPC requests an effective date of November 4, 1998. NMPC has requested waiver of the notice requirements for good cause shown.

NMPC has served copies of the filing upon the New York State Public Service Commission and North American Energy Conservation, Inc.

Comment date: November 27, 1998, in accordance with Standard Paragraph E at the end of this notice.

23. AES NY, L.L.C.

[Docket No. ER99–564–000]

Take notice that on November 10, 1998, AES NY, L.L.C. (AES NY), c/o Henry Aszklar, AES NY, L.L.C., 1001 North 19th Street, Suite 2000, Arlington, Virginia 22209, a Delaware limited liability company, petitioned the Commission for an order accepting rate schedule for filing and granting waivers and blanket approvals.

Comment date: November 27, 1998, in accordance with Standard Paragraph E at the end of this notice.

24. Arizona Public Service Company

[Docket No. ER99–565–000]

Take notice that on November 10, 1998, Arizona Public Service Company (APS), tendered for filing revisions to its Open Access Transmission Tariff needed in order to accommodate retail direct access being implemented by the Arizona Corporation Commission.

APS requests an effective date of January 1, 1999.

A copy of this filing has been served on the Arizona Corporation Commission and the parties included on the service list attached to this filing letter.

Comment date: November 27, 1998, in accordance with Standard Paragraph E at the end of this notice.

25. New England Power Pool

[Docket No. ER99–566–000]

Take notice that on November 9, 1998, the New England Power Pool Executive Committee filed for acceptance three signature pages to the New England Power Pool (NEPOOL) Agreement dated September 1, 1971, as amended, signed by Southern Energy New England, LLC (SENE); Southern Energy Canal, LLC (SE Canal); Southern Energy SE Kendall, LLC (SE Kendall). The NEPOOL Agreement has been designated NEPOOL FPC No. 2.

The Executive Committee states that the Commission's acceptance of the signature pages of SENE, SE Canal and SE Kendall would permit NEPOOL to expand its membership to include SENE, SE Canal and SE Kendall. NEPOOL further states that the filed signature pages do not change the NEPOOL Agreement in any manner, other than to make SENE, SE Canal and SE Kendall members in NEPOOL.

NEPOOL requests an effective date of as of the date of the acquisition by SE Canal and SE Kendall of the generating assets currently owned by Commonwealth Electric Company, Canal Electric Company, Montaup Electric Company and Cambridge Electric Light Company, which is anticipated to occur December 30, 1998.

Comment date: November 27, 1998, in accordance with Standard Paragraph E at the end of this notice.

26. New York State Electric & Gas Corporation

[Docket No. ER99–567–000]

Take notice that on November 10, 1998, New York State Electric & Gas Corporation (NYSEG), tendered for filing proposed changes in its Open Access Transmission Tariff (OATT) filed July 9, 1997 and effective on November 27, 1997, in Docket No. ER97–2353–000. The changes include a change in address, revised lists of customers taking Point-to-Point and Network Integration Transmission Services, and a typographical error.

NYSEG has served copies of the filing on the New York State Public Service Commission and on the OATT customers.

Comment date: November 30, 1998, in accordance with Standard Paragraph E at the end of this notice.

27. Deseret Generation & Transmission Co-operative

[Docket No. ER99–568–000]

Take notice that on November 10, 1998, Deseret Generation & Transmission Co-operative tendered for filing an executed umbrella short-term firm point-to-point service agreement with Constellation Power Source, Inc., under its open access transmission tariff. Deseret's open access transmission tariff is currently on file with the Commission in Docket No. OA97–487–000.

Deseret requests a waiver of the Commission's notice requirements for an effective date of November 10, 1998.

Constellation Power Source, Inc., has been provided a copy of this filing.

Comment date: November 27, 1998, in accordance with Standard Paragraph E at the end of this notice.

28. Deseret Generation & Transmission Co-operative

[Docket No. ER99–569–000]

Take notice that on November 10, 1998, Deseret Generation & Transmission Co-operative tendered for filing an executed umbrella non-firm point-to-point service agreement with Constellation Power Source, Inc., under its open access transmission tariff. Deseret's open access transmission tariff is currently on file with the Commission in Docket No. OA97–487–000.

Deseret requests a waiver of the Commission's notice requirements for an effective date of November 10, 1998.

Constellation Power Source, Inc., has been provided a copy of this filing.

Comment date: November 27, 1998, in accordance with Standard Paragraph E at the end of this notice.

29. Virginia Electric and Power Company

[Docket No. ER99–570–000]

Take notice that on November 10, 1998, Virginia Electric and Power Company (Virginia Power), tendered for filing the Service Agreement between Virginia Electric and Power Company and Energy Transfer Group, L.L.C., under the FERC Electric Tariff (Second Revised Volume No. 4), which was accepted by order of the Commission dated August 13, 1998 in Docket No. ER98–3771–000. Under the tendered Service Agreement, Virginia Power will provide services to Energy Transfer Group, L.L.C., under the terms and conditions of the Tariff.

Virginia Power requests an effective date of November 10, 1998.

Copies of the filing were served upon Energy Transfer Group, L.L.C., the Virginia State Corporation Commission

and the North Carolina Utilities Commission.

Comment date: November 27, 1998, in accordance with Standard Paragraph E at the end of this notice.

30. St. Joseph Light & Power Company

[Docket No. ER99–571–000]

Take notice that on November 10, 1998, St. Joseph Light & Power Co., tendered for filing nine executed agreements for transmission service under its Open Access Transmission Tariff. One of the service agreements provides for firm point-to-point transmission service to Nebraska Public Power District. The other eight agreements provide for non-firm point-to-point transmission service to American Electric Power Service Corporation; Amoco Energy Trading Corporation; Avista Energy, Inc.; Continental Energy Services, L.L.C.; Nebraska Public Power District; OGE Energy Resources, Inc.; The Power Company of America; and Tennessee Valley Authority.

Copies of the filing were served on each of these companies and the Tennessee Valley Authority.

Comment date: November 30, 1998, in accordance with Standard Paragraph E at the end of this notice.

31. Public Service Company of Colorado

[Docket No. ER98–4590–000]

Take notice that on November 6, 1998, Public Service Company of Colorado tendered for filing a response to the Commission's letter of deficiency in the above referenced docket.

Comment date: November 30, 1998, in accordance with Standard Paragraph E at the end of this notice.

Standard Paragraphs

E. Any person desiring to be heard or to protest said filing should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, D.C. 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 18 CFR 385.214). All such motions or protests should be filed on or before the comment date. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a motion to intervene. Copies of these filings are on file with the Commission and are available for public inspection.

David P. Boergers,

Secretary.

[FR Doc. 98–31445 Filed 11–24–98; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. EC99–9–000, et al.]

PacifiCorp, et al.; Electric Rate and Corporate Regulation Filings

November 12, 1998.

Take notice that the following filings have been made with the Commission:

1. PacifiCorp

[Docket No. EC99–9–000]

Take notice that on November 9, 1998, PacifiCorp tendered for filing in accordance with 18 CFR Part 33 of the Commission's Rules and Regulations, an application seeking an order authorizing PacifiCorp to sell to the Flathead Electric Cooperative, Inc. (Flathead) approximately 122.42 miles of 34.5, 115 and 230 kilovolt transmission line and transmission substations located in Big Horn, Flathead and Lincoln Counties, Montana.

Copies of this filing were supplied to Flathead and the Montana Public Service Commission.

Comment date: December 9, 1998, in accordance with Standard Paragraph E at the end of this notice.

2. Tri Energy Company Limited

[Docket No. EG99–7–000]

Take notice that on November 4, 1998, Tri Energy Company Limited (the Applicant) whose address is Grand Amarin Tower, 16th Floor, 1550 New Petchburi Road, Ratchathewi, Bangkok 10320, Thailand, filed with the Federal Energy Regulatory Commission an application for determination of exempt wholesale generator status pursuant to Part 365 of the Commission's regulations.

The Applicant states that it will be engaged directly and exclusively in the business of owning a nominal 700 MW combined cycle power plant located in Ratchaburi Province and selling electric energy at wholesale, as that term has been interpreted by the Commission. The Applicant requests a determination that the Applicant is an exempt wholesale generator under Section 32(a)(1) of the Public Utility Holding Company Act of 1935.

Comment date: December 3, 1998, in accordance with Standard Paragraph E at the end of this notice. The Commission will limit its consideration of comments to those that concern the adequacy or accuracy of the application.

3. CL Power Sales Seven, L.L.C., CL Power Sales Eight, L.L.C., CL Power Sales Nine, L.L.C., CL Power Sales Ten, L.L.C., Hartford Power Sales, CinCap IV, LLC, Cinergy Capital and Trading Inc., and Southern Company Energy Marketing L.P.

[Docket Nos. ER96–2652–017, ER96–2652–018, ER96–2652–019, ER96–2652–020, ER95–393–021, ER98–421–004, ER93–730–010, and ER97–4166–002]

Take notice that the following informational filings have been made with the Commission and are available for public inspection and copying in the Commission's Public Reference Room:

On October 30, 1998, CL Power Sales Seven, L.L.C., CL Power Sales, Eight, L.L.C., CL Power Sales Nine, L.L.C. and CL Power Sales Ten filed certain information as required by a Commission order issued in Docket No. ER96–2652–000.

On October 30, 1998, Hartford Power Sales filed certain information as required by a Commission order issued in Docket No. ER95–393–000.

On October 30, 1998, CinCap IV, LLC filed certain information as required by a Commission order issued in Docket No. ER98–421–000.

On October 30, 1998, Cinergy Capital and Trading Inc. filed certain information as required by a Commission order issued in Docket No. ER93–730–000.

On October 30, 1998, Southern Company Energy Marketing L.P. filed certain information as required by a Commission order issued in Docket No. ER97–4166–000.

4. Northeast Electricity Inc., The Detroit Edison Company, Dynegy Power Services, Inc., Commonwealth Energy Corporation, LG&E Energy Marketing Inc., Enserch Energy Services, Inc., Statoil Energy Trading, Inc., PG&E Energy Trading—Power, Electric Clearinghouse, Inc., ONEOK Power Marketing Company, and Merchant Energy Group of the Americas

[Docket Nos. ER98–3048–001, ER99–516–000, ER94–1612–019, ER97–4253–002, ER94–1188–025, ER98–895–003, ER94–964–020, ER95–1625–016, ER94–968–024, ER98–3897–001, and ER98–1055–003]

Take notice that the following informational filings have been made with the Commission and are available for public inspection and copying in the Commission's Public Reference Room:

On November 2, 1998, Northeast Electricity Inc. filed certain information

as required by a Commission order issued in Docket No. ER98–3048–000.

On November 2, 1998, The Detroit Edison Company filed certain information as required by a Commission order issued in Docket No. ER97–324–000.

On November 2, 1998, Dynegy Power Services, Inc. filed certain information as required by a Commission order issued in Docket No. ER94–1612–000.

On November 2, 1998, Commonwealth Energy Corporation filed certain information as required by a Commission order issued in Docket No. ER97–4253–000.

On November 2, 1998, LG&E Energy Marketing Inc. filed certain information as required by a Commission order issued in Docket No. ER94–1188–000.

On November 2, 1998, Enserch Energy Services, Inc. filed certain information as required by a Commission order issued in Docket No. ER98–895–000.

On November 2, 1998, Statoil Energy Trading, Inc. filed certain information as required by a Commission order issued in Docket No. ER94–964–000.

On November 2, 1998, PG&E Energy Trading—Power filed certain information as required by a Commission order issued in Docket No. ER95–1625–000.

On November 2, 1998, Electric Clearinghouse, Inc. filed certain information as required by a Commission order issued in Docket No. ER94–968–000.

On November 2, 1998, ONEOK Power Marketing Company filed certain information as required by a Commission order issued in Docket No. ER98–3897–000.

On November 2, 1998, Merchant Energy Group of the Americas filed certain information as required by a Commission order issued in Docket No. ER98–1055–000.

5. California Power Exchange Corporation

[Docket No. ER98–4607–000]

Take notice that on November 6, 1998, California Power Exchange Corporation (PX), tendered for filing an amendment to its tariff filing in the above-referenced docket.

Comment date: November 25, 1998, in accordance with Standard Paragraph E at the end of this notice.

6. Sunlaw Cogeneration Partners I

[Docket No. ER99–213–000]

Take notice that on November 9, 1998, Sunlaw Cogeneration Partners I (Sunlaw), tendered for filing a supplement to its petition, submitted on October 16, 1998, which requested acceptance of FERC Electric Rate Schedule No. 1; the granting of certain blanket approvals, including the authority to sell electricity at market-based rates; and the waiver of certain Commission Regulations.

Comment date: November 27, 1998, in accordance with Standard Paragraph E at the end of this notice.

7. Carolina Power & Light Company

[Docket No. ER99–299–000]

Take notice that on November 9, 1998, Carolina Power & Light Company tendered for filing a supplement to its power purchase agreement with South Carolina Public Service Authority filed on October 23, 1998, in the above-referenced docket.

Copies of the filing were served upon the North Carolina Utilities Commission, the South Carolina Public Service Commission and the South Carolina Public Service Authority.

Comment date: November 27, 1998, in accordance with Standard Paragraph E at the end of this notice.

8. Mountain Vista Power Generation L.L.C., Ormond Beach Generation, L.L.C., Ocean Vista Power Generation L.L.C., Alta Power Generation, L.L.C., State Line Energy, L.L.C., Sithe Mystic LLC, et al., Commonwealth Edison Company, United Power Technologies, Inc., and AG Energy, L.P., et al.

[Docket Nos. ER99–438–000, ER99–439–000, ER99–440–000, ER99–441–000, ER99–442–000, ER99–443–000, ER99–444–000, ER99–445–000, and ER98–2782–000]

Take notice that the following informational filings have been filed with the Commission and are available for public inspection and copying in the Commission's Office of Public Information:

On October 30, 1998, Mountain Vista Power Generation L.L.C. filed certain information as required by the Commission's order issued in Docket No. ER98–930–000.

On October 30, 1998, Ormond Beach Generation, L.L.C. filed certain information as required by the Commission's order issued in Docket No. ER98–2878–000.

On October 30, 1998, Ocean Vista Power Generation L.L.C. filed certain information as required by the Commission's order issued in Docket No. ER98–927–000.

On October 30, 1998, Alta Power Generation, L.L.C. filed certain information as required by the Commission's order in Docket No. ER98–931–000.

On October 30, 1998, State Line Energy, L.L.C. filed certain information as required by the Commission's order issued in Docket No. ER96–2869–000.

On October 30, 1998, Sithe Mystic LLC, *et al.*, filed certain information as required by the Commission's order issued in Docket No. ER98–1943–000.

On October 30, 1998, Commonwealth Edison Company filed certain information as required by the Commission's order issued in Docket No. ER98–1734–000.

On October 30, 1998, United Power Technologies, Inc. filed certain information as required by the Commission's order issued in Docket No. ER97–122–000.

On October 30, 1998, AG Energy, L.P., *et al.*, filed certain information as required by the Commission's order issued in Docket No. ER98–2782–000.

9. Great Bay Power Corporation, Unicom Power Marketing, Inc., CSW Power Marketing, Inc., Edison Source, CSW Energy Services, Inc., Texaco Energy Services, and Williams Energy Services Company

[Docket Nos. ER99–446–000, ER97–3954–005, ER97–1238–008, ER96–2150–011, ER98–2075–003, ER95–1787–011, and ER95–305–018]

Take notice that the following informational filings have been made with the Commission and are available for public inspection and copying in the Commission's Office of Public Information:

On October 30, 1998, Great Bay Power Corporation filed certain information as required by a Commission order issued in Docket No. ER98–3470–000.

On October 30, 1998, Unicom Power Marketing, Inc. filed certain information as required by a Commission order issued in Docket No. ER97–3954–000.

On October 30, 1998, CSW Power Marketing, Inc. filed certain information as required by a Commission order issued in Docket No. ER97–1238–000.

On October 30, 1998, Edison Source filed certain information as required by a Commission order issued in Docket No. ER96–2150–000.

On October 30, 1998, CSW Energy Services, Inc. filed certain information as required by a Commission order issued in Docket No. ER98–2075–000.

On October 30, 1998, Texaco Energy Services filed certain information as required by a Commission order issued in Docket No. ER95–1787–000.

On October 30, 1998, Williams Energy Services Company filed certain information as required by a Commission order issued in Docket No. ER95–305–000.

10. Duquesne Light Company

[Docket No. ER99–532–000]

Take notice that on November 9, 1998, Duquesne Light Company (DLC), tendered for filing a Service Agreement for Retail Network Integration Transmission Service and a Network Operating Agreement for Retail Network Integration Transmission Service dated October 21, 1998 with Penn Power Energy, Inc., under DLC's Open Access Transmission Tariff (Tariff). The Service Agreement and Network Operating Agreement adds Penn Power Energy, Inc., as a customer under the Tariff.

DLC requests an effective date of January 1, 1999, for the Service Agreement.

Comment date: November 27, 1998, in accordance with Standard Paragraph E at the end of this notice.

11. Tucson Electric Power Company

[Docket No. ER99–533–000]

Take notice that on November 6, 1998, Tucson Electric Power Company (TEP), tendered for filing proposed changes to its Open Access Transmission Tariff (OATT), FERC Electric Service Tariff No. 2. TEP has filed a revised OATT to include terms and conditions governing the provision of unbundled retail transmission service.

These changes to TEP's OATT are necessitated by the opening up of Arizona's retail electric markets to competition effective January 1, 1999.

Copies of the filing were served upon the TEP's jurisdictional customers and the Arizona Corporation Commission.

Comment date: November 25, 1998, in accordance with Standard Paragraph E at the end of this notice.

12. Peco Energy Company

[Docket No. ER99–534–000]

Take notice that on November 6, 1998, PECO Energy Company (PECO), tendered for filing a Service Agreement dated June 2, 1997, with Fox Islands Electric Cooperative, Inc. (FIEC), under PECO's FERC Electric Tariff Original Volume No. 1 (Tariff). The Service Agreement adds FIEC as a customer under the Tariff.

PECO requests an effective date of October 8, 1998, for the Service Agreement.

PECO states that copies of this filing have been supplied to FIEC and to the Pennsylvania Public Utility Commission.

Comment date: November 25, 1998, in accordance with Standard Paragraph E at the end of this notice.

13. Washington Water Power Company

[Docket No. ER99–542–000]

Take notice that on November 9, 1998, Washington Water Power Company (WWP), tendered for filing with the Federal Energy Regulatory Commission pursuant to 18 CFR Part 35 of the Commission's Rules and Regulations, an executed Long Term Service Agreement under WWP's FERC Electric Tariff First Revised Volume No. 9, with Duke Energy Trading and Marketing, LLC.

WWP requests an effective date of January 1, 1999.

Copies of this filing have been served upon Duke Energy Trading and Marketing, LLC.

Comment date: November 27, 1998, in accordance with Standard Paragraph E at the end of this notice.

14. Arizona Public Service Company

[Docket No. ER99–543–000]

Take notice that on November 9, 1998, Arizona Public Service Company (APS), tendered for filing Service Agreements under APS' FERC Electric Tariff, Original Volume No. 3, for service to the Electric Districts Nos. 1 and 3 of Pinal County, Arizona.

A copy of this filing has been served on the Arizona Corporation Commission, the Electric Districts Nos. 1 and 3.

Comment date: November 27, 1998, in accordance with Standard Paragraph E at the end of this notice.

15. Rochester Gas and Electric Corporation

[Docket No. ER99–544–000]

Take notice that on November 5, 1998, Rochester Gas and Electric Corporation (RG&E), tendered for filing a Service Agreement between RG&E and the Strategic Energy LTD., (Customer). This Service Agreement specifies that the Customer has agreed to the rates, terms and conditions of the RG&E open access transmission tariff filed on July 9, 1996 in Docket No. OA96–141-000.

RG&E requests waiver of the Commission's sixty (60) day notice requirements and an effective date of November 5, 1998, for the Strategic Energy LTD., Service Agreement.

RG&E has served copies of the filing on the New York State Public Service Commission and on the Customer.

Comment date: November 27, 1998, in accordance with Standard Paragraph E at the end of this notice.

16. South Carolina Electric & Gas Company

[Docket No. ER99–545–000]

Take notice that on November 9, 1998, South Carolina Electric & Gas Company (SCE&G), tendered for filing a service agreement establishing Southeastern Power Administration (SEPA) as a customer under the terms of SCE&G's Open Access Transmission Tariff.

SCE&G requests an effective date of one day subsequent to the filing of the service agreement. Accordingly, SCE&G requests waiver of the Commission's notice requirements.

Copies of this filing were served upon SEPA and the South Carolina Public Service Commission.

Comment date: November 27, 1998, in accordance with Standard Paragraph E at the end of this notice.

17. Allegheny Power Service Corporation, on behalf of Monongahela Power Co., The Potomac Edison Company, and West Penn Power Company (Allegheny Power)

[Docket No. ER99–547–000]

Take notice that on November 9, 1998, Allegheny Power Service Corporation on behalf of Monongahela Power Company, The Potomac Edison Company and West Penn Power Company (Allegheny Power), filed Supplement No. 39 to add PG&E Energy Trading—Power, L.P. and TransAlta Energy Marketing (U.S.) Inc., to Allegheny Power Open Access Transmission Service Tariff which has been submitted for filing by the Federal Energy Regulatory Commission in Docket No. OA96–18–000.

The proposed effective date under the Service Agreements is November 6, 1998.

Copies of the filing have been provided to the Public Utilities Commission of Ohio, the Pennsylvania Public Utility Commission, the Maryland Public Service Commission, the Virginia State Corporation Commission, the West Virginia Public Service Commission.

18. Washington Water Power Company

[Docket No. ER99–548–000]

Take notice that on November 9, 1998, Washington Water Power Company (WWP), tendered for filing with the Federal Energy Regulatory Commission, pursuant to 18 CFR Section 35.13, an executed Service Agreement under WWP's FERC Electric Tariff First Revised Volume No. 9, with Merchant Energy Group of the Americas, Inc.

WWP requests waiver of the prior notice requirement and requests that the Service Agreement with Merchant Energy Group of the Americas, Inc., be accepted for filing effective October 22, 1998.

Comment date: November 25, 1998, in accordance with Standard Paragraph E at the end of this notice.

19. Delmarva Power & Light Company

[Docket No. ER99–549–000]

Take notice that on November 9, 1998, Delmarva Power & Light Company (Delmarva), tendered for filing executed umbrella service agreements with NGE Generation, Inc., and Northern/AES Energy, L.L.C., under Delmarva's market rate sales tariff.

Comment date: November 27, 1998, in accordance with Standard Paragraph E at the end of this notice.

20. Northern Indiana Public Service Company

[Docket No. ER99–550–000]

Take notice that on November 9, 1998, Northern Indiana Public Service Company, tendered for filing an executed Standard Transmission Service Agreement for Non-Firm Point-to-Point Transmission Service between Northern Indiana Public Service Company and TransAlta Energy Marketing (U.S.) Inc. (Transmission Customer).

Under the Transmission Service Agreement, Northern Indiana Public Service Company will provide Point-to-Point Transmission Service to Transmission Customer pursuant to the Transmission Service Tariff filed by Northern Indiana Public Service Company in Docket No. OA96–47–000 and allowed to become effective by the Commission.

Northern Indiana Public Service Company has requested that the Service Agreement be allowed to become effective as of November 30, 1998.

Copies of this filing have been sent to the Indiana Utility Regulatory Commission and the Indiana Office of Utility Consumer Counselor.

Comment date: November 27, 1998, in accordance with Standard Paragraph E at the end of this notice.

21. Public Service Company of New Mexico

[Docket No. ER99–551–000]

Take notice that on November 9, 1998, Public Service Company of New Mexico (PNM), tendered for filing an executed service agreement dated October 30, 1998, for non-firm point-to-point transmission service under the terms of PNM's Open Access Transmission Service Tariff, with Southern California Edison Company. PNM's filing is available for public inspection at its offices in Albuquerque, New Mexico.

PNM requests an effective date of September 25, 1998 for the Service agreement.

Comment date: November 27, 1998, in accordance with Standard Paragraph E at the end of this notice.

22. Central Hudson Gas & Electric Corporation, Consolidated Edison Company of New York, Inc., Long Island Power Authority, New York State Electric & Gas Corporation, Niagara Mohawk Power Corporation, Orange and Rockland Utilities, Inc., Rochester Gas & Electric Corporation, and Power Authority of the state of New York

[Docket Nos. ER97–1523–000, OA97–470–000, and ER97–4234–000]

Take notice that on October 23, 1998, the Member Systems of the New York Power Pool [1] tendered an ISO Governance Issues Agreement.

Comment date: December 2, 1998, in accordance with Standard Paragraph E at the end of this notice.

Standard Paragraphs

E. Any person desiring to be heard or to protest said filing should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, D.C. 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 18 CFR 385.214). All such motions or protests should be filed on or before the comment date. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a motion to intervene. Copies of these filings are on file with the Commission and are available for public inspection.

David P. Boergers,

Secretary.

[FR Doc. 98–31446 Filed 11–24–98; 8:45 am]

BILLING CODE 6717–01–P

[1] Central Hudson Gas & Electric Corporation, Consolidated Edison Company of New York, Inc., Long Island Power Authority, New York Power Authority, New York State Electric & Gas Corporation, Niagara Mohawk Power Corporation, Orange and Rockland Utilities, Inc. and Rochester Gas and Electric Corporation.

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Notice of Application Accepted for Filing and Soliciting Motions To Intervene, Protests, and Comments

November 19, 1998.

Take notice that the following hydroelectric application has been filed with the Commission and is available for public inspection:

a. *Type of Application:* Preliminary Permit.

b. *Project No.:* 11623–000.

c. *Date filed:* November 3, 1998.

d. *Applicant:* Energy Recycling Company.

e. *Name of Project:* Klamath County Water Power Project.

f. *Location:* In Klamath County, Oregon, partially in Bureau of Land Management lands. T39S, R11E (sections 35 and 36), T39S, R12E (sections 19, 20, 30, and 31), T40S, R12E (sections 1, 2, 11, 12, 13, 14, 24, 25, and 26), T40S, R13E (section 6).

g. *Filed Pursuant to:* Federal Power Act, 16 U.S.C. §§ 791(a)–825(r).

h. *Applicant Contact:* Mr. Douglas Spaulding, Energy Recycling Company, 1030 North Tyrol Trail, Minneapolis, MN 55416, (612) 315–6309.

i. *FERC Contact:* Any questions on this notice should be addressed to Héctor M. Pérez, E-mail address hector.perez@ferc.fed.us, or telephone 202–219–2843.

j. *Deadline for filing motions to intervene and protest:* 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, 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. *Description of the Project:* The proposed pumped storage project would consist of the following new facilities: (1) An upper reservoir with a maximum storage capacity of 14,300 acre-feet and an area of 199 acres at maximum normal water surface elevation of 5,523 feet above mean sea level (msl), impounded

by two earth and rock fill embankments, 178 and 50-foot-high, respectively, with a crest elevation of 5,533 feet msl; (2) a 24-foot-diameter, 1,326-foot-long vertical shaft; (3) a 24-foot-diameter, 3,200-foot-long concrete-lined tunnel; (4) four, 12-foot-diameter, 355-foot-long, steel-lined penstocks; (5) a powerhouse with four 250-megawatt pump/turbines; (6) a 1,500-foot-long by 38-foot-wide D-shaped tailrace tunnel; (7) a lower reservoir with a maximum storage capacity of 16,900 acre-feet and an area of 405 acres at maximum water surface elevation of 4,191 feet msl, impounded by a 49-foot-high earth and rockfill embankment, with a crest elevation of 4,200 feet msl; (8) a 4-mile-long, 500-kilovolt transmission line connecting the project to Captain Jack substation; and (9) other appurtenances. The project would operate as a closed system using water obtained from groundwater sources.

l. *Locations of the application:* A copy of the application is available for inspection and reproduction at the Commission's Public Reference Room, located at 888 First Street, NE., Room 2A, Washington, DC 20426, or by calling (202) 208–1371. The application may be viewed on the web at www.ferc.fed.us. Call (202) 208–2222 for assistance. A copy is also available for inspection and reproduction at the address in item h above.

m. *This notice also consists of the following standard paragraphs:* A5, A7, A9, A10, B, C, and D2.

A5. Preliminary Permit—Anyone desiring to file a competing application for preliminary permit for a proposed project must submit the competing application itself, or a notice of intent to file such an application, to the Commission on or before the specified comment date for the particular application (see 18 CFR 4.36). Submission of a timely notice of intent allows an interested person to file the competing preliminary permit application no later than 30 days after the specified comment date for the particular application. A completing preliminary permit application must conform with 18 CFR 4.30(b) and 4.36.

A7. Preliminary Permit—Any qualified development applicant desiring to file a competing development application must submit to the Commission, on or before a specified comment date for the particular application, either a competing development application or a notice of intent to file such an application. Submission of a timely notice of intent to file a development application allows an interested person to file the competing application no later than 120 days after the specified comment date for the particular application. A competing license application must conform with 18 CFR 4.30(b) and 4.36.

A9. Notice of intent—A notice of intent must specify the exact name, business address, and telephone number of the prospective applicant, and must include an unequivocal statement of intent to submit, if such an application may be filed, either a preliminary permit application or a development application (specify which type of application). A notice of intent must be served on the applicant(s) named in this public notice.

A10. Proposed Scope of Studies under Permit—A preliminary permit, if issued, does not authorize construction. The term of the proposed preliminary permit would be 36 months. The work proposed under the preliminary permit would include plans, and a study of environmental impacts. Based on the results of these studies, the Applicant would decide whether to proceed with the preparation of a development application to construct and operate the project.

B. Comments, Protests, or Motions to Intervene—Anyone may submit comments, a protest, or a motion to intervene in accordance with the requirements of Rules of Practice and Procedure, 18 CFR 385.210, .211 .214. In determining the appropriate action to take, the Commission will consider all protests or other comments filed, but only those who file a motion to intervene in accordance with the Commission's Rules may become a party to the proceeding. Any comments, protests, or motions to intervene must be received on or before the specified comment date for the particular applications.

C. Filing and Service of Responsive Documents—Any filings must bear in all capital letters the title ''COMMENTS'', ''NOTICE OF INTENT TO FILE COMPETING APPLICATION'', ''COMPETING APPLICATION'', ''PROTEST'', ''MOTION TO INTERVENE'', as applicable, and the Project Number of the particular application to which the filing refers. Any of the above-named documents must be filed by providing the original and the number of copies provided by the Commission's regulations to: The Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426. An additional copy must be sent to Director, Division of Project Review, Federal Energy Regulatory Commission, at the above-mentioned address. A copy of any notice of intent, competing application or motion to intervene must also be served upon each representative of the Applicant specified in the particular application.

D2. Agency Comments—Federal, state, and local agencies are invited to file comments on the described application. A copy of the application may be obtained by agencies directly from the Applicant. If an agency does not file comments within the time specified for filing comments, it will be presumed to have no comments. One copy of an agency's comments must also be sent to the Applicant's representatives.

Linwood A. Watson, Jr.,

Acting Secretary.

[FR Doc. 98–31453 Filed 11–24–98; 8:45 am]

BILLING CODE 6717–01–M

ENVIRONMENTAL PROTECTION AGENCY

[OPP–00551A; FRL–6046–8]

Rodenticide Cluster Reregistration Eligibility Decision Document for Comment

AGENCY: Environmental Protection Agency (EPA).

ACTION: Reopening of Comment Period.

SUMMARY: This notice announces the reopening of the original 60–day comment period, starting a new 30–day public comment period for the Rodenticide Cluster Reregistration Eligibility Decision (RED) document (63 FR 48729, September 11, 1998)(FRL–6027–7). This document includes the active ingredients brodifacoum (case 2755), bromadiolone (case 2760), bromethalin (case 2765), chlorophacinone (case 2100), diphacinone and its sodium salt (case 2205), and pival and its sodium salt (case 2810).

DATES: Written comments on the RED decisions must be submitted by December 28, 1998.

ADDRESSES: Three copies of comments identified with the docket control number ''OPP–00551A'' and the case number (noted below), should be submitted to: By mail: Public Information and Records Integrity Branch, Information Resources and Services Division (7506C), Office of Pesticide Programs, Environmental Protection Agency, 401 M St., SW., Washington, DC 20460. In person, deliver comments to the docket on the first floor (Room 119), CM #2, 1921 Jefferson Davis Highway, Arlington, VA.

Comments and data may also be submitted electronically by following

the instructions under ''SUPPLEMENTARY INFORMATION'' of this document. No Confidential Business Information (CBI) should be submitted through e-mail.

Information submitted as a comment in response to this notice may be claimed confidential by marking any part or all of that information as CBI. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2. A copy of the comment that does not contain CBI must be submitted for inclusion in the public docket. Information not marked confidential will be included in the public docket without prior notice (including comments and data submitted electronically). The public docket and docket index, including printed paper versions of electronic comments, which does not include any information claimed as CBI will be available for public inspection on the first floor (Room 119) at the address given above, from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays.

FOR FURTHER INFORMATION CONTACT: Technical questions on the RED documents listed below should be directed to Dennis Deziel at (703) 308–8173.

To request a copy of any of the RED documents listed in the SUMMARY, or a specific RED Fact Sheet, contact the OPP Pesticide Docket, Public Information and Records Integrity Branch, first floor (Room 119), at the address given above or call (703) 305–5805.

SUPPLEMENTARY INFORMATION:

I. Electronic Availability

Electronic copies of the REDs and RED fact sheets can be downloaded from the Pesticide Reregistration Eligibility Decisions (REDs) home page at http://www.epa.gov/REDs.

II. Reregistration Decision

The Agency has issued Reregistration Eligibility Decision (RED) documents for the pesticidal active ingredients listed in the SUMMARY above. Under the Federal Insecticide, Fungicide, and Rodenticide Act, as amended in 1988, EPA is conducting an accelerated reregistration program to reevaluate existing pesticides to make sure they meet current scientific and regulatory standards. The data base to support the reregistration of each of the chemicals listed above is substantially complete.

The Agency has received a request from the California Deparment of Food and Agriculture to exend (or reopen) the Rodenticide Cluster RED comment period due to the extensive nature of this RED, and due to the fact that many registrants, including California, have multiple registrations with multiple active ingredients within the rodenticide cluster. The original comment period closed on November 10, 1998. The Agency believes that an additional 30-day comment period for the Rodenticide Cluster RED is justified, therefore, the Agency is reopening the comment period for an additional 30 days.

The official record for this notice, as well as the public version, has been established for this notice under docket control number ''OPP–00551A'' (including comments and data submitted electronically as described below). A public version of this record, including printed, paper versions of electronic comments, which does not include any information claimed as CBI, is available for inspection from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The official record is located at the address in ''ADDRESSES'' at the beginning of this document.

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

Electronic comments must be submitted as an ASCII file avoiding the use of special characters and any form of encryption. Comment and data will also be accepted on disks in Wordperfect 6.1 file format or ASCII file format. All comments and data in electronic form must be identified by the docket control number (OPP–00551A). Electronic comments on this notice may be filed online at many Federal Depository Libraries.

List of Subjects

Environmental protection. Rodenticide.

Dated: November 16, 1998.

Jack E. Housenger,

Acting Director, Special Review and Reregistration Division, Office of Pesticide Programs.

[FR Doc. 98–31395 Filed 11–24–98; 8:45 am]

BILLING CODE 6560–50–F

ENVIRONMENTAL PROTECTION AGENCY

[OPP–00555; FRL–6038–9]

Pesticide Registration Reinvention Measures

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of availability.

SUMMARY: EPA has issued updated policies and procedures concerning certain types of registration amendments. This document is available in a Pesticide Registration (PR) Notice entitled ''Notifications, Non-notifications, and Minor Formulation Amendments'' which is available upon request. EPA proposed this policy for 30 days of public comment on October 1, 1997 (62 FR 51467) (FRL–5742–1). Interested parties may request a copy of the Agency's final policy as set forth in the ADDRESSES unit of this notice.

ADDRESSES: The PR Notice is available from Linda Arrington; by mail: Registration Division (7505C), Environmental Protection Agency, 401 M St., SW., Washington, DC 20460. Office location and telephone number: Rm. 713D, CM#2, 1921 Jefferson Davis Highway, Arlington, VA (703) 305–5446, e-mail: arrington.linda@epa.gov.

FOR FURTHER INFORMATION CONTACT: By mail: Linda Arrington (7505C), Environmental Protection Agency, 401 M St., SW., Washington, DC 20460. Office location and telephone number: Rm. 713D, CM#2, 1921 Jefferson Davis Highway, Arlington, VA (703) 305–5446, e-mail: arrington.linda@epa.gov.

SUPPLEMENTARY INFORMATION:

I. Electronic Availability

A. Internet

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

B. Fax-on-Demand

For Fax-on-Demand, use a faxphone to call 202–401–0527 and select item 6118 for a copy of the PR Notice.

II. Purpose

This **Federal Register** notice announces the availability of the final PR Notice which reinvents the registration process by expanding the types of minor amendments which may be accomplished by notification, non-notification or minor formula changes. This PR Notice supersedes PR Notice 95–2 (May 31, 1995). The goal of this notice is to increase the efficiency and timeliness of the registration amendment process so as to reduce regulatory burdens while maintaining protection to human health and the environment.

III. Applicability

The PR Notice applies to all applicants seeking minor registration amendments which meet the criteria in the notice.

IV. Contents of the PR Notice

The PR Notice simply expands the current PR Notice 95–2 to include more kinds of minor labeling amendments which may be accomplished by notification or non-notification. In addition, the notice revises the process for submission and review of notifications to reflect the new requirements of the Food Quality Protection Act (FQPA) of 1996, which required a new process be established for antimicrobial products. Finally, the notice describes a process for expediting the review of minor formulation amendments.

V. Public Record

Public comments submitted concerning the draft PR Notice were fully considered before this notice was made final. All public comments, as well as a summary of the Agency's responses to those comments, are filed in the Office of Pesticide Programs Docket Office under docket control number ''OPP-00555.'' The public record is available for inspection from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The public record is located in Rm. 119, CM#2, 1921 Jefferson Davis Highway, Arlington, VA. To contact the docket office by mail, telephone, or e-mail: Public Information and Records Integrity Branch, Information Resources and Services Division (7502C), Office of Pesticide Programs, Environmental Protection Agency, 401 M St., SW., Washington, DC 20460; (703) 305–5805; e-mail: opp-docket@epa.gov.

List of Subjects

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

Dated: October 23, 1998.

Arnold E. Layne,

Acting Director, Registration Division, Office of Pesticide Programs.

[FR Doc. 98–31250 Filed 11–24–98; 8:45 am]

BILLING CODE 6560–50–F

ENVIRONMENTAL PROTECTION AGENCY

[OPP–30462; FRL–6038–8]

Certain Companies; Applications to Register Pesticide Products

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: This notice announces receipt of applications to register pesticide products containing new active ingredients not included in any previously registered products pursuant to the provisions of section 3(c)(4) of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), as amended.

DATES: Written comments must be submitted by December 28, 1998.

ADDRESSES: By mail, submit written comments identified by the document control number [OPP–30462] and the file symbols to: Public Information and Records Intregrity Branch, Information Resources and Services Division (7502C), Office of Pesticide Programs, Environmental Protection Agency, 401 M St., SW., Washington, DC 20460. In person, bring comments to: Environmental Protection Agency, Rm. 119, Crystal Mall #2, 1921 Jefferson Davis Hwy., Arlington, VA.

Comments and data may also be submitted electronically to: opp-docket@epamail.epa.gov. Follow the instructions under ''SUPPLEMENTARY INFORMATION.'' No Confidential Business Information (CBI) should be submitted through e-mail.

Information submitted as a comment concerning this notice may be claimed confidential by marking any part or all of that information as CBI. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2. A copy of the comment that does not contain CBI must be submitted for inclusion in the public record. Information not marked confidential may be disclosed publicly by EPA without prior notice. The public docket is available for public inspection in Rm. 119 at the Virginia address given above, from 8:30 a.m. to 4 p.m., Monday through Friday, excluding holidays.

FOR FURTHER INFORMATION CONTACT: The Regulatory Action Leader, Biopesticides and Pollution Prevention Division (7511C), in the table listed below:

Regulatory Action Leader	Office location/telephone number	Address
Edward Allen	9th floor, CM #2, 703–308–8699, e-mail:allen.edward@epamail.epa.gov.	1921 Jefferson Davis Hwy, Arlington, VA
Sheila Moats	9th floor, CM #2, 703–308–1259, e-mail: moats.sheila@epamail.epa.gov.	Do.

SUPPLEMENTARY INFORMATION: EPA received applications as follows to register pesticide products containing active ingredients not included in any previously registered products pursuant to the provision of section 3(c)(4) of FIFRA. Notice of receipt of these applications does not imply a decision by the Agency on the applications.

I. Products Containing Active Ingredients Not Included In Any Previously Registered Products

1. File Symbol: 70724–E. Applicant: Agrium Inc., 402-15 Innovation Blvd., Saskatoon, Saskatchewan Canada S7N 2X8. Product Name: AtEze. Microbial Pesticide. Active ingredient: *Pseudomonas chlororphis* strain 63-28 at 1.15%. Proposed classification/Use: None. For the suppression of root/stem rot pathogens of greenhouse crops. (E. Allen)

2. File Symbol: 57538–RA. Applicant: Stoller Enterprises, Inc., 8580 Katy Freeway, Suite 200, Houston, TX 70024. Product Name: Adjust I. Biochemical. Active ingredient: Salicylic acid at 0.87%. Proposed classification/Use: None. For use on a variety of agricultural, horticultural applications to enchance plant defense against pathogens. (S. Moats)

Notice of approval or denial of an application to register a pesticide product will be announced in the **Federal Register**. The procedure for requesting data will be given in the **Federal Register** if an application is approved.

Comments received within the specified time period will be considered before a final decision is made; comments received after the time specified will be considered only to the extent possible without delaying processing of the application.

II. Public Record and Electronic Submissions

The official record for this notice, as well as the public version, has been established for this notice under docket number [OPP–30462] (including

comments and data submitted electronically as described below). A public version of this record, including printed, paper versions of electronic comments, which does not include any information claimed as CBI, is available for inspection from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The official notice record is located at the address in ''ADDRESSES'' at the beginning of this document.

Electronic comments can be sent directly to EPA at:

opp-docket@epamail.epa.gov

Electronic comments must be submitted as an ASCII file avoiding the use of special characters and any form of encryption. Comment and data will also be accepted on disks in Wordperfect 5.1/6.1 or ASCII file format. All comments and data in electronic form must be identified by the docket number [OPP–30462]. Electronic comments on this notice may be filed online at many Federal Depository Libraries.

Authority: 7 U.S.C. 136.

List of Subjects

Environmental protection, Pesticides and pest, Product registration.

Dated: October 22, 1998.

Janet L. Andersen,

Director, Biopesticides and Pollution Prevention Division, Office of Pesticide Programs.

[FR Doc. 98–31392 Filed 11–24–98; 8:45 am]

BILLING CODE 6560–50–F

ENVIRONMENTAL PROTECTION AGENCY

[OPP–30421A; FRL–6038–6]

Babolna Bioenvironmental Centre Ltd.; Approval of a Pesticide Product Registration

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: This notice announces Agency approval of an application to register the pesticide product Babolna Insect Attractant Trap, containing a new active ingredient not included any previously registered product pursuant to the provisions of section 3(c)(5) of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), as amended.

FOR FURTHER INFORMATION CONTACT: By mail: Sheila Moats, Regulatory Action Leader, Biopesticides and Pollution Prevention Division (7511C), Office of Pesticide Programs, Environmental Protection Agency, 401 M St., SW., Washington, DC 20460. Office location, telephone number, and e-mail address: Rm. 9th floor, Crystal Mall #2, 1921 Jefferson Davis Hwy., Arlington, VA, 22202, (703) 308–1259, e-mail: moats.sheila@epamail.epa.gov.

SUPPLEMENTARY INFORMATION:

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

EPA issued a notice, published in the **Federal Register** of October 9, 1996 (61 FR 52942)(FRL–5395–6), which announced that Babolna Bioenvironmental Centre Ltd., 1107 Budapest X., Szallas U.6, Hungary, had submitted an application to register the pesticide product Babolna Insect Attractant Trap (EPA File Symbol 070062–R), containing the active ingredient maple lactone [2-hydroxy-3-methyl-cyclo-pent-2-en-1-one at 1.0%, an active ingredient not included in any previously registered product. The U.S. Agent for this company is c/o Landis International Inc., P.O. Box 5126, Valdosta, GA 31603-5209.

The application was approved on September 30, 1998, as Babolna Insect Attractant Trap for use as a monitoring device and as a control treatment on cockroaches (EPA Registration Number 70062–1).

The Agency has considered all required data on risks associated with the proposed use of maple lactone, and information on social, economic, and environmental benefits to be derived from use. Specifically, the Agency has considered the nature of the chemical and its pattern of use, application methods and rates, and level and extent of potential exposure. Based on these reviews, the Agency was able to make basic health safety determinations which show that use of maple lactone when used in accordance with widespread and commonly recognized practice, will not generally cause unreasonable adverse effects to the environment.

More detailed information on this registration is contained in the EPA Pesticide Fact Sheet on maple lactone.

A paper copy of the fact sheet, which provides a summary description of the pesticides, use patterns and formulations, science findings, and the Agency's regulatory position and rationale, may be obtained from the National Technical Information Service (NTIS), 5285 Port Royal Road, Springfield, VA 22161.

In accordance with section 3(c)(2) of FIFRA, a copy of the approved label, the list of data references, the data and other scientific information used to support registration, except for material specifically protected by section 10 of FIFRA, are available for public inspection in the Public Information and Records Integrity Branch, Information Resources and Services Division (7502C), Office of Pesticide Programs, Environmental Protection Agency, Rm. 119, CM #2, Arlington, VA 22202 (703–305–5805). Requests for data must be made in accordance with the provisions of the Freedom of Information Act and must be addressed to the Freedom of Information Office (A-101), 401 M St., SW., Washington, DC 20460. Such requests should: (1) Identify the product name and registration number and (2) specify the data or information desired.

Authority: 7 U.S.C. 136.

List of Subjects

Environmental protection, Pesticides and pests, Product registration.

Dated: October 22, 1998.

Janet L. Andersen,

Director, Biopesticides and Pollution Prevention Division, Office of Pesticide Programs.

[FR Doc. 98–31393 Filed 11–24–98; 8:45 am]

BILLING CODE 6560–50–F

ENVIRONMENTAL PROTECTION AGENCY

[OPP–30448A; FRL–6038–7]

Ecogen, Inc.; Approval of a Pesticide Product Registration

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: This notice announces Agency approval of an application to conditionally register the pesticide product BTI Technical Powder Bioinsecticide containing a new active ingredient not included in any previously registered product pursuant to the provisions of section 3(c)(7)(C) of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), as amended.

FOR FURTHER INFORMATION CONTACT: By mail: Alan Reynolds, Regulatory Action Leader, Biopesticides and Pollution Prevention Division (7511C), Office of Pesticide Programs, 401 M St., SW., Washington, DC 20460. Office location and telephone number: Rm. 9th floor,

Crystal Mall #2, Environmental Protection Agency, 1921 Jefferson Davis Hwy, Arlington, VA 22202, 703–605–0515; e-mail: reynolds.alan@epamail.epa.gov.

SUPPLEMENTARY INFORMATION:

Electronic Availability: Electronic copies of this document and the Fact Sheet are available from the EPA home page at the **Federal Register** Environmental Sub-Set entry for this document under ''Laws and Regulations'' (http://www.epa.gov/fedrgstr/).

EPA issued a notice, published the **Federal Register** of February 25, 1998 (63 FR 9517)(FRL–5773–7), which announced that Ecogen Inc., 2005 Cabot Blvd., West, P.O. Box 3023 Langhorne, PA 19047–3023, had submitted an application to conditionally register the pesticide product BTI Technical Powder Bioinsecticide (EPA File Symbol 55638–UR) containing the active ingredient *Bacillus thuringiensis* subspecies *israelensis* strain EG2215 at 20%, an active ingredient not included in any previously registered pesticide product.

The application was approved on September 30, 1998, as BTI Techncial Powder Bioinsecticide, a manufacturing use product for formulation into end-use products to control mosquitoes (EPA Registration Number 55638–41).

A conditional registration may be granted under section 3(c)(7)(C) of FIFRA for a new active ingredient where certain data are lacking, on condition that such data are received by the end of the conditional registration period and do not meet or exceed the risk criteria set forth in 40 CFR 154.7; that use of the pesticide during the conditional registration period will not cause unreasonable adverse effects; and that use of the pesticide is in the public interest. The Agency has considered the available data on the risks associated with the proposed use of *Bacillus thuringiensis* subspecies *israelensis* strain EG2215, and information on social, economic, and environmental benefits to be derived from such use. Specifically, the Agency has considered the nature and its pattern of use, application methods and rates, and level and extent of potential exposure. Based on these reviews, the Agency was able to make basic health and safety determinations which show that use of *Bacillus thuringiensis* subspecies *israelensis* strain EG2215 during the period of conditional registration will not cause any unreasonable adverse effect on the environment, and that use of the pesticide is, in the public interest.

Consistent with section 3(c)(7)(C), the Agency has determined that this conditional registration is in the public interest. Use of the pesticides are of significance to the user community, and appropriate labeling, use directions, and other measures have been taken to ensure that use of the pesticides will not result in unreasonable adverse effects to man and the environment.

The studies listed below must be completed within 6 months of the date of the conditional registration:

1. A *Daphnia Study.*

2. An Interperitoneal Injection Study.

3. Mosquito Bioassay to Verify the Potency of the Toxin.

4. An Eye/Dermal Irritattion Study.

This product is conditionally registered in accordance with FIFRA section 3(c)(7)(C). If these conditions are not complied with, the registration will be cancelled in accordance with FIFRA section 6(e).

More detailed information on this conditional registration is contained in an EPA Pesticide Fact Sheet on *Bacillus thuringiensis* subspecies *israelensis* strain EG2215.

A paper copy of this fact sheet, which provides a summary description of the chemical, use patterns and formulations, science findings, and the Agency's regulatory position and rationale, may be obtained from the National Technical Information Service (NTIS), 5285 Port Royal Road, Springfield, VA 22161.

In accordance with section 3(c)(2) of FIFRA, a copy of the approved label, the list of data references, the data and other scientific information used to support registration, except for material specifically protected by section 10 of FIFRA, are available for public inspection in the Public Information and Records Intregrity Branch, Information Resources and Services Division (7502C), Office of Pesticide Programs, Environmental Protection Agency, Rm. 119, CM #2, Arlington, VA 22202 (703–305–5805). Requests for data must be made in accordance with the provisions of the Freedom of Information Act and must be addressed to the Freedom of Information Office (A-101), 401 M St., SW., Washington, DC 20460. Such requests should: (1) Identify the product name and registration number and (2) specify the data or information desired.

Authority: 7 U.S.C. 136.

List of Subjects

Environmental protection, Pesticides and pests, Product registration.

Dated: October 20, 1998.

Janet L. Andersen,

Director, Biopesticides and Pollution Prevention Division, Office of Pesticide Programs.

[FR Doc. 98–31547 Filed 11–24–98; 8:45 am]

BILLING CODE 6560–50–F

ENVIRONMENTAL PROTECTION AGENCY

[PF–841; FRL 6039–7]

Notice of Filing of Pesticide Petition

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: This notice announces the initial filing of a pesticide petition (PP) 8G5008 for an exemption from the requirement of a temporary tolerance for residues of the biopesticide, 2,6-diisopropylnapthalene (2,6-DIPN) when used to inhibit sprouting in potatoes held in storage.

DATES: Comments, identified by the docket control number (PF–841), must be received on or before December 28, 1998.

ADDRESSES: By mail submit written comments to: Public Information and Records Integrity Branch (7502C), Information Resources and Services Division, Office of Pesticide Programs, Environmental Protection Agency, 401 M St., SW., Washington, DC 20460. In person bring comments to: Rm. 119, CM #2, 1921 Jefferson Davis Highway, Arlington, VA.

Comments and data may also be submitted electronically to: opp-docket@epamail.epa.gov. Follow the instructions under ''SUPPLEMENTARY INFORMATION.'' No confidential business information should be submitted through e-mail.

Information submitted as a comment concerning this document may be claimed confidential by marking any part or all of that information as Confidential Business Information (CBI). CBI should not be submitted through e-mail. Information marked as CBI will not be disclosed except in accordance with procedures set forth in 40 CFR part 2. A copy of the comment that does not contain CBI must be submitted for inclusion in the public record. Information not marked confidential may be disclosed publicly by EPA without prior notice. All written comments will be available for public inspection in Rm. 119 at the address given above, from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays.

FOR FURTHER INFORMATION CONTACT: By mail: Rita Kumar, PM 90, Biopesticides and Pollution Prevention Division (7511C), Office of Pesticide Programs, Environmental Protection Agency, 401 M St., SW., Washington, DC 20460. Office location, telephone number and e-mail: Rm. 902W5, CM#2, 1921 Jefferson Davis Hwy., Arlington, VA 22202, (703) 308–8291; e-mail: kumar.rita@epamail.epa.gov.

SUPPLEMENTARY INFORMATION: EPA has received a pesticide petition as follows proposing the establishment and/or amendment of regulations for residues of certain pesticide chemicals in or on various food commodities under section 408 of the Federal Food, Drug, and Comestic Act (FFDCA), 21 U.S.C. 346a. EPA has determined that this petition contains data or information regarding the elements set forth in section 408(d)(2); however, EPA has not fully evaluated the sufficiency of the submitted data at this time or whether the data support granting of the petition. This petition was submitted to support an application for an experimental use permit (EUP) to treat potatoes in closed storage facilities, to evaluate the control of sprouting. A notice of receipt for this EUP is being published elsewhere in this issue of the **Federal Register**. Additional data may be needed before EPA rules on the petition.

The official record for this notice of filing, as well as the public version, has been established for this notice of filing under docket control number (PF–841) (including comments and data submitted electronically as described below). A public version of this record, including printed, paper versions of electronic comments, which does not include any information claimed as CBI, is available for inspection from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The official record is located at the address in ''ADDRESSES'' at the beginning of this document.

Electronic comments can be sent directly to EPA at:

opp-docket@epamail.epa.gov

Electronic comments must be submitted as an ASCII file avoiding the use of special characters and any form of encryption. Comments and data will also be accepted on disks in Wordperfect 5.1/6.1 or ASCII file format. All comments and data in electronic form must be identified by the docket number (PF-841) and appropriate petition number. Electronic comments on this notice may be filed online at many Federal Depository Libraries.

List of Subjects

Environmental protection, Agricultural commodities, Feed additives, Food additives, Pesticides and pests, Reporting and recordkeeping requirements.

Dated: November 4, 1998.

Janet L. Andersen,

Director, Biopesticides and Pollution Prevention Division, Office of Pesticide Programs.

Summary of the Petition

Petitioners summary of the pesticide petition is printed below as required by section 408(d)(3) of the FFDCA. The summary of the petition was prepared by the petitioners and represent the views of the petitioners. EPA is publishing the petition summary verbatim with minor non-substantive editorial changes. The petiton summary announces the availability of a description of the analytical methods available to EPA for the detection and measurement of the pesticide chemical residues or an explanation of why no such method is needed.

Platte Chemical Company

PP 8G5008

EPA has received a pesticide petition (PP) 8G5008 from Platte Chemical Company, 419, 18th Street, Greeley, CO 80632, proposing pursuant to section 408(d) of the (FFDCA), 21 U.S.C. 346a(d), to amend 40 CFR part 180 by establishing an exemption from the requirement of a temporary tolerance for residues of 2,6-DIPN in or on the raw agriculture commodity potatoes.

Pursuant to section 408(d)(2)(A)(i) of the FFDCA, as amended, Platte Chemical Company has submitted the following summary of information, data and arguments in support of their pesticide petition. This summary was prepared by Platte Chemical Company and EPA has not fully evaluated the merits of the petition. The summary may have been edited by EPA if the terminology used was unclear, the summary contained extraneous material, or the summary was not clear that it reflected the conclusion of the petitioner and not necessarily EPA.

A. Proposed Use Practices

The proposed experimental program will be conducted in potato storage facilities located in Idaho, Maine, Minnesota, North Dakota, Oregon, Washington, and Wisconsin. Stored potatoes will be treated in one or two facilities in each state. The proposed experimental program would utilize 1,500 pounds of active ingredient on approximately 90 million pounds of stored potatoes during 1998 and 1999. The active ingredient, 2,6-DIPN, is a plant growth regulator that will be applied as an aerosol at a rate of one pound active ingredient per 60,120 pounds of potatoes, to achieve an initial residue of 16.6 parts per million (ppm). A maximum of 3 applications may be made while the potatoes are held in storage.

B. Product Identity/Chemistry

1. *Identity of the biopesticide*. EPA has classified DIPN as a biochemical pesticide. The formulated end product, Amplify Sprout Inhibitor, contains 100% DIPN as the active ingredient which is an odorless liquid.

C. Residue Chemistry

Platte conducted studies to determine 2,6-DIPN residues in whole potatoes and peels at various times, up to 180 days, following 1 to 3 treatments at the maximum application rate. A gas chromatography method was used to measure residues of 2,6-DIPN. Potatoes were treated using a small chamber system that reproduced a commercial environment, including temperatures and humidity. The 2,6-DIPN was applied to the chambers using a fogging device that reproduced a commercial operation, but on a small scale. When treated up to 3 times during storage at a rate of 1.2 pounds active ingredient per 60,120 pounds of potatoes and sampled 0 days after treatment (DAT) to 180 DAT, residues in the peel ranged from 0.15 ppm to 4.05 ppm. Residues for whole potatoes ranged from 0.03 ppm to 2.43 ppm.

The 2,6-DIPN residues for potato peel were as follows: Potatoes treated 1 time at 1.2 pounds active ingredient per 60,120 pounds of potato had residues of 2.82 ppm, 3.39 ppm, and 4.05 ppm at 0 DAT; 1.01 ppm, 2.59 ppm, and 2.77 ppm at 30 DAT; 0.33 ppm, 0.46 ppm, and 0.76 ppm at 90 DAT; and 0.15 ppm, 0.24 ppm, and 0.24 ppm at 180 DAT.

Potatoes were treated 3 times at 1.2 pounds active ingredient per 60,120 pounds of potato per treatment at 0 day and at 60 days, and 120 days after the first treatment.

The 2,6-DIPN residues in peels were 2.18 ppm, 2.55 ppm, and 3.52 ppm at 0 DAT; 1.30 ppm, 1.82 ppm, and 2.59 ppm at 30 DAT; 2.43 ppm, 2.71 ppm, and 4.51 ppm at 60 DAT; 0.86 ppm, 1.32 ppm, and 1.83 ppm at 90 DAT; 2.41 ppm, 3.79 ppm, and 3.49 ppm at 120 DAT; and 0.74 ppm, 0.86 ppm, and 0.91 ppm at 180 DAT.

The 2,6-DIPN residues for whole potatoes were as follows: Potatoes treated 1 time at 1.2 pounds active

ingredient per 60,120 pounds of potato had residues of 0.82 ppm, 1.18 ppm, and 1.27 ppm at 0 DAT; 0.22 ppm, 0.28 ppm, and 0.41 ppm at 30 DAT; 0.10 ppm, 0.11 ppm, and 0.04 ppm at 90 DAT; and 0.03 ppm, 0.03 ppm, and 0.05 ppm at 180 DAT.

Potatoes treated 3 times at day 0, 60, and 120, as described above, had 2,6-DIPN residues of 0.83 ppm, 1.28 ppm, and 1.39 ppm at 0 DAT; 0.25 ppm, 0.30 ppm, 0.37 ppm at 30 DAT; 0.80 ppm, 1.07 ppm, and 2.43 ppm at 60 DAT; 0.28 ppm, 0.42 ppm, and 0.62 ppm at 90 DAT; 1.16 ppm, 1.79 ppm, and 1.86 ppm at 120 DAT; and 0.13 ppm, 0.17 ppm, and 0.24 ppm at 180 DAT.

Magnitude of residue at the time of harvest and method used to determine the residue. A statement of why an analytical method for detecting and measuring the levels of the pesticide residue are not needed. Since the petitioner has requested a tolerance exemption, an analytical method to detect residues is not required.

D. Toxicology Profile

1. *Acute toxicity.* Technical 2,6-DIPN exhibits low acute toxicity. It is a toxicity category IV biopesticide. The rat oral LD_{50} is greater than 5,000 milligram/kilogram (mg/kg), the rabbit dermal LD_{50} is greater than 5,000 mg/kg, and the rat inhalation LC_{50} is greater than 2.60 milligram/Liter (mg/L) at the maximum attainable condition. In addition, 2,6-DIPN is not a skin sensitizer in guinea pigs, shows no dermal irritation at 72 hours in rabbits, and shows minimal ocular irritation in rabbits. The end use formulation is the same as the technical formulation; it contains no intentionally added inert ingredients.

2. *Genotoxicity.* Short-term assays for genotoxicity consisting of a bacterial reverse mutation assay (Ames test), an *in vivo/in vitro* unscheduled DNA synthesis in rat primary hepatocyte cultures at 2 time points, and an *in vivo* mouse micronucleus assay have been conducted for 2,6-DIPN. These studies show a lack of genotoxicity for 2,6-DIPN.

3. *Other tests.* No additional mammalian toxicology testing has been conducted. Platte requested a waiver from the requirement to submit further mammalian toxicology studies on the basis of the favorable toxicological profile for 2,6-DIPN, the low residues observed in treated potatoes, the specific plant growth regulator mode of action, and the confined nature of the proposed use. No data were found in the literature that would indicate 2,6-DIPN has any adverse effect on mammals. No incidents of hypersensitivity or any other adverse effects have been observed in individuals handling the material over the past 6 years.

E. Aggregate Exposure

In examining aggregate exposure, section 408 of the FFDCA directs EPA to consider available information about exposures from the pesticide residue in food and all other non-occupational exposures, including drinking water from groundwater or surface water and exposure through pesticide use in gardens, lawns, or buildings (residential and other indoor uses).

1. *Dietary exposure from food and drinking water.* Any dietary exposure resulting from applications made under an experimental use permit (EUP) would be through potato consumption and animal products in which animals are fed potato feed stocks. Residues in treated potatoes have been shown to be low. Residues would be expected to continue to decline after potatoes are removed from storage and before consumption. Cooking and/or processing would be expected to further lower the residue level in consumed potatoes or potato products. Since 2,6-DIPN would only be used in commercial storage warehouses, there is little if any potential for drinking water exposure. There are no other established U.S. tolerances or exemptions from tolerances for 2,6-DIPN food or feed crops in the United States. The Agency has classified 2,6-DIPN as a biochemical pesticide.

2. *Non-dietary exposure.* The EUP would only cover use for direct application to potatoes when stored in commercial warehouses. There are currently no other registered uses of 2,6-DIPN. Non-dietary exposure to 2,6-DIPN via lawn care, topical treatments, etc., will not occur. Thus, the potential for non-occupational exposure to the general population is virtually non-existent.

F. Cumulative Exposure

EPA also is required to consider the potential for cumulative effects of 2,6-DIPN and other substances that have a common mechanism of toxicity. Consideration of a common mode of toxicity is not appropriate, given that there is no indication of mammalian toxicity of 2,6-DIPN and no information that indicates toxic effects, if any, would be cumulative with any other compounds. Since, 2,6-DIPN does not exhibit a toxic mode of action in the target plant, it is appropriate to consider only the potential risks of 2,6-DIPN in this exposure assessment.

G. Endocrine Effects

Platte has no information to suggest that 2,6-DIPN will adversely affect the immune or endocrine systems. The Agency is not requiring information on endocrine effects of this biochemical pesticide at this time.

H. Safety Determinations

1. *U.S. population in general and infants and children.* Since there are no anticipated residues in drinking water or from other non-occupational sources, and no reliable information exists on cumulative effects due to a common mechanism of toxicity, the aggregate exposure to 2,6-DIPN is adequately represented by the dietary route. The lack of toxicity of 2,6-DIPN has been demonstrated by the results of acute toxicity testing in mammals in which 2,6-DIPN caused no adverse effects when dosed orally, dermally, and via inhalation at the limit dose for each study. Anticipated residues in consumed potatoes are low. Moreover, 2,6-DIPN exhibits close similarity to other plant-based, naturally occurring methyl and isopropyl naphthalenes. Thus, the dietary exposure to 2,6-DIPN should pose negligible risks to human health. Based on the lack of toxicity and low exposure, there is a reasonable certainty that no harm to infants, children, or adults will result from aggregate exposure to 2,6-DIPN residues. Exempting 2,6-DIPN from the requirement of a tolerance should pose no significant risk to humans or the environment.

I. Analytical Method

An analytical method for residues is not applicable, as this proposes an exemption from the requirement of a tolerance.

J. Existing Tolerances

No codex maximum residue levels are established for residues of 2,6-DIPN in or on any food or feed crop.

[FR Doc. 98–31248 Filed 11–24–98; 8:45 am]
BILLING CODE 6560–50–F

ENVIRONMENTAL PROTECTION AGENCY

[OPP–50848; FRL–6043–4]

Experimental Use Permit; Notice of Receipt of Application

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: This notice announces receipt of an application [34704–EUP–RG] from

Platte Chemical Company requesting an experimental use permit (EUP) for the biochemical pesticide 2,6–diisopropylnapthalene (2,6–DIPN). The Agency has determined that the application may be of regional and national significance. Therefore, in accordance with 40 CFR 172.11(a), the Agency is soliciting comments on this application.

DATES: Written comments must be received on or before December 28, 1998.

ADDRESSES: By mail, submit written comments to: Public Information and Records Integrity Branch, Information Resources and Services Division (7502C), Office of Pesticide Programs, Environmental Protection Agency, 401 M St., SW., Washington, DC 20460. In person, deliver comments to: Rm. 119, CM #2, 1921 Jefferson Davis Hwy., Arlington, VA.

Comments and data may also be submitted electronically to: opp-docket@epa.gov. Follow the instructions under Unit II. of this document. No Confidential Business Information (CBI) should be submitted through e-mail.

Information submitted as a comment concerning this document may be claimed confidential by marking any part or all of that information as CBI. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2. A copy of the comment that does not contain CBI must be submitted for inclusion in the public record. Information not marked confidential will be included in the public docket by EPA without prior notice. The public docket is available for public inspection in Rm. 119 at the Virginia address given above, from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays.

FOR FURTHER INFORMATION CONTACT: By mail: Rita Kumar, PM 90, Biopesticides and Pollution Prevention Division (7511C), Office of Pesticide Programs, Environmental Protection Agency, 401 M St., SW., Washington, DC 20460. Office location, telephone number, and e-mail address: Rm. 902W5, CM #2, 1921 Jefferson Davis Hwy., Arlington, VA, Telephone: 703–308–8291, e-mail: kumar.rita@epa.gov.

SUPPLEMENTARY INFORMATION:

I. Background

Following the review of the Platte Chemical Company's application and any comments received in response to this notice, EPA will decide whether to issue or deny the EUP request for this EUP program, and if issued, the conditions under which it is to be conducted. Any issuance of an EUP will be announced in the **Federal Register**.

The proposed program would allow the use of 1,500 pounds of the plant growth regulator 2,6–DIPN on approximately 90 million pounds of potatoes in nine closed storage facilities (representing the harvest of approximately 3,160 acres). Platte's program would evaluate the control of potato spouting. The program would be authorized only in the States of Idaho, Maine, Minnesota, North Dakota, Oregon, Washington, and Wisconsin. This EUP is accompanied by a pesticide petition for an exemption from the requirement of a tolerance for residues of 2,6–DIPN when used to inhibit sprouting in potato held in storage. This pesticide petition is being issued elsewhere in this issue of the **Federal Register**.

II. Public Record and Electronic Submissions

The official record for this notice, as well as the public version, has been established for this notice under docket control number ''OPP–50848'' (including comments and data submitted electronically as described below). A public version of this record, including printed, paper versions of electronic comments, which does not include any information claimed as CBI, is available for inspection from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The official record is located at the Virginia address in ''ADDRESSES'' at the beginning of this document.

Electronic comments can be sent directly to EPA at:

opp-docket@epa.gov

Electronic comments must be submitted as an ASCII file avoiding the use of special characters and any form of encryption. Comment and data will also be accepted on disks in Wordperfect 5.1/6.1 or ASCII file format. All comments and data in electronic form must be identified by the docket control number ''OPP–50848.'' Electronic comments on this notice may be filed online at many Federal Depository Libraries.

Dated: November 4, 1998.

Janet L. Andersen,

Director, Biopesticides and Pollution Prevention Division, Office of Pesticide Programs.

[FR Doc. 98–31249 Filed 11–24–98; 8:45 am]

BILLING CODE 6560–50–F

ENVIRONMENTAL PROTECTION AGENCY

[FRL–6193–2]

Notice of Proposed De Minimis Administrative Order on Consent Pursuant to Section 122(g) of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), Osage Metals Superfund Site, Kansas City, Kansas, Docket No. VII–98–F–0023

AGENCY: Environmental Protection Agency.

ACTION: Notice of Proposed De Minimis Administrative Order on Consent, Osage Metals Superfund Site, Kansas City, Kansas.

SUMMARY: Notice is hereby given that a proposed administrative order on consent regarding the Osage Metals Superfund Site, was signed by the United States Environmental Protection Agency (EPA) on September 30, 1998 and approved by the United States Department of Justice (DOJ) on October 30, 1998.

DATES: EPA will receive comments on or before December 28, 1998 relating to the proposed agreement and covenant not to sue.

ADDRESSES: Comments should be addressed to Audrey Asher, Senior Assistant Regional Counsel, United States Environmental Protection Agency, Region VII, 726 Minnesota Avenue, Kansas City KS 66101 and should refer to *the Osage Metals Superfund Site Administrative Order on Consent, EPA Docket No. VII–98–F–0023.*

The proposed agreement may be examined or obtained in person or by mail at the office of the United States Environmental Protection Agency, Region VII, 726 Minnesota Avenue, Kansas City, KS 66101 (913–551–7255).

SUPPLEMENTARY INFORMATION: The proposed agreement concerns the 1.7-acre Osage Metals Superfund Site (''Site''), located at 120 Osage Avenue in Kansas City, Kansas. The Site was the location of metals salvage and reclamation facilities between 1948 and 1993. Samples taken at the Site in 1994 found polychlorinated biphenyls (''PCBs'') in surface soils at levels as high as 334 mg/kg, and lead contamination in levels as high as 56,600 mg/kg. The EPA approved a removal action at the Site on February 13, 1995, and began cleanup in March of 1995. EPA completed its work in October 1995. No further response action is anticipated.

As of May 31, 1998, EPA and DOJ had incurred costs in excess of $1.3 million exclusive of interest. Each of the proposed settlors arranged with Trinity Environmental Technologies, Inc. for disposal of capacitors contaminated with PCBs. Trinity Environmental Technologies, Inc. in turn arranged for disposal of these capacitors with PCB Treatment, Inc. In addition to this arrangement, each settlor arranged for disposal of capacitors contaminated with PCBs directly with PCB Treatment, Inc. PCB Treatment, Inc. then arranged for disposal at the Site of scrap metal from the capacitors.

EPA has determined that any party who arranged for disposal of between 206 and 89,387 pounds of capacitors contributed a *de minimis* volume of waste to the Site and that such wastes are not more toxic than any other hazardous substance at the Site.

Each settler will pay a share of costs based on its volumetric share of capacitor weight compared to all capacitor weight with an additional premium of 15%.

Through this settlement EPA will recover over $10,000. EPA has recovered over $80,000 through a consent decree with the former owner/operator and will seek the remaining costs from other potentially responsible parties at the Site. EPA will be recovering over $180,000 through Administrative Order on Consent EPA Docket No. VII–98–F0012, which became effective on October 23, 1998.

Dated: November 3, 1998.

Dennis Grams, P.E.,

Regional Administrator, Region VII.

[FR Doc. 98–31539 Filed 11–24–98; 8:45 am]

BILLING CODE 6560–50–M

ENVIRONMENTAL PROTECTION AGENCY

[FRL–6193]

Notice of Proposed De Minimis Administrative Order on Consent Pursuant to Section 122(g) of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), Osage Metals Superfund Site, Kansas City, Kansas, Docket No. VII–98–F–0019

AGENCY: Environmental Protection Agency.

ACTION: Notice of Proposed De Minimis Administrative Order on Consent, Osage Metals Superfund Site, Kansas City, Kansas.

SUMMARY: Notice is hereby given that a proposed administrative order on consent regarding the Osage Metals Superfund Site, was signed by the United States Environmental Protection Agency (EPA) on September 30, 1998 and approved by the United States Department of Justice (DOJ) on October 30, 1998.

DATES: EPA will receive comments on or before December 28, 1998 related to the proposed agreement and covenant not to sue.

ADDRESSES: Comments should be addressed to Audrey Asher, Senior Assistant Regional Counsel, United States Environmental Protection Agency, Region VII, 726 Minnesota Avenue, Kansas City, Kansas 66101 and should refer to *the Osage Metals Superfund Site Administrative Order on Consent, EPA Docket No. VII–98–F–0019.*

The proposed agreement may be examined or obtained in person or by mail at the office of the United States Environmental Protection Agency, Region VII, 726 Minnesota Avenue, Kansas City, KS 66101 (913) 551–7255.

SUPPLEMENTARY INFORMATION: The proposed agreement concerns the 1.7-acre Osage Metals Superfund Site (''Site''), located at 120 Osage Avenue in Kansas City, Kansas. The Site was the location of metals salvage and reclamation facilities between 1948 and 1993. Samples taken at the Site in 1994 found polychlorinated biphenyls (''PCBs'') in surface soils at levels as high as 334 mg/kg, and lead contamination in levels as high as 56,600 mg/kg. The EPA approved a removal action at the Site on February 13, 1995, and began cleanup in March of 1995. EPA completed its work in October 1995. No further response action is anticipated.

As of May 31, 1998, EPA and DOJ had incurred costs in excess of $1.3 million exclusive of interest. Each of the proposed settlors arranged with Trinity Environmental Technologies, Inc. for disposal of capacitors contaminated with PCBs. Trinity Environmental Technologies, Inc. in turn arranged for disposal of the capacitors with PCB Treatment, Inc. PCB Treatment, Inc. then arranged for disposal at the Site of scrap metal from the capacitors.

EPA has determined that any party who arranged for disposal of between 206 and 89,387 pounds of capacitors contributed a *de minimis* volume of waste to the Site and that such wastes are not more toxic than any other hazardous substance at the Site.

Each settlor will pay a share of costs based on its volumetric share of capacitor weight compared to all capacitor weight with an additional premium of 15%.

Through this settlement EPA will recover over $10,000. EPA has recovered $80,000 through a consent decree with the former owner/operator and will seek the remaining costs from other potentially responsible parties at the Site. EPA will be recovering over $180,000 through Administrative Order on Consent EPA Docket No. VII–98–F0012, which became effective on October 27, 1998.

Dated: November 3, 1998.

Dennis Grams, P.E.,

Regional Administrator, Region VII.

[FR Doc. 98–31538 Filed 11–24–98; 8:45 am]

BILLING CODE 6560–50–M

FEDERAL COMMUNICATIONS COMMISSION

Public Information Collections Approved by Office of Management and Budget

November 16, 1998.

The Federal Communications Commission (FCC) has received Office of Management and Budget (OMB) approval for the following public information collections pursuant to the Paperwork Reduction Act of 1995, Public Law 104–13. 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 further information contact Shoko B. Hair, Federal Communications Commission, (202) 418–1379.

Federal Communications Commission

OMB Control No.: 3060–0859.

Expiration Date: 05/31/99.

Title: Suggested Guidelines for Petitions for Ruling Under Section 253 of the Communications Act.

Form No.: N/A.

Respondents: Business or other for-profit; State, local or tribal government.

Estimated Annual Burden: 80 respondents; 78.5 hours per response (avg.); 6280 total annual burden hours for all collections.

Estimated Annual Reporting and Recordkeeping Cost Burden: $0.

Frequency of Response: On occasion.

Description: Section 253 of the Communications Act of 1934, as amended requires the Commission, with certain important exceptions, to preempt the enforcement of any state or local statute or regulation, or other state or local legal requirement (to the extent necessary) that prohibits or has the effect prohibiting the ability of any

entity to provide any interstate or intrastate telecommunications service. The Commission's consideration of preemption begins with the filing of a petition by an aggrieved party. In order to render a timely and informed decision, petitioners and commenters should submit relevant information sufficient to describe the legal regime involved in the controversy and to establish the factual basis necessary for decision. Factual assertions should be supported by credible evidence, including affidavits, and, where appropriate, studies or other descriptions of the economic effects of the legal requirement that is the subject to the petition. In preparing their submissions, parties should address as appropriate all parts of section 253. In particular, parties should first describe whether the challenged requirement falls within the proscription of section 253(a); if it does, parties should describe whether the requirement nevertheless if permissible under other sections of the statute, specifically sections 253(b) and (c). Lastly, parties should submit information on whether and how the Commission could tailor a decision to preempt the enforcement of an offending legal requirement only ''to the extent necessary to correct such violation or inconsistency'' as required by section 253(d). (Number of respondents filing petitions: 20; annual hour burden per respondent: 125 hours; total annual burden = 2500 hours. Number of respondents filing comments on petitions: 60; annual hour burden per respondent: 63 hours; total annual burden = 3780). The petition is placed on public notice and commented on by others. The Commission issued a Public Notice that establishes guidelines relating to its consideration of preemption petitions. The Commission will use the information to discharge its statutory mandate relating to the preemption of state or local statutes or other state or local legal requirements. Obligation to respond: Voluntary.

Public reporting burden for the collections of information is as noted above. Send comments regarding the burden estimate or any other aspect of the collections of information, including suggestions for reducing the burden to Performance Evaluation and Records Management, Washington, D.C. 20554.

Federal Communications Commission.

Magalie Roman Salas,

Secretary.

[FR Doc. 98–31492 Filed 11–24–98; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

[Report No. 2305]

Petitions for Reconsideration and Clarification of Action in Rulemaking Proceedings

November 18, 1998.

Petitions for reconsideration and clarification have been filed in the Commission's rulemaking proceedings listed in this Public Notice and published pursuant to 47 CFR Section 1.429(e). The full text of these documents are available for viewing and copying in Room 239, 1919 M Street, N.W., Washington, D.C. or may be purchased from the Commission's copy contractor, ITS, Inc. (202) 857–3800. Oppositions to these petitions must be filed by December 10, 1998. See Section 1.4(b)(1) of the Commission's rules (47 CFR 1.4(b)(1). Replies to an opposition must be filed within 10 days after the time for filing oppositions has expired.

Subject: Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licenses (WT Docket No. 97–82).

Number of Petitions Filed: 6.

Subject: Implementation of the Telecommunications Act of 1996; Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information (CC Docket No. 96–115).

Number of Petitions Filed: 1.

Federal Communications Commission.

Magalie Roman Salas,

Secretary.

[FR Doc. 98–31493 Filed 11–24–98; 8:45 am]

BILLING CODE 6712–01–M

FEDERAL HOUSING FINANCE BOARD

Sunshine Act Meeting; Announcing an Open Meeting of the Board

TIME AND DATE: 10:00 a.m., Wednesday, December 2, 1998

PLACE: Board Room, Second Floor, Federal Housing Finance Board, 1777 F Street, N.W., Washington, D.C. 20006.

STATUS: The entire meeting will be open to the public.

MATTERS TO BE CONSIDERED DURING PORTIONS OPEN TO THE PUBLIC:

- Office of Finance 1999 Debt Authorization.
- Approval of 1999 Operating and Capital Expenditure Budgets—Office of Finance.
- Finance Board 1999 Strategic Plan.
- Proposed Rule—Advances Collateral Changes.

CONTACT PERSON FOR MORE INFORMATION: Elaine L. Baker, Secretary to the Board, (202) 408–2837.

William W. Ginsberg,

Managing Director.

[FR Doc. 98–31629 Filed 11–23–98; 12:57 pm]

BILLING CODE 6725–01–P

FEDERAL RESERVE SYSTEM

Change in Bank Control Notices; Acquisitions of Shares of Banks or Bank Holding Companies

The notificants listed below have applied under the Change in Bank Control Act (12 U.S.C. 1817(j)) and § 225.41 of the Board's Regulation Y (12 CFR 225.41) to acquire a bank or bank holding company. The factors that are considered in acting on the notices are set forth in paragraph 7 of the Act (12 U.S.C. 1817(j)(7)).

The notices are available for immediate inspection at the Federal Reserve Bank indicated. The notices also will be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing to the Reserve Bank indicated for that notice or to the offices of the Board of Governors. Comments must be received not later than December 9, 1998.

A. Federal Reserve Bank of Kansas City (D. Michael Manies, Assistant Vice President) 925 Grand Avenue, Kansas City, Missouri 64198-0001:

1. The David J. Duey Trust, and David V. Duey, as Trustee, both of Plattsmouth, Nebraska; to acquire voting shares of Cass County State Company, Plattsmouth, Nebraska, and thereby indirectly acquire voting shares of Cass County Bank, Plattsmouth, Nebraska.

Board of Governors of the Federal Reserve System, November 19, 1998.

Robert deV. Frierson,

Associate Secretary of the Board.

[FR Doc. 98–31425 Filed 11–24–98; 8:45 am]

BILLING CODE 6210–01–F

FEDERAL RESERVE SYSTEM

Formations of, Acquisitions by, and Mergers of Bank Holding Companies

The companies listed in this notice have applied to the Board for approval, pursuant to the Bank Holding Company Act of 1956 (12 U.S.C. 1841 *et seq.*) (BHC Act), Regulation Y (12 CFR Part 225), and all other applicable statutes and regulations to become a bank holding company and/or to acquire the assets or the ownership of, control of, or

the power to vote shares of a bank or bank holding company and all of the banks and nonbanking companies owned by the bank holding company, including the companies listed below.

The applications listed below, as well as other related filings required by the Board, are available for immediate inspection at the Federal Reserve Bank indicated. The application also will be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing on the standards enumerated in the BHC Act (12 U.S.C. 1842(c)). If the proposal also involves the acquisition of a nonbanking company, the review also includes whether the acquisition of the nonbanking company complies with the standards in section 4 of the BHC Act. Unless otherwise noted, nonbanking activities will be conducted throughout the United States.

Unless otherwise noted, comments regarding each of these applications must be received at the Reserve Bank indicated or the offices of the Board of Governors not later than December 18, 1998.

A. Federal Reserve Bank of St. Louis (Randall C. Sumner, Vice President) 411 Locust Street, St. Louis, Missouri 63102-2034:

1. Union Planters Corporation, and its wholly owned subsidiary, Union Planters Holding Corporation, both of Memphis, Tennessee; to acquire 100 percent of the voting shares of First Mutual Bancorp, Inc., Decatur, Illinois, and thereby indirectly acquire First Mutual Bank, S.B., Decatur, Illinois.

B. Federal Reserve Bank of Dallas (W. Arthur Tribble, Vice President) 2200 North Pearl Street, Dallas, Texas 75201-2272:

1. Woodlands Bancorp, Inc., Homer, Louisiana; to become a bank holding company by acquiring 100 percent of the voting shares of First Woodlands Bank, Homer, Louisiana;

Board of Governors of the Federal Reserve System, November 19, 1998.

Robert deV. Frierson,

Associate Secretary of the Board.

[FR Doc. 98–31427 Filed 11–24–98; 8:45 am]

BILLING CODE 6210–01–F

FEDERAL RESERVE SYSTEM

Notice of Proposals to Engage in Permissible Nonbanking Activities or to Acquire Companies that are Engaged in Permissible Nonbanking Activities

The companies listed in this notice have given notice under section 4 of the Bank Holding Company Act (12 U.S.C. 1843) (BHC Act) and Regulation Y, (12 CFR Part 225) to engage *de novo*, or to acquire or control voting securities or assets of a company, including the companies listed below, that engages either directly or through a subsidiary or other company, in a nonbanking activity that is listed in § 225.28 of Regulation Y (12 CFR 225.28) or that the Board has determined by Order to be closely related to banking and permissible for bank holding companies. Unless otherwise noted, these activities will be conducted throughout the United States.

Each notice is available for inspection at the Federal Reserve Bank indicated. The notice also will be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing on the question whether the proposal complies with the standards of section 4 of the BHC Act.

Unless otherwise noted, comments regarding the applications must be received at the Reserve Bank indicated or the offices of the Board of Governors not later than December 9, 1998.

A. Federal Reserve Bank of San Francisco (Maria Villanueva, Manager of Analytical Support, Consumer Regulation Group) 101 Market Street, San Francisco, California 94105-1579:

1. Philippine National Bank, Metro Manila, The Philippines, and Century Holding Corporation, Beverly Hills, California; to acquire PNB Remittance Centers, Inc., Los Angeles, California, and thereby engage in money remittance activities; *Philippine Commercial International Bank*, 77 Fed. Res. Bull. 270 (1991); *Bergen Bank A/S*, 76 Fed. Res. Bull. 457 (1990); and *Norwest Corporation*, 81 Fed. Res. Bull. 974 (1995).

Board of Governors of the Federal Reserve System, November 19, 1998.

Robert deV. Frierson,

Associate Secretary of the Board.

[FR Doc. 98–31426 Filed 11–24–98; 8:45 am]

BILLING CODE 6210–01–F

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. 91N–0396]

Agency Information Collection Activities; Submission for OMB Review; Comment Request; Medical Devices; Reports of Corrections and Removals

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing that the proposed collection of information listed in this document has been submitted to the Office of Management and Budget (OMB) for review and clearance under the Paperwork Reduction Act of 1995 (the PRA).

DATES: Submit written comments on the collection of information by December 28, 1998.

ADDRESSES: Submit written comments on the collection of information to the Office of Information and Regulatory Affairs, OMB, New Executive Office Bldg., 725 17th St. NW., rm. 10235, Washington, DC 20503, Attn: Desk Officer for FDA.

FOR FURTHER INFORMATION CONTACT: Margaret R. Schlosburg, Office of Information Resources Management (HFA–250), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301–827–1223.

SUPPLEMENTARY INFORMATION: In compliance with section 3507 of the PRA (44 U.S.C. 3507), FDA has submitted the following proposed collection of information to OMB for review and clearance.

Title: Medical Devices; Reports of Corrections and Removals.

Description: FDA issued a direct final rule to amend the reporting and recordkeeping requirements for corrections and removals under part 806 (21 CFR part 806) to eliminate those requirements for distributors of medical devices. This amendment implements changes made by the Food and Drug Administration Modernization Act of 1997 (FDAMA) to section 519(f) of the Federal Food, Drug, and Cosmetic Act (the act) (21 U.S.C. 360i(f)). FDAMA did not amend section 519(f) of the act with respect to manufacturers and importers. Manufacturers and importers continue to be subject to the requirements of part 806.

Description of Respondents: Business or other for profit organizations.

In the **Federal Register** of August 7, 1998 (63 FR 42229), the agency requested comments on the proposed collections of information. No significant comments were received.

FDA estimates the burden for this collection of information as follows:

TABLE 1.—ESTIMATED ANNUAL REPORTING BURDEN[1]

21 CFR Section	No. of Respondents	Annual Frequency per Response	Total Annual Responses	Hours per Response	Total Hours
806.10	880	1	880	10	8,800

[1]There are no capital costs or operating and maintenance costs associated with this collection of information.

TABLE 2.—ESTIMATED ANNUAL RECORDKEEPING BURDEN[1]

21 CFR Section	No. of Recordkeepers	Annual Frequency per Recordkeeping	Total Annual Records	Hours per Recordkeeper	Total Hours
806.20	440	1	440	10	4,400

[1]There are no capital costs or operating and maintenance costs associated with this collection of information.

The information collection requirements in part 806 prior to the direct final rule (63 FR 42229) have been approved by OMB and assigned control number 0910–0359. When preparing the earlier package for approval of the information collection requirements in part 806, FDA reviewed the reports of corrections and removals submitted in the previous 3 years under 21 CFR part 7 (the agency's recall provisions). During that period of time, no reports of corrections or removals were submitted by distributors. For that reason, FDA did not include distributors among the respondents estimated in the collection burden for the requirements previously approved by OMB. Because distributors were not included in that earlier estimate and because FDAMA now has eliminated requirements for distributor reporting, FDA has determined that estimates of the reporting burden for §§ 806.10 and 806.20 should remain the same.

Dated: November 17, 1998.

William K. Hubbard,

Associate Commissioner for Policy Coordination.

[FR Doc. 98–31411 Filed 11–24–98; 8:45 am]

BILLING CODE 4160–01–F

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. 98E–0791]

Determination of Regulatory Review Period for Purposes of Patent Extension; Tisseel VH Kit

AGENCY: Food and Drug Administration, HHS

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) has determined the regulatory review period for Tisseel VH Kit and is publishing this notice of that determination as required by law. FDA has made the determination because of the submission of an application to the Commissioner of Patents and Trademarks, Department of Commerce, for the extension of a patent which claims that human biological product.

ADDRESSES: Written comments and petitions should be directed to the Dockets Management Branch (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852.

FOR FURTHER INFORMATION CONTACT: Brian J. Malkin, Office of Health Affairs (HFY–20), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301–827–6620.

SUPPLEMENTARY INFORMATION: The Drug Price Competition and Patent Term Restoration Act of 1984 (Pub. L. 98–417) and the Generic Animal Drug and Patent Term Restoration Act (Pub. L. 100–670) generally provide that a patent may be extended for a period of up to 5 years so long as the patented item (human drug product, animal drug product, medical device, food additive, or color additive) was subject to regulatory review by FDA before the item was marketed. Under these acts, a product's regulatory review period forms the basis for determining the amount of extension an applicant may receive.

A regulatory review period consists of two periods of time: A testing phase and an approval phase. For human biological products, the testing phase begins when the exemption to permit the clinical investigations of the biological becomes effective and runs until the approval phase begins. The approval phase starts with the initial submission of an application to market the human biological product and continues until FDA grants permission to market the biological product. Although only a portion of a regulatory review period may count toward the actual amount of extension that the Commissioner of Patents and Trademarks may award (for example, half the testing phase must be subtracted as well as any time that may have occurred before the patent was issued), FDA's determination of the length of a regulatory review period for a human biological product will include all of the testing phase and approval phase as specified in 35 U.S.C. 156(g)(1)(B).

FDA recently approved for marketing the human biological product Tisseel VH Kit. Tisseel VH Kit is indicated for use as an adjunct to hemostasis in surgeries involving cardiopulmonary bypass and treatment of splenic injuries due to blunt or penetrating trauma to the abdomen, when control of bleeding by conventional surgical techniques, including suture, ligature, and cautery is ineffective or impractical, and also as an adjunct for the closure of colostomies. Subsequent to this approval, the Patent and Trademark Office received a patent term restoration application for Tisseel VH Kit (U.S. Patent No. 4,362,567) from Immuno Aktiengesellschaft fur chemsih-medizinshe Produkte, and the Patent and Trademark Office requested FDA's assistance in determining this patent's eligibility for patent term restoration. In a letter dated October 7, 1998, FDA advised the Patent and Trademark Office that this human biological product had undergone a regulatory review period and that the approval of Tisseel VH Kit represented the first permitted commercial marketing or use of the product. Shortly thereafter, the Patent and Trademark Office requested that FDA determine the product's regulatory review period.

FDA has determined that the applicable regulatory review period for Tisseel VH Kit is 5,065 days. Of this time, 1,203 days occurred during the testing phase of the regulatory review

period, while 3,862 days occurred during the approval phase. These periods of time were derived from the following dates:

1. *The date an exemption under section 351 of the Public Health Service Act became effective*: June 20, 1984. FDA has verified the applicant's claim that the date the investigational new drug application became effective was on June 20, 1984.

2. *The date the application was initially submitted with respect to the human biological product under section 351 of the Public Health Service Act*: October 5, 1987. FDA has verified the applicant's claim that the product license application (PLA) for Tisseel VH Kit (PLA 87–0509) was initially submitted on October 5, 1987.

3. *The date the application was approved*: May 1, 1998. FDA has verified the applicant's claim that PLA 87–0509 was approved on May 1, 1998.

This determination of the regulatory review period establishes the maximum potential length of a patent extension. However, the U.S. Patent and Trademark Office applies several statutory limitations in its calculations of the actual period for patent extension. In its application for patent extension, this applicant seeks 1,827 days of patent term extension.

Anyone with knowledge that any of the dates as published is incorrect may, on or before January 25, 1999, submit to the Dockets Management Branch (address above) written comments and ask for a redetermination. Furthermore, any interested person may petition FDA, on or before May 24, 1999, for a determination regarding whether the applicant for extension acted with due diligence during the regulatory review period. To meet its burden, the petition must contain sufficient facts to merit an FDA investigation. (See H. Rept. 857, part 1, 98th Cong., 2d sess., pp. 41–42, 1984.) Petitions should be in the format specified in 21 CFR 10.30.

Comments and petitions should be submitted to the Dockets Management Branch (address above) in three copies (except that individuals may submit single copies) and identified with the docket number found in brackets in the heading of this document. Comments and petitions may be seen in the Dockets Management Branch between 9 a.m. and 4 p.m., Monday through Friday.

Dated: November 4, 1998.

Thomas J. McGinnis,

Deputy Associate Commissioner for Health Affairs.

[FR Doc. 98–31413 Filed 11–24–98; 8:45 am]

BILLING CODE 4160–01–F

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. 98C–1017]

International Association of Color Manufacturers; Filing of Color Additive Petition

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing that the International Association of Color Manufacturers has filed a petition proposing that the color additive regulations be amended to provide for the safe use of D&C Red No. 28 and its aluminum lake to color food and dietary supplements.

FOR FURTHER INFORMATION CONTACT: Andrew D. Laumbach, Center for Food Safety and Applied Nutrition (HFS–215), Food and Drug Administration, 200 C St. SW., Washington, DC 20204, 202–418–3071.

SUPPLEMENTARY INFORMATION: Under the Federal Food, Drug, and Cosmetic Act (sec. 721(d)(1) (21 U.S.C. 379e(d)(1))), notice is given that a color additive petition (CAP 9C0264) has been filed by the International Association of Color Manufacturers, c/o Daniel R. Thompson, P.C., 1620 I St., suite 925, Washington, DC 20006. The petition proposes to amend the color additive regulations to provide for the safe use of D&C Red No. 28 and its aluminum lake to color food and dietary supplements.

The agency has determined under 21 CFR 25.32(k) that this action is of a type that does not individually or cumulatively have a significant effect on the human environment. Therefore, neither an environmental assessment nor an environmental impact statement is required.

Dated: November 6, 1998.

Laura M. Tarantino,

Acting Director, Office of Premarket Approval, Center for Food Safety and Applied Nutrition.

[FR Doc. 98–31505 Filed 11–24–98; 8:45 am]

BILLING CODE 4160–01–F

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. 98N–1002]

Center for Biologics Evaluation and Research Medical Device Action Plan; Public Meeting; Correction

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice of meeting; correction.

SUMMARY: The Food and Drug Administration (FDA) is correcting a notice that appeared in the **Federal Register** of November 2, 1998 (63 FR 58743). The document announced an upcoming public meeting requesting suggestions for improvements to the Center for Biologics Evaluation and Research's regulation of medical devices or reasons to maintain the current systems to protect public health. The notice inadvertently omitted the date and addresses for the submissions of comments after the meeting. This document corrects those omissions.

FOR FURTHER INFORMATION CONTACT: Kathy A. Eberhart, Center for Biologics Evaluation and Research (HFM–43), Food and Drug Administration, 1401 Rockville Pike, Rockville, MD 20852–1448, 301–827–1317.

SUPPLEMENTARY INFORMATION: In the **Federal Register** of November 2, 1998 (63 FR 58743), in FR Doc. 98–29185, FDA announced an upcoming public meeting requesting suggestions for improvements to the the Center for Biologics Evaluation and Research's regulations of medical devices or reasons to maintain the current systems to protect public health. The notice inadvertently omitted the date and address for the submissions of comments after the meeting.

1. On page 58743, in the third column, under the *Date and Time* caption, a second sentence is added to read ''Submit written comments by December 22, 1998.''

2. On the same page, after the ''*Location*'' portion, another paragraph is added to read ''*Addresses*: Submit by December 22, 1998, written comments to the Dockets Management Branch (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852. Two copies of any comments are to be submitted, except that individuals may submit one copy. Comments are to be identified with the docket number found in brackets in the heading of this document. A copy and received comments are available for public

examination in the Dockets Management Branch between 9 a.m. and 4 p.m., Monday through Friday.''

Dated: November 18, 1998.

William K. Hubbard,

Associate Commissioner for Policy Coordination.

[FR Doc. 98–31412 Filed 11–24–98; 8:45 am]

BILLING CODE 4160–01–F

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. 98N–0192]

Agency Information Collection Activities; Announcement of OMB Approval; Establishment and Product License Applications

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing that a collection of information entitled ''Establishment and Product License Applications'' has been approved by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (the PRA).

FOR FURTHER INFORMATION CONTACT: JonnaLynn P. Capezzuto, Office of Information Resources Management (HFA–250), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301–827–4659.

SUPPLEMENTARY INFORMATION: In the **Federal Register** of September 4, 1998 (63 FR 47299), the agency announced that the proposed information collection had been submitted to OMB for review and clearance under section 3507 of the PRA (44 U.S.C. 3507). 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. OMB has now approved the information collection and has assigned OMB control number 0910–0124. The approval expires on November 30, 2001.

Dated: November 18, 1998.

William K. Hubbard,

Associate Commissioner for Policy Coordination.

[FR Doc. 98–31410 Filed 11–24–98; 8:45 am]

BILLING CODE 4160–01–F

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Care Financing Administration

[Document Identifier: HCFA–287 & HCFA–1491]

Agency Information Collection Activities: Proposed Collection; Comment Request

AGENCY: Health Care Financing Administration, HHS.

In compliance with the requirement of section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995, the Health Care Financing Administration (HCFA), Department of Health and Human Services, is publishing the following summary of proposed collections for public comment. Interested persons are invited to send comments regarding this burden estimate or any other aspect of this collection of information, including any of the following subjects: (1) The necessity and utility of the proposed information collection for the proper performance of the agency's functions; (2) the accuracy of the estimated burden; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) the use of automated collection techniques or other forms of information technology to minimize the information collection burden.

(1) *Type of Information Collection Request:* Extension of a currently approved collection;

Title of Information Collection: Home Office Cost Statement and Supporting Regulations in 42 CFR Section 413.17;

Form No.: HCFA–287 (OMB# 0938–0202);

Use: Medicare law permits components of chain organizations to be reimbursed for certain costs incurred by the Home Offices of the chain. The Home Office Cost Statement is required by the fiscal intermediary to verify Home Office Costs claimed by the components. This requires that the provider include in its costs, the costs incurred by the related organization in furnishing such services, supplies or facilities.

Frequency: Annually;

Affected Public: Not-for-profit institutions, Business or other for-profit;

Number of Respondents: 1,231;

Total Annual Responses: 1,231;

Total Annual Hours: 573,646.

(2) *Type of Information Collection Request:* Extension of a currently approved collection;

Title of Information Collection: Request for Medicare Payment—Ambulance and Supporting Regulations in 42 CFR Section 410.40 and 424.124;

Form No.: HCFA–1491 (OMB# 0938–0042);

Use: This form is used by physicians, suppliers, and beneficiaries to request payment of Part B Medicare services. It is used to apply for reimbursement for ambulance services.

Frequency: On occasion;

Affected Public: Business or other for-profit, Individuals or households, and Not-for-profit Institutions;

Number of Respondents: 9,634,435;

Total Annual Responses: 9,634,435;

Total Annual Hours: 406,251.

To obtain copies of the supporting statement and any related forms for the proposed paperwork collections referenced above, access HCFA's Web Site address at http://www.hcfa.gov/regs/prdact95.htm, or E-mail your request, including your address, phone number, OMB number, and HCFA document identifier, to Paperwork@hcfa.gov, or call the Reports Clearance Office on (410) 786–1326. Written comments and recommendations for the proposed information collections must be mailed within 60 days of this notice directly to the HCFA Paperwork Clearance Officer designated at the following address: HCFA, Office of Information Services, Security and Standards Group, Division of HCFA Enterprise Standards, Attention: Louis Blank, Room N2–14–26, 7500 Security Boulevard, Baltimore, Maryland 21244–1850.

Dated: November 10, 1998.

John P. Burke III,

HCFA Reports Clearance Officer, HCFA Office of Information Services, Security and Standards Group, Division of HCFA Enterprise Standards.

[FR Doc. 98–31536 Filed 11–24–98; 8:45 am]

BILLING CODE 4120–03–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Care Financing Administration

[HCFA–1051–N]

Medicare Program; December 14, 1998, Meeting of the Practicing Physicians Advisory Council

AGENCY: Health Care Financing Administration (HCFA), HHS.

ACTION: Notice of meeting.

SUMMARY: In accordance with section 10(a) of the Federal Advisory Committee Act, this notice announces a meeting of the Practicing Physicians Advisory Council. This meeting is open to the public.

DATES: The meeting is scheduled for December 14, 1998, from 8:30 a.m. until 5 p.m., E.S.T.

ADDRESSES: The meeting will be held in Room 800, 8th Floor, Hubert H. Humphrey Building, 200 Independence Avenue, SW., Washington, DC 20201.

FOR FURTHER INFORMATION CONTACT: Aron Primack, M.D., M.A., F.A.C.P., Executive Director, Practicing Physicians Advisory Council, Room 435-H, Hubert H. Humphrey Building, 200 Independence Avenue, SW., Washington, DC 20201, (202) 690–7874.

SUPPLEMENTARY INFORMATION: The Secretary of the Department of Health and Human Services (the Secretary) is mandated by section 1868 of the Social Security Act to appoint a Practicing Physicians Advisory Council (the Council) based on nominations submitted by medical organizations representing physicians. The Council meets quarterly to discuss certain proposed changes in regulations and carrier manual instructions related to physicians' services, as identified by the Secretary. To the extent feasible and consistent with statutory deadlines, the consultation must occur before publication of the proposed changes. The Council submits an annual report on its recommendations to the Secretary and the Administrator of the Health Care Financing Administration not later than December 31 of each year.

The Council consists of 15 physicians, each of whom has submitted at least 250 claims for physicians' services under Medicare or Medicaid in the previous year. Members of the Council include both participating and nonparticipating physicians, and physicians practicing in rural and underserved urban areas. At least 11 members must be doctors of medicine or osteopathy authorized to practice medicine and surgery by the States in which they practice. Members have been invited to serve for overlapping 4-year terms. In accordance with section 14 of the Federal Advisory Committee Act, terms of more than 2 years are contingent upon the renewal of the Council by appropriate action before the end of the 2-year term.

The Council held its first meeting on May 11, 1992.

The current members are: Jerold M. Aronson, M.D.; Richard Bronfman, D.P.M.; Wayne R. Carlsen, D.O.; Gary C. Dennis, M.D.; Mary T. Herald, M.D.; Ardis Hoven, M.D.; Sandral Hullett, M.D.; Jerilynn S. Kaibel, D.C.; Marie G. Kuffner, M.D.; Marc Lowe, M.D.; Derrick K. Latos, M.D.; Sandra B. Reed, M.D.; Susan Schooley, M.D.; Maisie Tam, M.D.; and Kenneth M. Viste, Jr., M.D. The chairperson is Kenneth M. Viste, Jr., M.D. The vice chairperson is Marie G. Kuffner, M.D.

Council members will receive updates on the activities of the Center for Beneficiary Services, access to care in managed care (provider protection), and Y2K. The agenda will provide for discussion and comment on the following topics:

- Medicare Integrity Program Contracting Initiatives (HCFA Solicitation RFP 98 0016).
- Proposed regulations to implement the Medicaid managed care provisions of the Balanced Budget Act of 1997.
- Using the inherent reasonableness authority.

Individuals or organizations that wish to make 5 minute oral presentations on the agenda issues should contact the Executive Director by 12 noon, December 3, 1998, to be scheduled. The number of oral presentations may be limited by the time available. A written copy of the oral remarks should be submitted to the Executive Director no later than 12 noon, December 9, 1998. Anyone who is not scheduled to speak may submit written comments to the Executive Director by 12 noon, December 9, 1998. The meeting is open to the public, but attendance is limited to the space available.

(Section 1868 of the Social Security Act (42 U.S.C. 1395ee) and section 10(a) of Public Law 92–463 (5 U.S.C. App. 2, section 10(a)); 45 C.F.R. Part 11)

(Catalog of Federal Domestic Assistance Program No. 93.773, Medicare—Hospital Insurance; and Program No. 93.774, Medicare—Supplementary Medical Insurance Program)

Dated: November 19, 1998.

Nancy-Ann Min DeParle,

Administrator, Health Care Financing Administration.

[FR Doc. 98–31428 Filed 11–24–98; 8:45 am]

BILLING CODE 4120–01–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

Notice of Receipt of Applications for Permit

The following applicants have applied for a permit to conduct certain activities with endangered species. This notice is provided pursuant to Section 10(c) of the Endangered Species Act of 1973, *as amended* (16 U.S.C. 1531, *et seq.*):

Applicant: The Field Museum of Natural History, Chicago, IL, PRT–004641.

The applicant requests a permit to import 8 scientific specimens of mouse lemurs (*Microcebus* sp.) collected in the wild in Madagascar, for the purpose of scientific research.

Applicant: University of Arizona, Laboratory of Molecular Systematics and Evolution, Tucson, AZ, PRT–837560.

The applicant requests amendment of their permit to import tissue samples taken from captive-held and/or wild chimpanzees (*Pan troglodytes*), pygmy chimpanzees (*Pan paniscus*), gorilla (*Gorilla gorilla*), and orangutan (*Pongo pygmaeus*) for the purpose of scientific research.

Applicant: Rhinoceros Advisory Group of the American Zoo and Aquarium Association, Cumberland, OH, PRT–004917.

The applicant requests a permit to import for the Honolulu Zoo, HI, one captive-born female black rhinoceros from the Asa Hiroshima Zoo Park, JP, for the purpose of captive propagation for the enhancement of the survival of the species.

Applicant: The National Museum of Natural History, Washington, DC, PRT–004868.

The applicant requests a permit to import the skin and skull and skeletal elements of one Kara-Tau argali (*Ovis ammon nigrimontana*) and one Kazakhstan argali (*Ovis ammon collium*) from the Republic of Kasakhstan for the purpose of scientific research and species identification.

Applicant: International Animal Exchange, Ferndale, MI, PRT–004862.

The applicant requests a permit for foreign commerce to purchase one male and one female jaguar (*Panthera onca*) from Tierpark Nadermann, Germany and sell to Taegu Talsung Park Zoo, Korea for the purpose of enhancement of survival of the species through conservation education and captive propagation.

Applicant: Howard Covey, Phoenix, AZ, PRT–005201.

The Applicant request a permit to import sport-hunted trophy of one male bontebok (*Damaliscus pygargus dorcas*) culled from a captive herd maintained under the management program of the Republic of South Africa, for the purpose of enchancement of the survival of the species.

Applicant: Zoological Society of San Diego, Escondido, CA, PRT–004996.

The applicant requests a permit to import 5 Lesser Rheas (*Rhea pennata*) from Tiergarten Hubertus, Vossberg, Dotlingen, Germany, for the enhancement of the survival of the species through captive propagation and conservation education.

Written data or comments 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 and must be received by the Director within 30 days of the date of this publication.

Documents and other information submitted with these applications are available for review, *subject to the requirements of the Privacy Act and Freedom of Information Act,* by any party who submits a written request for a copy of such documents to the following office within 30 days of the date of publication of this notice: U.S. Fish and Wildlife Service, Office of Management Authority, 4401 North Fairfax Drive, Room 700, Arlington, Virginia 22203. Phone: (703/358–2104); FAX: (703/358–2281).

Dated: November 20, 1998.

MaryEllen Amtower,

Acting Chief, Branch of Permits, Office of Management Authority.

[FR Doc. 98–31507 Filed 11–24–98; 8:45 am]

BILLING CODE 4310–55–U

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[WY–050–1430–01; WYW13591, WYW58783, WYW80291, WYW81213]

Notice of Realty Action; Recreation and Public Purposes (R&PP) Act Classification; Wyoming

AGENCY: Bureau of Land Management.

ACTION: Notice.

SUMMARY: The following public lands located near the rural communities of Atlantic City, Jeffrey City, Lysite, and Shoshoni in Fremont County, Wyoming, have been examined and found suitable for classification for conveyance to the Fremont County Solid Waste Disposal District under the provisions of the Recreation and Public Purposes Act, as amended (43 U.S.C. 869 *et seq.*). The Fremont County Solid Waste Disposal District intends to continue the use of the Shoshoni sanitary landfill. Solid Waste Transfer stations would be continued at the other three sites.

Sixth Principal Meridian

Shoshoni Sanitary Landfill

T. 38 N., R. 94 W.,
Sec. 34, E½SW¼SW¼, W½SE¼SW¼, W½W½E½SE¼SW¼.

The land described above contains 45 acres.

Lysite Transfer Station

T. 38 N., R. 91 W.,
Sec. 1, SE¼SW¼SE¼SE¼.

The land described above contains 2.5 acres.

Atlantic City Transfer Station

T. 29 N., R. 100 W.,
Sec. 15, SW¼NE¼NW¼NW¼NE¼, SE¼NW¼NW¼NW¼NE¼, N½NE¼SW¼NW¼NW¼NE¼, N½NW¼SE¼NW¼NW¼NE¼.

The land described above contains 1.875 acres.

Jeffrey City Transfer Station

T. 28 N., R. 92 W.,
Sec. 17, SW¼SW¼NE¼.

The land described above contains 10 acres.

FOR FURTHER INFORMATION CONTACT: Detailed information concerning this action is available for review at the Lander Field Office, Bureau of Land Management, 1335 Main, P.O. Box 589, Lander, Wyoming 82520, or contact Bill Bartlett at (307) 332–8400.

SUPPLEMENTARY INFORMATION: The lands are not needed for Federal purposes. Conveyance is consistent with current BLM land use planning and would be in the public interest. The conveyances of the four sites, when completed, will be subject to the following terms, conditions and reservations:

1. Provisions of the Recreation and Public Purposes Act and to all applicable regulations of the Secretary of the Interior.
2. All valid existing rights documented on the official public land records at the time of patent issuance.
3. All minerals shall be reserved to the United States, together with the right to prospect for, mine, and remove the minerals.
4. A right-of-way for ditches and canals constructed by the authority of the United States.

Upon publication of this notice in the **Federal Register**, the lands will be segregated from all other forms of appropriation under the public land laws, including the general mining laws, except for conveyance under the Recreation and Public Purposes Act and leasing under the mineral leasing laws.

For a period of 45 days from the date of publication of this notice in the **Federal Register**, interested parties may submit comments regarding the proposed conveyance or classification of the lands to the Field Manager, Bureau of Land Management, Lander Field Office, P.O. Box 589, Lander, Wyoming 82520.

Classification Comments: Interested parties may submit comments involving the suitability of the lands for a sanitary landfill site at Shoshoni and for transfer station sites at Lysite, Atlantic City, and Jeffrey City. Comments on the classification should only address whether the land is physically suited for the landfill or transfer station sites (as appropriate), whether the use will maximize the future use or uses of the land, whether the use is consistent with local planning and zoning, or if the use is consistent with State and Federal programs.

Application Comments: Interested parties may submit comments regarding the specific uses proposed in the conveyance applications and plans of development, whether the BLM followed proper administrative procedures in reaching the decisions, or any other factor not directly related to the suitability of the land for solid waste disposal facilities. Any adverse comments will be reviewed by the State Director. In the absence of any adverse comments, the classification will become effective 60 days from the date of publication of this notice in the **Federal Register**.

Dated: November 18, 1998.

Jack Kelly,

Field Manager.

[FR Doc. 98–31433 Filed 11–24–98; 8:45 am]

BILLING CODE 4310–22–P

DEPARTMENT OF THE INTERIOR

National Park Service

Notice of Intent to Repatriate Cultural Items from Arizona in the Possession of the Arizona State Museum, The University of Arizona, Tucson, AZ

AGENCY: National Park Service

ACTION: Notice

Notice is hereby given under the Native American Graves Protection and Repatriation Act, 43 CFR 10.10 (a)(3), of the intent to repatriate cultural items in the possession of the Arizona State Museum, The University of Arizona, Tucson, AZ which meets the definition of ''object of cultural patrimony'' under Section 2 of the Act.

The eleven cultural items consist of seven Dilzini Gaan headdresses and four wands.

In 1937, museum documentation indicates one headdress was collected by G. Mundinger at East Fork, AZ. In 1930, one headdress with wands was collected by the Donner family at Whiteriver, AZ; and two headdresses and one wand are part of the E.E. Guenther collection of Whiteriver, AZ. Around 1970, three wands and three headdresses came to the Arizona State Museum from the now-defunct Kinishba Museum near Fort Apache, AZ.

Museum documentation and consultation with representatives of the White Mountain Apache Tribe of the Fort Apache Reservation indicates these

cultural items are White Mountain Apache. Representatives of the White Mountain Apache Tribe of the Fort Apache Reservation state that the eleven cultural items have ongoing traditional and cultural importance to the tribe itself and could not have been alienated by any individual. Information regarding the status of this cultural item is being withheld from this notice by the Arizona State Museum at the request of the representatives of the White Mountain Apache Tribe of the Fort Apache Reservation in order not to compromise the White Mountain Apache Tribe of the Fort Apache Reservation's code of religious practice.

Officials of the Arizona State Museum have determined that, pursuant to 43 CFR 10.2 (d)(4), these eleven cultural items have ongoing historical, traditional, and cultural importance central to the culture itself, and could not have been alienated, appropriated, or conveyed by any individual. Officials of the Arizona State Museum have also determined that, pursuant to 43 CFR 10.2 (e), there is a relationship of shared group identity which can be reasonably traced between these items and the White Mountain Apache Tribe of the Fort Apache Reservation.

This notice has been sent to officials of the White Mountain Apache Tribe of the Fort Apache Reservation, the Yavapai-Apache Nation of the Camp Verde Indian Reservation, the Fort McDowell Mohave-Apache Indian Community of the Fort McDowell Indian Reservation, the Tonto Apache Tribe, and the San Carlos Apache Tribe of the San Carlos Reservation. Representatives of any other Indian tribe that believes itself to be culturally affiliated with these objects should contact Alyce Sadongei, Program Coordinator, Arizona State Museum, University of Arizona, Tucson, AZ 85721; telephone: (520) 621-4609 before December 28, 1998. Repatriation of these objects to the White Mountain Apache Tribe of the Fort Apache Reservation may begin after that date if no additional claimants come forward.

Dated: November 17, 1998.

Veletta Canouts,

Acting Departmental Consulting Archeologist,

Deputy Manager, Archeology and Ethnography Program.

[FR Doc. 98–31484 Filed 11–24–98; 8:45 am]

BILLING CODE 4310–70–F

DEPARTMENT OF THE INTERIOR

National Park Service

Notice of Intent to Repatriate Cultural Items in the Possession of the Fowler Museum of Cultural History, University of California-Los Angeles, Los Angeles, CA

AGENCY: National Park Service

ACTION: Notice

Notice is hereby given under the Native American Graves Protection and Repatriation Act, 43 CFR 10.10 (a)(3), of the intent to repatriate cultural items in the possession of the Fowler Museum of Cultural History, University of California-Los Angeles which meet the definition of ''sacred object'' under Section 2 of the Act.

The 17 cultural items consist of 12 katsinas, including Qoqto, a Corn Katsina, an Apache Katsina, two Chakwainam, Heoto, a ''Mad'' Katsina, and a Rugan Corn Katsina (X83.8; X83.537; X83.538; X83.539; X84.225; X84.226; X84.227; X84.228; X.84.229; X84.230; X.84.231; and X66.2796); three rattles (X72.1072; X68.504; X68.505); one dance wand (X76.291); and a drum and beater (X68.147A&B).

During 1983-1984, eleven katsinas were donated by a donor whose name is withheld at the museum's request and accessioned into the Fowler Museum of Cultural History.

In 1966, one Hopi katsina was donated by a donor whose name is withheld at the museum's request and accessioned in the Fowler Museum of Cultural History.

In 1972, the one rattle was donated by a donor whose name is withheld at the museum's request and accessioned in the Fowler Museum of Cultural History.

In 1968, the drum and beater and two rattles were purchased from Raleigh W. Applegate and accessioned in the Fowler Museum of Cultural History. The accession records state this drum and beater were used in Hopi kiva ceremonies.

In 1976, the dance wand was accessioned into the collections of the Fowler Museum of Cultural History. There is no donor or purchase information for this dance wand.

Based on construction and design, these cultural items have been identified as consistent with Hopi ceremonial and sacred items as recorded in ethnographic records. Representatives of the Hopi Tribe and the Katsimomngwit (traditional Hopi religious leaders) have identified these items as sacred objects used by them in the Hopi villages for the practice of traditional Hopi religion.

Based on the above-mentioned information, officials of the Fowler Museum of Cultural History have determined that, pursuant to 43 CFR 10.2 (d)(3), these 17 cultural items are specific ceremonial objects needed by traditional Native American religious leaders for the practice of traditional Native American religions by their present-day adherents. Officials of the Fowler Museum of Cultural History have also determined that, pursuant to 43 CFR 10.2 (e), there is a relationship of shared group identity which can be reasonably traced between these items and the Hopi Tribe.

This notice has been sent to officials of the Hopi Tribe. Representatives of any other Indian tribe that believes itself to be culturally affiliated with these objects should contact Dr. Diana Wilson, c/o NAGPRA Coordinator, Office of the Vice Chancellor, Research, Box 951405, Los Angeles, CA 90095-1405; telephone (310) 836-4343 before December 28, 1998. Repatriation of these objects to the Hopi Tribe may begin after that date if no additional claimants come forward.

Dated: November 18, 1998.

Veletta Canouts,

Acting Departmental Consulting Archeologist,

Deputy Manager, Archeology and Ethnography Program.

[FR Doc. 98–31485 Filed 11–24–98; 8:45 am]

BILLING CODE 4310–70–F

DEPARTMENT OF THE INTERIOR

National Park Service

Notice of Inventory Completion for Native American Human Remains and Associated Funerary Objects from Pecos Pueblo, NM in the Possession of the Maxwell Museum of Anthropology, University of New Mexico, Albuquerque, NM

AGENCY: National Park Service

ACTION: Notice

Notice is hereby given in accordance with provisions of the Native American Graves Protection and Repatriation Act (NAGPRA), 43 CFR 10.9, of the completion of an inventory of human remains and associated funerary objects from Pecos Pueblo, NM in the possession of the Maxwell Museum of Anthropology, University of New Mexico, Albuquerque, NM.

A detailed assessment of the human remains was made by Maxwell Museum of Anthropology professional staff in consultation with representatives of the

Apache Tribe of Oklahoma, the Comanche Indian Tribe, the Hopi Tribe, the Jicarilla Apache Tribe of the Jicarilla Apache Indian Reservation, the Kiowa Indian Tribe of Oklahoma, the Mescalero Apache Tribe of the Mescalero Reservation, the Navajo Nation, the Pueblo of Cochiti, the Pueblo of Jemez, the Pueblo of Santo Domingo, the Pueblo of Zuni, and the Wichita and Affiliated Tribes.

In 1939, human remains representing approximately 51 individuals were recovered from the mission churches at Pecos Pueblo, NM during legally authorized excavations conducted by a joint research team from the University of New Mexico and the Museum of New Mexico headed by William B. Witkind. No known individuals were identified. The 26 associated funerary objects include burial wrappings, feathers, fur, human hair, cordage, animal bone, matting, ceramic sherds, adobe with fiber, obsidian chipped stone, worked wood, and beads.

Four Roman Catholic churches were constructed as Pecos Pueblo; two of these were built prior to the Pueblo Revolt of 1680; and two churches were constructed after 1680. The majority of human remains recovered in these 1939 excavations appear to correspond to burials associated with the second and fourth churches. Based on skeletal morphology and associated funerary objects, 49 of these individuals have been determined to be Native American. Historic records indicate that individuals from a number of Native American groups were baptized, married, or buried at the site. The burial records include persons with Tewa, Nambe, Picuri, Yuta, Apache, Comanche, and Tano affiliations as well as people from Pecos and the Pueblo of Jemez. Historic records and family information indicate Plains Indians were incorporated into the Pecos community through trade, slavery, and marriage.

Based on material culture, historic records and documents, and oral history presented by representatives of the Apache Tribe of Oklahoma, the Comanche Indian Tribe, the Hopi Tribe, the Jicarilla Apache Tribe, the Kiowa Indian Tribe, the Mescalero Apache Tribe, the Navajo Nation, the Pueblo of Cochiti, the Pueblo of Jemez, the Pueblo of Zuni, and the Wichita and Affiliated Tribes, Pecos Pueblo (LA 625) and Pecos Mission (LA 4444) have been identified as a Puebloan occupation dating from the Pueblo III period (c. 1100 A.D.) to its abandonment in 1838 when the native inhabitants left Pecos Pueblo and went to the Pueblo of Jemez. While Pecos Pueblo mission churches have been determined to have shared cultural affiliation with the consulted tribes, the descendants and government of Pecos Pueblo now reside at the Pueblo of Jemez. In 1936, an Act of Congress recognized the Pueblo of Jemez as a ''consolidation'' and ''merger'' of the Pueblo of Pecos and the Pueblo of Jemez. This Act further recognized that all property, rights, titles, interests, and claims of both Pueblos were consolidated under the Pueblo of Jemez.

Based on the above mentioned information, officials of the Maxwell Museum of Anthropology have determined that, pursuant to 43 CFR 10.2 (d)(1), the human remains listed above represent the physical remains of 49 individuals of Native American ancestry. Officials of the Maxwell Museum of Anthropology have also determined that, pursuant to 43 CFR 10.2 (d)(2), the 26 objects listed above are reasonably believed to have been placed with or near individual human remains at the time of death or later as part of the death rite or ceremony. Lastly, officials of the Maxwell Museum of Anthropology have determined that, pursuant to 43 CFR 10.2 (e), there is a relationship of shared group identity which can be reasonably traced between these Native American human remains and associated funerary objects and the Pueblo of Jemez.

This notice has been sent to officials of the Apache Tribe of Oklahoma, the Comanche Indian Tribe, the Hopi Tribe, the Jicarilla Apache Tribe of the Jicarilla Apache Indian Reservation, the Kiowa Indian Tribe of Oklahoma, the Mescalero Apache Tribe of the Mescalero Reservation, the Navajo Nation, the Pueblo of Cochiti, the Pueblo of Jemez, the Pueblo of Santo Domingo, the Pueblo of Zuni, and the Wichita and Affiliated Tribes. Representatives of any other Indian tribe that believes itself to be culturally affiliated with these human remains and associated funerary objects should contact Brenda A. Dorr, NAGPRA Project Director, Maxwell Museum of Anthropology, University of New Mexico, Albuquerque, NM 87131-1201; telephone: (505) 277-0195, before December 28, 1998. Repatriation of the human remains and associated funerary objects to the Pueblo of Jemez may begin after that date if no additional claimants come forward.

Dated: November 18, 1998.

Veletta Canouts,

Acting Departmental Consulting Archeologist,

Deputy Manager, Archeology and Ethnography Program.

[FR Doc. 98–31482 Filed 11–24–98; 8:45 am]

BILLING CODE 4310–70–F

DEPARTMENT OF THE INTERIOR

National Park Service

Notice of Inventory Completion for Native American Human Remains and Associated Funerary Objects from New Mexico in the Possession of the Museum of Indian Arts and Culture/ Laboratory of Anthropology, Museum of New Mexico, Santa Fe, NM

AGENCY: National Park Service

ACTION: Notice

Notice is hereby given in accordance with provisions of the Native American Graves Protection and Repatriation Act (NAGPRA), 43 CFR 10.9, of the completion of an inventory of human remains and associated funerary objects from New Mexico in the possession of the Museum of Indian Arts and Culture/ Laboratory of Anthropology, Museum of New Mexico, Santa Fe, NM.

A detailed assessment of the human remains was made by Museum of Indian Arts and Culture/Laboratory of Anthropology professional staff in consultation with representatives of the Pueblo of Nambe, the Pueblo of Pojoaque, the Pueblo of San Ildefonso, the Pueblo of San Juan, the Pueblo of Santa Clara, and the Pueblo of Tesuque.

In 1952, human remains representing 38 individuals were removed from Cuyamungue Pueblo (LA 38) during legally authorized excavations conducted by Museum of New Mexico staff. No known individuals were identified. The five associated funerary objects include a cotton textile fragment, two ceramic vessels, a cache of burned macro botanical remains, and a necklace of shell and turquoise beads.

Based on archeological evidence, Spanish Colonial documents, geographic location, continuity of occupation, and oral history presented during consultation by representatives of the pueblo listed above, Cuyamungue Pueblo (LA 38) has been identified as a puebloan village occupied from the Anasazi PIII period (1100-1300 A.D.) until the Pueblo Revolt of 1696. Historical documents and oral history indicates Cuyamungue Pueblo was

abandoned and the survivors were absorbed by the pueblos of Nambe, Pojoaque, San Ildefonso, San Juan, Santa Clara, and Tesuque.

Based on the above mentioned information, officials of the Museum of Indian Arts and Culture/Laboratory of Anthropology have determined that, pursuant to 43 CFR 10.2 (d)(1), the human remains listed above represent the physical remains of 38 individuals of Native American ancestry. Officials of the Museum of Indian Arts and Culture/ Laboratory of Anthropology have also determined that, pursuant to 43 CFR 10.2 (d)(2), the five objects listed above are reasonably believed to have been placed with or near individual human remains at the time of death or later as part of the death rite or ceremony. Lastly, officials of the Museum of Indian Arts and Culture/Laboratory of Anthropology have determined that, pursuant to 43 CFR 10.2 (e), there is a relationship of shared group identity which can be reasonably traced between these Native American human remains and associated funerary objects and the Pueblo of Nambe, the Pueblo of Pojoaque, the Pueblo of San Ildefonso, the Pueblo of San Juan, the Pueblo of Santa Clara, and the Pueblo of Tesuque.

This notice has been sent to officials of the Pueblo of Nambe, the Pueblo of Pojoaque, the Pueblo of San Ildefonso, the Pueblo of San Juan, the Pueblo of Santa Clara, and the Pueblo of Tesuque. Representatives of any other Indian tribe that believes itself to be culturally affiliated with these human remains and associated funerary objects should contact Patricia House, Director, Museum of Indian Arts and Culture/ Laboratory of Anthropology, P.O. Box 2087, Santa Fe, NM 87504; telephone: (505) 827-6344, before December 28, 1998. Repatriation of the human remains and associated funerary objects to the Pueblo of Nambe, the Pueblo of Pojoaque, the Pueblo of San Ildefonso, the Pueblo of San Juan, the Pueblo of Santa Clara, and the Pueblo of Tesuque may begin after that date if no additional claimants come forward.

Dated: November 17, 1998.

Veletta Canouts,

Acting Departmental Consulting Archeologist,

Deputy Manager, Archeology and Ethnography Program.

[FR Doc. 98–31486 Filed 11–25–98; 8:45 am]

BILLING CODE 4310–70–F

DEPARTMENT OF THE INTERIOR

National Park Service

Notice of Intent to Repatriate a Cultural Item in the Possession of the Olmsted County Historical Society, Rochester, MN

AGENCY: National Park Service

ACTION: Notice

Notice is hereby given under the Native American Graves Protection and Repatriation Act, 43 CFR 10.10 (a)(3), of the intent to repatriate a cultural item in the possession of the Olmsted County Historical Society, Rochester, MN which meets the definition of ''sacred object'' under Section 2 of the Act.

The cultural item is a Iroquois Medicine Rattle constructed of a cow's horn with a wooden handle.

In 1966, this item was donated to the Olmsted County Historical Society by the Mayo Clinic, Rochester, MN. The Mayo Clinic had received this item from Dr. S.A. Barrett of the Milwaukee Public Museum. At an earlier unknown date, this item was acquired in western New York State.

Museum records indicate this rattle is a Medicine Rattle. Consultation with representatives of the Cayuga Nation of New York indicate this item is needed by traditional Native American religious leaders for practice of traditional Native American religion by present-day adherents.

Based on the above-mentioned information, officials of the Olmsted County Historical Society have determined that, pursuant to 43 CFR 10.2 (d)(3), this cultural item is a specific ceremonial object needed by traditional Native American religious leaders for the practice of traditional Native American religions by their present-day adherents. Officials of the Olmsted County Historical Society have also determined that, pursuant to 43 CFR 10.2 (e), there is a relationship of shared group identity which can be reasonably traced between this item and the Cayuga Nation of New York.

This notice has been sent to officials of the Cayuga Nation of New York, the Tuscarora Nation of New York, the Seneca Nation of New York, the Seneca-Cayuga Tribe of Oklahoma, the St. Regis Band of Mohawk Indians of New York, the Onondaga Nation of New York, the Oneida Nation of New York, and the Oneida Tribe of Wisconsin. Representatives of any other Indian tribe that believes itself to be culturally affiliated with these objects should contact Margot Ballard, Curator, Olmsted County Historical Society, 1195 Cty. Rd. 22 SW, Rochester, MN 55902; telephone (507) 282–9447 before December 28, 1998. Repatriation of these objects to the Cayuga Nation of New York may begin after that date if no additional claimants come forward.

Dated: November 18, 1998.

Veletta Canouts,

Acting Departmental Consulting Archeologist,

Deputy Manager, Archeology and Ethnography Program.

[FR Doc. 98–31487 Filed 11–24–98; 8:45 am]

BILLING CODE 4310–70–F

DEPARTMENT OF THE INTERIOR

National Park Service

Notice of Inventory Completion for Native American Human Remains and Associated Funerary Objects from Bernalillo, Cibola, and Socorro Counties, NM in the Control of the Cibola National Forest, United States Forest Service, Albuquerque, NM

AGENCY: National Park Service

ACTION: Notice

Notice is hereby given in accordance with provisions of the Native American Graves Protection and Repatriation Act (NAGPRA), 43 CFR 10.9, of the completion of an inventory of human remains and associated funerary objects from Bernalillo, Cibola, and Socorro Counties, NM in the control of the Cibola National Forest, United States Forest Service, Albuquerque, NM.

A detailed assessment of the human remains was made by Maxwell Museum (University of New Mexico), the Museum of New Mexico, Northern Arizona University, and U.S. Forest Service professional staff in consultation with representatives of the Pueblo of Acoma, the Hopi Tribe, the Pueblo of Isleta, the Pueblo of Sandia, and the Pueblo of Zuni.

Between 1977 and 1979, human remains representing 28 individuals were recovered from sites NA 21566, NA 23177, and NA 23178 during legally authorized excavations conducted by J. Richard Ambler of Northern Arizona University. No known individuals were identified. The 11 associated funerary objects include ceramic vessels, sherds, and chipped stone.

Based on material culture, architecture, and site organization, sites NA 21566, NA 23177, and NA 23178 have been identified as small Anasazi pueblos occupied between 800-1150 A.D. Continuities of ethnographic materials, technology, and architecture indicate affiliation of Anasazi sites in

west-central New Mexico with historic and present-day Puebloan cultures. Oral traditions presented by representatives of the Pueblo of Acoma, the Hopi Tribe, and the Pueblo of Zuni support cultural affiliation with Anasazi sites in west-central New Mexico.

Based on the above mentioned information, officials of the USDA Forest Service have determined that, pursuant to 43 CFR 10.2 (d)(1), the human remains listed above represent the physical remains of 28 individuals of Native American ancestry. Officials of the USDA Forest Service have also determined that, pursuant to 43 CFR 10.2 (d)(2), the 11 objects listed above are reasonably believed to have been placed with or near individual human remains at the time of death or later as part of the death rite or ceremony. Lastly, officials of the USDA Forest Service have determined that, pursuant to 43 CFR 10.2 (e), there is a relationship of shared group identity which can be reasonably traced between these Native American human remains and associated funerary objects and the Pueblo of Acoma, the Hopi Tribe, and the Pueblo of Zuni.

Between 1948 and 1976, human remains representing 124 individuals were recovered from Tijeras Pueblo (LA 581) during legally authorized excavations and collections conducted by the University of New Mexico Archeological Field School, the Museum of New Mexico, and the Cibola National Forest. These human remains are currently curated at the Maxwell Museum of Anthropology (University of New Mexico) and the Museum of New Mexico. No known individuals were identified. The approximately 360 associated funerary objects include ceramic vessels, sherds, stone tools and jewelry, bone tools, botanical samples, corn cobs, and projectile points.

Based on material culture, architecture, and site organization, Tijeras Pueblo has been identified as a large masonry pueblo occupied between 1300-1600 A.D.

Between 1974 and 1977, human remains representing 33 individuals were recovered from Gallinas Springs Ruin (LA 1178 and LA 1180) during legally authorized excavations and collections conducted by the Western Michigan University Archeological Field School and the University of New Mexico Archeological Field School. These human remains are currently curated at the Maxwell Museum of Anthropology (University of New Mexico). No known individuals were identified. The approximately 20 associated funerary objects include ceramic vessels, sherds, stone tools, groundstone, and shell beads.

Based on material culture, architecture, and site organization, Gallinas Springs Ruin has been identified as a large masonry pueblo occupied between 1300-1600 A.D.

Between 1982 and 1983, human remains representing four individuals were recovered from Two Dead Juniper Village (LA 87432) during legally authorized excavations and collections by the Center for Anthropological Studies. These human remains are currently curated at the Maxwell Museum of Anthropology (Univerity of New Mexico). No known individuals were identified. No associated funerary objects were present.

Based on material culture, architecture, and site organization, Two Dead Juniper Village has been identified as an Anasazi pithouse village occupied between 1150-1250 A.D.

In 1987, human remains representing one individual were recovered from the Bear Canyon site (LA 61032) during legally authorized excavations conducted by University of New Mexico personnel. No known individual was identified. No associated funerary objects are present.

Based on material culture, architecture, and site organization, the Bear Canyon site has been identified as a small Anasazi pueblo occupied between 1200-1600 A.D.

Continuities of ethnographic materials, technology, and architecture indicate affiliation of Anasazi sites in portions of central New Mexico with historic and present-day Puebloan cultures. Oral traditions presented by representatives of the Pueblo of Isleta and the Pueblo of Sandia support cultural affiliation with Anasazi sites in the portions of central New Mexico where the preceeding sites are located.

Based on the above mentioned information, officials of the USDA Forest Service have determined that, pursuant to 43 CFR 10.2 (d)(1), the human remains listed above represent the physical remains of 162 individuals of Native American ancestry. Officials of the USDA Forest Service have also determined that, pursuant to 43 CFR 10.2 (d)(2), the minimum of 380 objects listed above are reasonably believed to have been placed with or near individual human remains at the time of death or later as part of the death rite or ceremony. Lastly, officials of the USDA Forest Service have determined that, pursuant to 43 CFR 10.2 (e), there is a relationship of shared group identity which can be reasonably traced between these Native American human remains and associated funerary objects and the Pueblo of Isleta, the Pueblo of Sandia, and Ysleta del Sur Pueblo.

This notice has been sent to officials of the Pueblo of Acoma, the Hopi Tribe, the Pueblo of Zuni, the Pueblo of Isleta, the Pueblo of Sandia, and Ysleta del Sur Pueblo. Representatives of any other Indian tribe that believes itself to be culturally affiliated with these human remains and associated funerary objects should contact Dr. Frank E. Wozniak, NAGPRA Coordinator, Southwestern Region, USDA Forest Service, 517 Gold Ave., SW, Albuquerque, NM 87102; telephone: (505) 842-3238, fax (505) 842-3800, before December 28, 1998. Repatriation of the human remains and associated funerary objects to the Hopi Tribe, the Pueblo of Acoma, the Pueblo of Isleta, the Pueblo of Sandia, the Pueblo of Zuni, and Ysleta del Sur Pueblo may begin after that date if no additional claimants come forward.

Dated: November 18, 1998.

Veletta Canouts,

Acting Departmental Consulting Archeologist,

Deputy Manager, Archeology and Ethnography Program.

[FR Doc. 98–31483 Filed 11–24–98; 8:45 am]

BILLING CODE 4310–70–F

INTERNATIONAL TRADE COMMISSION

[Investigations Nos. 731–TA–794–796 (Final)]

Certain Emulsion Styrene-Butadiene Rubber From Brazil, Korea, and Mexico

AGENCY: United States International Trade Commission.

ACTION: Scheduling of the final phase of antidumping investigations.

SUMMARY: The Commission hereby gives notice of the scheduling of the final phase of antidumping investigations Nos. 731–TA–794–796 (Final) under section 735(b) of the Tariff Act of 1930 (19 U.S.C. 1673d(b)) (the Act) to determine whether an industry in the United States is materially injured or threatened with material injury, or the establishment of an industry in the United States is materially retarded, by reason of less-than-fair-value imports from Brazil, Korea, and Mexico of certain emulsion styrene-butadiene rubber (''ESBR''), provided for in subheading 4002.19.00 of the Harmonized Tariff Schedule of the United States.[1]

[1] The imported product subject to these investigations, ESBR, is a synthetic polymer made via free radical cold emulsion copolymerization of

Continued

For further information concerning the conduct of this phase of the investigations, hearing procedures, and rules of general application, consult the Commission's rules of practice and procedure, part 201, subparts A through E (19 CFR part 201), and part 207, subparts A and C (19 CFR part 207).

EFFECTIVE DATE: November 2, 1998.

FOR FURTHER INFORMATION CONTACT: Fred Ruggles (202–205–3187), Office of Investigations, U.S. International Trade Commission, 500 E Street SW, Washington, DC 20436. Hearing-impaired persons can obtain information on this matter by contacting the Commission's TDD terminal on 202–205–1810. Persons with mobility impairments who will need special assistance in gaining access to the Commission should contact the Office of the Secretary at 202–205–2000. General information concerning the Commission may also be obtained by accessing its internet server (http://www.usitc.gov).

SUPPLEMENTARY INFORMATION:

Background.—The final phase of these investigations is being scheduled as a result of affirmative preliminary determinations by the Department of Commerce that imports of certain emulsion styrene-butadiene rubber from Brazil, Korea, and Mexico are being sold in the United States at less than fair value within the meaning of section 733 of the Act (19 U.S.C. 1673b). The investigation was requested in a petition filed on April 1, 1998, by Ameripol Synpol Corp., Akron, OH, and DSM Copolymer, Baton Rouge, LA.

Participation in the investigations and public service list.—Persons, including industrial users of the subject merchandise and, if the merchandise is sold at the retail level, representative consumer organizations, wishing to participate in the final phase of these investigations as parties must file an entry of appearance with the Secretary to the Commission, as provided in § 201.11 of the Commission's rules, no later than 21 days prior to the hearing date specified in this notice. A party that filed a notice of appearance during the preliminary phase of the investigations need not file an additional notice of appearance during this final phase. The Secretary will maintain a public service list containing the names and addresses of all persons, or their representatives, who are parties to the investigations.

Limited disclosure of business proprietary information (BPI) under an administrative protective order (APO) and BPI service list.—Pursuant to § 207.7(a) of the Commission's rules, the Secretary will make BPI gathered in the final phase of these investigations available to authorized applicants under the APO issued in the investigations, provided that the application is made no later than 21 days prior to the hearing date specified in this notice. Authorized applicants must represent interested parties, as defined by 19 U.S.C. 1677(9), who are parties to the investigations. A party granted access to BPI in the preliminary phase of the investigations need not reapply for such access. A separate service list will be maintained by the Secretary for those parties authorized to receive BPI under the APO.

Staff report.—The prehearing staff report in the final phase of these investigations will be placed in the nonpublic record on March 17, 1999, and a public version will be issued thereafter, pursuant to § 207.22 of the Commission's rules.

Hearing.—The Commission will hold a hearing in connection with the final phase of these investigations beginning at 9:30 a.m. on March 30, 1999, at the U.S. International Trade Commission Building. Requests to appear at the hearing should be filed in writing with the Secretary to the Commission on or before March 23, 1999. A nonparty who has testimony that may aid the Commission's deliberations may request permission to present a short statement at the hearing. All parties and nonparties desiring to appear at the hearing and make oral presentations should attend a prehearing conference to be held at 9:30 a.m. on March 25, 1999, at the U.S. International Trade Commission Building. Oral testimony and written materials to be submitted at the public hearing are governed by §§ 201.6(b)(2), 201.13(f), and 207.24 of the Commission's rules. Parties must submit any request to present a portion of their hearing testimony *in camera* no later than 7 days prior to the date of the hearing .

Written submissions.—Each party who is an interested party shall submit a prehearing brief to the Commission. Prehearing briefs must conform with the provisions of § 207.23 of the Commission's rules; the deadline for filing is March 24, 1999. Parties may also file written testimony in connection with their presentation at the hearing, as provided in § 207.24 of the Commission's rules, and posthearing briefs, which must conform with the provisions of § 207.25 of the Commission's rules. The deadline for filing posthearing briefs is April 6, 1999; witness testimony must be filed no later than three days before the hearing. In addition, any person who has not entered an appearance as a party to the investigations may submit a written statement of information pertinent to the subject of the investigations on or before April 16, 1999. On April 16, 1999, the Commission will make available to parties all information on which they have not had an opportunity to comment. Parties may submit final comments on this information on or before April 20, 1999, but such final comments must not contain new factual information and must otherwise comply with § 207.30 of the Commission's rules. All written submissions must conform with the provisions of § 201.8 of the Commission's rules; any submissions that contain BPI must also conform with the requirements of §§ 201.6, 207.3, and 207.7 of the Commission's rules. The Commission's rules do not authorize filing of submissions with the Secretary by facsimile or electronic means.

In accordance with §§ 201.16(c) and 207.3 of the Commission's rules, each document filed by a party to the investigations must be served on all other parties to the investigations (as identified by either the public or BPI service list), and a certificate of service must be timely filed. The Secretary will not accept a document for filing without a certificate of service.

Authority: These investigations are being conducted under authority of title VII of the Tariff Act of 1930; this notice is published pursuant to § 207.21 of the Commission's rules.

Issued: November 19, 1998.

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styrene and butadiene monomers in reactors. The reaction process involves combining styrene and butadiene monomers in water, with an initiator system, an emulsifier system, and molecular weight modifiers. ESBR consists of cold non-pigmented rubbers and cold oil extended non-pigmented rubbers that contain at least 1 percent of organic acids from the emulsion polymerization process. ESBR is produced and sold, both inside the United States and internationally, in accordance with a generally accepted set of product specifications issued by the International Institute of Synthetic Rubber Producers (IISRP). The universe of products subject to these investigations are grades of ESBR included in the IISRP 1500 series and IISRP 1700 series of synthetic rubbers. The 1500 grades are light in color and are often described as ''Clear'' or ''White Rubber.'' The 1700 grades are oil-extended and thus darker in color, and are often called ''Brown Rubber.'' ESBR is used primarily in the production of tires. It is also used in a variety of other products, including conveyor belts, shoe soles, some kinds of hoses, roller coverings, and flooring.

Imported products manufactured by blending ESBR with other polymers, high styrene resin master batch, carbon black master batch (i.e., IISRP 1600 series and 1800 series) and latex (an intermediate product) are not included within the scope of these investigations.

By order of the Commission.

Donna R. Koehnke,

Secretary.

[FR Doc. 98–31519 Filed 11–24–98; 8:45 am]

BILLING CODE 7020–02–P

INTERNATIONAL TRADE COMMISSION

[Investigation No. 701–TA–384 (Preliminary) and Investigations Nos. 731–TA–806–808 (Preliminary)]

Certain Hot-Rolled Steel Products From Brazil, Japan, and Russia

Determinations

On the basis of the record [1] developed in the subject investigations, the United States International Trade Commission determines, pursuant to section 703(a) of the Tariff Act of 1930 (19 U.S.C. 1671b(a)), that there is a reasonable indication that an industry in the United States is threatened with material injury by reason of imports from Brazil of certain hot-rolled steel products, provided for in headings 7208, 7210, 7211, 7212, 7225, and 7226 of the Harmonized Tariff Schedule of the United States, that are alleged to be subsidized by the Government of Brazil.[2] The Commission also determines, pursuant to section 733(a) of the Tariff Act of 1930 (19 U.S.C. 1673b(a)), that there is a reasonable indication that an industry in the United States is threatened with material injury by reason of such imports from Brazil, Japan, and Russia that are alleged to be sold in the United States at less than fair value.[2]

Commencement of Final Phase Investigations

Pursuant to § 207.18 of the Commission's rules, the Commission also gives notice of the commencement of the final phase of its investigations. The Commission will issue a final phase notice of scheduling which will be published in the **Federal Register** as provided in § 207.21 of the Commission's rules upon notice from the Department of Commerce (Commerce) of affirmative preliminary determinations in these investigations under section 703(b) and section 733(b) of the Act, or, if the preliminary determinations are negative, upon notice of affirmative final determinations in the investigations under section 705(a) and section 735(a) of the Act. Parties that filed entries of appearance in the preliminary phase of the investigations need not enter a separate appearance for the final phase of the investigations. Industrial users, and, if the merchandise under investigation is sold at the retail level, representative consumer organizations, have the right to appear as parties in Commission antidumping and countervailing duty investigations. The Secretary will prepare a public service list containing the names and addresses of all persons, or their representatives, who are parties to the investigations.

Background

On September 30, 1998, a petition was filed with the Commission and the Department of Commerce by Bethlehem Steel Corp., Bethlehem, PA; U.S. Steel Group, a unit of USX Corp., Pittsburgh, PA; Ispat Inland Steel, East Chicago, IN; LTV Steel Co., Inc., Cleveland, OH; National Steel Corp., Mishawaka, IN; [3] California Steel Industries, Fontana, CA; Gallatin Steel Co., Ghent, KY; Geneva Steel, Vineyard, UT; Gulf States Steel, Inc., Gadsden, AL; IPSCO Steel, Inc., Muscatine, IA; Steel Dynamics, Butler, IN; Weirton Steel Corp., Weirton, WV; Independent Steelworkers Union, Weirton, WV; and the United Steelworkers of America, Pittsburgh, PA, alleging that an industry in the United States is materially injured by reason of subsidized or LTFV imports of certain hot-rolled steel products from Brazil, Japan, and Russia. Sales of such product are allegedly subsidized with respect to Brazil and made at LTFV with respect to Brazil, Japan, and Russia. Accordingly, effective September 30, 1998, the Commission instituted investigation No. 701–TA–384 (Preliminary) and investigations Nos. 731–TA–806–808 (Preliminary).

Notice of the institution of the Commission's investigations and of a public conference to be held in connection therewith was given by posting copies of the notice in the Office of the Secretary, U.S. International Trade Commission, Washington, DC, and by publishing the notice in the **Federal Register** of October 7, 1998 (63 FR 53926). The conference was held in Washington, DC, on October 21, 1998, and all persons who requested the opportunity were permitted to appear in person or by counsel.

The Commission transmitted its determinations in these investigations to the Secretary of Commerce on November 16, 1998. The views of the Commission are contained in USITC Publication 3142 (November 1998), entitled Certain Hot-rolled Steel Products from Brazil, Japan, and Russia: Investigations Nos. 701–TA–384 and 731–TA–806–808 (Preliminary).

Issued: November 17, 1998.

By order of the Commission.

Donna R. Koehnke,

Secretary.

[FR Doc. 98–31517 Filed 11–24–98; 8:45 am]

BILLING CODE 7020–02–P

INTERNATIONAL TRADE COMMISSION

[Investigation No. AA1921–111 (Review)]

Roller Chain From Japan

AGENCY: United States International Trade Commission.

ACTION: Scheduling of a full five-year review concerning the antidumping duty order on roller chain from Japan.

SUMMARY: The Commission hereby gives notice of the scheduling of a full review pursuant to section 751(c)(5) of the Tariff Act of 1930 (19 U.S.C. 1675(c)(5)) (the Act) to determine whether revocation of the antidumping duty order on roller chain from Japan would be likely to lead to continuation or recurrence of material injury. For further information concerning the conduct of this review and rules of general application, consult the Commission's rules of practice and procedure, part 201, subparts A through E (19 CFR part 201), and part 207, subparts A, D, E, and F (19 CFR part 207). Recent amendments to the rules of practice and procedure pertinent to five-year reviews, including the text of subpart F of part 207, are published at 63 FR 30599, June 5, 1998, and may be downloaded from the Commission's World Wide Web site at http://www.usitc.gov/rules.htm.

EFFECTIVE DATE: November 16, 1998.

FOR FURTHER INFORMATION CONTACT: Debra Baker (202–205–3180), Office of Investigations, U.S. International Trade Commission, 500 E Street SW, Washington, DC 20436. Hearing-impaired persons can obtain information on this matter by contacting the Commission's TDD terminal on 202–205–1810. Persons with mobility impairments who will need special assistance in gaining access to the Commission should contact the Office of the Secretary at 202–205–2000. General information concerning the Commission may also be obtained by accessing its internet server (http://www.usitc.gov).

[1] The record is defined in § 207.2(f) of the Commission's rules of practice and procedure (19 CFR 207.2(f)).

[2] Commissioner Crawford determined that there is a reasonable indication that an industry in the United States is materially injured.

[3] National Steel Corp. is not a petitioner with respect to Japan.

SUPPLEMENTARY INFORMATION:

Background.—On October 8, 1998, the Commission determined that responses to its notice of institution of the subject five-year review were such that a full review pursuant to section 751(c)(5) of the Act should proceed (63 FR 56048, October 20, 1998). A record of the Commissioners' votes and a statement by Commissioner Carol T. Crawford are available from the Office of the Secretary and at the Commission's web site.

Participation in the review and public service list.—Persons, including industrial users of the subject merchandise and, if the merchandise is sold at the retail level, representative consumer organizations, wishing to participate in this review as parties must file an entry of appearance with the Secretary to the Commission, as provided in § 201.11 of the Commission's rules, by January 4, 1999. A party that filed a notice of appearance following publication of the Commission's notice of institution of the review need not file an additional notice of appearance. The Secretary will maintain a public service list containing the names and addresses of all persons, or their representatives, who are parties to the review.

Limited disclosure of business proprietary information (BPI) under an administrative protective order (APO) and BPI service list.—Pursuant to § 207.7(a) of the Commission's rules, the Secretary will make BPI gathered in this review available to authorized applicants under the APO issued in the review, provided that the application is made no later than January 4, 1999. Authorized applicants must represent interested parties, as defined by 19 U.S.C. 1677(9), who are parties to the review. A party granted access to BPI following publication of the Commission's notice of institution of the review need not reapply for such access. A separate service list will be maintained by the Secretary for those parties authorized to receive BPI under the APO.

Staff report.—The prehearing staff report in the review will be placed in the nonpublic record on April 19, 1999, and a public version will be issued thereafter, pursuant to § 207.64 of the Commission's rules.

Hearing.—The Commission will hold a hearing in connection with the review beginning at 9:30 a.m. on May 6, 1999, at the U.S. International Trade Commission Building. Requests to appear at the hearing should be filed in writing with the Secretary to the Commission on or before April 27, 1999. A nonparty who has testimony that may aid the Commission's deliberations may request permission to present a short statement at the hearing. All parties and nonparties desiring to appear at the hearing and make oral presentations should attend a prehearing conference to be held at 9:30 a.m. on April 29, 1999, at the U.S. International Trade Commission Building. Oral testimony and written materials to be submitted at the public hearing are governed by §§ 201.6(b)(2), 201.13(f), 207.24, and 207.66 of the Commission's rules. Parties must submit any request to present a portion of their hearing testimony *in camera* no later than 7 days prior to the date of the hearing.

Written submissions.—Each party to the review may submit a prehearing brief to the Commission. Prehearing briefs must conform with the provisions of § 207.65 of the Commission's rules; the deadline for filing is April 28, 1999. Parties may also file written testimony in connection with their presentation at the hearing, as provided in § 207.24 of the Commission's rules, and posthearing briefs, which must conform with the provisions of § 207.67 of the Commission's rules. The deadline for filing posthearing briefs is May 18, 1999; witness testimony must be filed no later than three days before the hearing. In addition, any person who has not entered an appearance as a party to the review may submit a written statement of information pertinent to the subject of the review on or before May 18, 1999. On June 9, 1999, the Commission will make available to parties all information on which they have not had an opportunity to comment. Parties may submit final comments on this information on or before June 11, 1999, but such final comments must not contain new factual information and must otherwise comply with § 207.68 of the Commission's rules. All written submissions must conform with the provisions of § 201.8 of the Commission's rules; any submissions that contain BPI must also conform with the requirements of §§ 201.6, 207.3, and 207.7 of the Commission's rules. The Commission's rules do not authorize filing of submissions with the Secretary by facsimile or electronic means.

In accordance with §§ 201.16(c) and 207.3 of the Commission's rules, each document filed by a party to the review must be served on all other parties to the review (as identified by either the public or BPI service list), and a certificate of service must be timely filed. The Secretary will not accept a document for filing without a certificate of service.

Authority: This review is being conducted under authority of title VII of the Tariff Act of 1930; this notice is published pursuant to § 207.62 of the Commission's rules.

Issued: November 17, 1998.

By order of the Commission.

Donna R. Koehnke,

Secretary.

[FR Doc. 98–31518 Filed 11–24–98; 8:45 am]

BILLING CODE 7020–02–P

INTERNATIONAL TRADE COMMISSION

[USITC SE–98–020]

Sunshine Act Meeting

AGENCY HOLDING THE MEETING: United States International Trade Commission.

TIME AND DATE: December 7, 1998 at 2:00 p.m.

PLACE: Room 101, 500 E Street S.W., Washington, DC 20436.

STATUS: Open to the public.

MATTERS TO BE CONSIDERED:

1. Agenda for future meeting: None.
2. Minutes.
3. Ratification List.
4. Inv. No. 731–TA–811 (Preliminary) (DRAMS of One Megabit and Above from Taiwan)—briefing and vote.
5. Outstanding action jackets:

1. Document No. INV–98–080: Approval of revised work schedule in Inv. Nos. 751–TA–21–27 (Ferrosilicon from Brazil, China, Kazakhstan, Russia, Ukraine, and Venezuela).

In accordance with Commission policy, subject matter listed above, not disposed of at the scheduled meeting, may be carried over to the agenda of the following meeting.

By order of the Commission.

Issued: November 23, 1998.

Donna R. Koehnke,

Secretary.

[FR Doc. 98–31630 Filed 11–23–98; 8:45 am]

BILLING CODE 7020–02–M

DEPARTMENT OF JUSTICE

Notice of Lodging of Partial Consent Decree Under the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. §§ 9601 et seq.; Excel Corp.

Under 28 CFR 50.7, notice is hereby given that on November 16, 1998 a proposed partial consent decree (''consent decree'') in *United States* v. *Excel Corp.*, Civil Action No. 3:93CV119RM, was lodged with the United States District Court for the Northern District of Indiana.

In this action the United States sought civil penalties and unrecovered response costs in connection with the Main Street Well Field Site in Elkhart, Indiana (''Site''). The proposed consent decree provides for the payment by defendants Joseph S. Beale and JSB Corporation d/b/a Adlake Enterprises, Inc. (collectively ''JSB'') of $350,000 of the United States unrecovered response costs at the Site. The proposed consent decree also resolve the United States claims against JSB for its alleged failure to perform response activities at the Site pursuant to an administrative order issued by the United States Environmental Protection Agency (''EPA'').

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 of the Environment and Natural Resources Division, Department of Justice, Washington, D.C. 20530, and should refer to *United States* v. *Excel Corp.*, D.J. Ref. No. 90–11–3–799.

The proposed consent decree may be examined at the Office of the United States Attorney, 301 Federal Building, 204 South Main Street, South Bend, Indiana; at the Region 5 Office of EPA, 77 West Jackson Blvd., Chicago, Illinois 60604; and at the Consent Decree Library, 1120 G Street, N.W., 3rd Floor, Washington, D.C. 20005, (202) 624–0892. A copy of the proposed consent decree may be obtained in person or by mail from the Consent Decree Library, 1120 G Street, N.W., 3rd Floor, Washington, D.C. 20005. In requesting a copy, please enclose a check in the amount of $7.50 (25 cents per page reproduction cost) payable to the Consent Decree Library.

Joel M. Gross,

Chief, Environmental Enforcement Section, Environment and Natural Resources Division.

[FR Doc. 98–31432 Filed 11–24–98; 8:45 am]

BILLING CODE 4410–15–M

DEPARTMENT OF JUSTICE

[AAG/A Order 154–98]

Privacy Act of 1974; Notice of Modified System of Records

Pursuant to the provisions of the Privacy Act of 1974 (5 U.S.C. 552a), notice is hereby given that the Department of Justice, Federal Bureau of Investigation (FBI), is modifying the following system of records which was last published in the **Federal Register** on June 4, 1998 (63 FR 30514):

The National Instant Criminal Background Check System (NICS) JUSTICE/FBI–018.

In the rules section of today's **Federal Register**, the Department of Justice is also providing a final rule exempting the NICS from certain provisions of the Privacy Act.

This notice addresses comments received by the Department of Justice following publication of the Notice of New System of Records for the NICS, published in the **Federal Register** on June 4, 1998 (63 FR 30514), in which, in accordance with 5 U.S.C. 552a(e)(4) and (11), the public, the Office of Management and Budget, and the Congress were invited to comment on the new routine uses. The Department of Justice/FBI accepted comments on the NICS system notice from the public dated on or before July 6, 1998.

Significant Comments

A number of comments raised matters that were more pertinent to other notices of proposed rulemaking relating to the NICS: The National Instant Criminal Background Check System Regulation published in the **Federal Register** on June 4, 1998 (63 FR 30430), and the National Instant Criminal Background Check System User Fee Regulation, published in the **Federal Register** on August 17, 1998 (63 FR 43893). Such comments have been addressed in the final NICS rule, the National Instant Criminal Background Check System Regulation, published in the **Federal Register** on October 30, 1998 (63 FR 58303). Other comments raised matters that were more pertinent to the proposed rule exempting the NICS from certain provisions of the Privacy Act, published in the **Federal Register** on June 4, 1998 (63 FR 30429). Such comments are addressed in a final rule, Exemption of System of Records Under the Privacy Act, published in the rules section of today's **Federal Register**.

A number of comments opposed retention by the NICS of a temporary log of background check transactions that allow a firearm transfer to proceed. (For a more detailed discussion of this issue, see the final NICS rule, the National Instant Criminal Background Check System Regulation, published in the **Federal Register** on October 30, 1998 (63 FR 58303).) Although the Brady Handgun Violence Prevention Act (Brady Act) mandates the destruction of all personally identified information in the NICS associated with approved firearms transactions (other than the identifying number and the date the number was assigned), the statute does not specify a period of time within which records of approvals must be destroyed. At the same time, the Brady Act requires that the Department ensure the privacy and security of the NICS and the proper operation of the system. The Department has attempted to balance various interests involved and comply with both statutory requirements by retaining such records in the NICS Audit Log for a limited, but sufficient, period of time to conduct audits of the NICS. The original NICS records system notice indicated that records of firearm transaction approvals would be maintained for eighteen months. However, in recognition of the numerous comments objecting to this retention period as too long, the Department reexamined the time period needed to perform audits of the NICS. The Department determined that the general retention period for records of allowed transfers in the NICS Audit Log should be the minimum reasonable period for performing audits on the system, but in no event more than six months. The final NICS regulations reflect this (but also provide that such information may be retained for a longer period if necessary to pursue identified cases of misuse of the system). The Department further determined that the FBI shall work toward reducing the retention period to the shortest practicable period of time less than six months that will allow basic security audits of the NICS. By February 28, 1999, the Department will issue a notice of a proposed revision of the regulation setting forth a further reduced period of retention that will be observed by the system. The NICS system of records has been modified to reflect these changes.

Various comments expressed concern that the Audit Log would allow states acting as NICS Points of Contact (POCs) and law enforcement agencies access to records of approved transfers. This is not a well-founded concern because only the FBI will be able to directly access information in the transaction log. Section 25.9(b)(2) of the final rule was revised to provide explicitly that such information is directly available only to the FBI, and only for the purposes of conducting audits of the use and performance of the NICS or pursuing cases of misuse of the system.

In addition to several comments which objected to particular routine uses, one comment pointed out that the list of ''routine uses'' in the original NICS system notice appeared broader than the uses addressed in the regulations for both the National Crime Information Center (NCIC) (citing 28 CFR 20.20(c) and 20.21(b)) and for the NICS (citing 28 CFR 25.6(j)). Specifically, 28 CFR 25.6(j) limits the

access to the NICS Index for purposes that are unrelated to NICS background checks required by the Brady Act to providing information to criminal justice agencies in connection with the issuance of firearm-related and explosives-related permits or licenses or to the ATF in connection with enforcement of the Gun Control Act (18 U.S.C. Chapter 44) or the National Firearms Act (26 U.S.C. Chapter 53). The comment objected that the original NICS system notice provided no justification for any such apparent differences and expressed the opinion that a significant number of the uses are ''inconsistent with Congress' intent.''

The Department acknowledges that these apparent differences warrant clarification. The NICS regulations were issued to establish policies and procedures implementing the Brady Act. As explained in the final NICS rule (63 FR 58305), the purpose of the limitation on access to the NICS Index was to prevent checks of the NICS Index for general law enforcement purposes.

The NICS Index is a separate database within the NICS which contains records provided by Federal agencies to the FBI on persons prohibited from receiving firearms under Federal law and records provided voluntarily by some states on persons who have been denied the purchase of a firearm or who are known to be disqualified from possessing a firearm under federal law. Information in the NICS Index generally relates to individuals who fall within categories ''C'' through ''G'' of the categories of individuals covered by the system described in the NICS system notice below. For the most part, criminal history records are not pertinent to these categories; instead the NICS Index consists of data relating to such matters as mental incompetence, renunciations of citizenship, immigration matters, and dishonorable discharges. Largely due to privacy-related concerns expressed by the federal agencies supplying such sensitive records to the NICS Index, the Department will limit generalized non-Brady law enforcement disclosures of the NICS Index to those uses provided in 28 CFR 25.6(j) (which are embodied in this notice as routine uses ''A'' and ''B'').

However, the NICS Index is only one of several parts of the NICS, and the express language of the regulation clearly limits the scope of 25 CFR 25.6(j) to the contents of the NICS Index. The NICS Audit Log is separate from the NICS Index. In the course of conducting a NICS search, the NICS will query the NICS Index, and any ''match'' found in the NICS Index will be replicated in the NICS Audit Log. The limitations in 28 CFR 25.6(j) do not extend to information in the NICS Audit Log derived from individual ''hits'' in the NICS Index. (Nor, apart from the NICS Index, do these limitations extend to other components of the NICS,) Thus—as to these other NICS components—28 CFR 25.6(j) does not preclude the generalized law-enforcement disclosures established in routine use ''C.'' Routine use ''C'' would not, however, apply to the NICS Index, and this routine use is being revised to make this clear.

Nor was 28 CFR 25.6(j) intended to limit certain other disclosures incident to management and administration of the NICS when properly authorized pursuant to the Privacy Act. Although this may not be readily apparent from the express terms of the NICS regulation, it is clearly evidenced by the Department's publication of the original NICS Privacy Act system notice—which included the routine uses—simultaneously with the publication of the proposed NICS regulations, in which the system notice was expressly referenced. The NICS regulations are to be read together with the NICS system notice. (Indeed, this same result is a mirror of the NCIC, in which disclosures addressed in the NCIC regulations are supplemented in NCIC's system notice (60 FR 19775).) Thus, for instance, the NICS regulations must be read together with routine use ''D,'' which provides for disclosures to contractors, grantees, experts, consultants, volunteers, detailees, and other non-FBI employees performing or working on a contract, service, grant, cooperative agreement, or job for the Federal Government when necessary to accomplish an agency function related to this system of records and under requirements (including Privacy Act requirements) specified by the FBI. The need to utilize outside service providers, particularly in the creation, maintenance, and management of highly complex systems, is a fact of life for virtually every public and private entity. Further, when an agency provides by contract for the operation of a system of records to accomplish an agency function, the Privacy Act itself provides for considering the contractor and any employee of such contractor as an employee of the agency for purposes of Privacy Act sanctions (5 U.S.C. 552a(m)). The persons covered by this use are the functional equivalent of FBI employees, and this use confirms authority for disclosures to these persons to the same extent as if they were actual FBI employees.

All of the routine uses contained in the NICS system notice comport with Congress' intent and are fully compatible with the Brady Act. As noted in House Report 103–344, the Brady Act was enacted in an effort to stem the appalling consequences of an epidemic of gun violence by preventing the acquisition of firearms by those prohibited under federal or state law. The routine uses further the Brady Act's preventive goals not only by preventing transfers of firearms to disqualified individuals, but also by enhancing the deterrent prospect of capture and prosecution of those who pursue unlawful transfers or otherwise seek to unlawfully subvert the Brady Act. Prevention is also furthered by routine uses which could permit prophylactic advisories to the public and/or potential victims. Finally, it is entirely compatible with the Brady Act to provide the FBI with the necessary flexibility to carry out its responsibilities, and to facilitate inquiries by Members of Congress to ensure their constituents have been treated appropriately under the Brady Act. Accordingly, except as noted below, this notice continues the routine uses as originally published.

Routine use ''C'' provides the necessary authority for further coordination among law enforcement agencies for the purposes of investigating, prosecuting, and/or enforcing violations of criminal or civil law or regulation that may come to light during the NICS operations. This provides a mechanism for pursuing criminal or civil sanctions against those attempting to thwart governing laws or regulations, which will strengthen and further the Brady Act's deterrence goal. One comment objected to this routine use's additional provision for disclosing violations of contract. Although this additional provision was modeled after other systems where such authority is useful and appropriate, it does appear not to be necessary in the NICS. We are modifying this routine use to delete the provision relating to disclosures of a violation or potential violation of a contract. (As previously discussed, we are also modifying this routine use to expressly provide that it does not apply to the NICS Index.)

Routine use ''E'' provides for appropriate disclosures to the public (including a victim or potential victim) in furtherance of a legitimate law enforcement or public safety function, or to keep the public appropriately informed of other law enforcement or FBI matters of legitimate public interest where disclosure would not constitute a clearly unwarranted invasion of personal privacy. As for all routine uses, such disclosures would only include those compatible with the purposes for

collecting the information under the Brady Act. Such disclosures might include local media announcements asking the public's assistance in locating a dangerous fugitive who attempted to purchase a firearm in the area, or alerting a protected spouse when the subject of a protective order attempts to purchase a firearm. Such disclosures would fully comport with the violence-prevention goals of Brady Act. As another example, providing the public examples of the NICS' effectiveness in particular cases could help deter disqualified persons who might otherwise be tempted to test the system. On further review, however, we conclude that it is unnecessary to also provide for public disseminations not related to law enforcement or FBI matters. We are modifying this routine use to delete the provision allowing disclosures to the news media or general public in situations not related to law enforcement or FBI matters. In addition, we are further modifying this routine use to expressly provide that it does not apply to information in the NICS Index.

Changes

This notice modifies the NICS system of records to reflect recent statutory and regulatory changes affecting the NICS, and to make various editorial and clarifying revisions. To the extent possible, the changes and additions are italicized throughout the attached system notice, and brief descriptions of the more noteworthy ones are provided below.

As discussed above, the system has been modified to reflect that the general retention period for records of allowed transfers in the NICS Audit Log should be the minimum reasonable period for performing audits on the system, but in no event more than six months, provided that such information may be retained for a longer period if necessary to pursue identified cases of misuse of the system.

Also as discussed above, routine use ''C'' has been modified to delete the provision for disclosing violations or potential violations of contracts, routine use ''E'' has been modified to delete provisions for public disclosures not related to law enforcement or FBI matters, and both of these routine uses have been modified to expressly provide that they do not apply to the NICS Index.

In consonance with other changes made in the final NICS rule, the NICS system notice has been modified to replace the term ''password'' with ''code word''; replace words such as ''purchase'' and ''purchaser'' with words such as ''transfer'' and ''transferee''; change terminology relating to NICS denials from ''reason to believe'' to ''information demonstrating''; and to clarify that allowable non-Brady Act uses of the NICS Index include responding to inquiries by criminal justice agencies in connection with licenses or permits to carry a concealed firearm or to import, manufacture, deal in, or purchase explosives, and to inquiries by the ATF in connection with enforcement of the Gun Control Act (18 U.S.C. Chapter 44) or the National Firearms Act (26 U.S.C. Chapter 53).

The original NICS records system notice indicated that NICS' searches of the National Crime Information Center (NCIC) and the Interstate Identification Index (III) would be specifically directed towards locating information that an individual is within the system-notice categories A, B, H, and I of persons covered by the system. The NICS searches of NCIC and III will also be directed towards locating information that an individual is within the system-notice categories C (unlawful user of or addicted to any controlled substance), and D (adjudicated as a mental defective or has been committed to a mental institution). The NICS system notice has been modified to reflect this.

The original NICS records system notice indicated that the categories of individuals covered by the system included persons who were FFLs authorized by the FBI to request NICS checks. The system will also cover persons who claim on applications submitted to the FBI for NICS access to be FFLs even though they are not, and FFLs on record with the ATF that have not been granted authority to request NICS checks. In addition, the original notice may not have been clear that these FFL records are separate from the NICS Index and the NICS Audit Log. The NICS system notice has been modified to clarify this.

The NICS system notice has been modified to expressly confirm that in advising an FFL that a response will be ''delayed,'' the NICS may apprise an FFL of an estimated time for completing the analysis.

Dated: November 19, 1998.

Stephen R. Colgate,

Assistant Attorney General for Administration.

JUSTICE/FBI–018

SYSTEM NAME:

National Instant Criminal Background Check System (NICS).

SYSTEM LOCATION:

Federal Bureau of Investigation, 1000 Custer Hollow Road, Clarksburg, West Virginia 26306.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

The categories of individuals covered by the system include any person who:

A. Is under indictment for, or has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;

B. Is a fugitive from justice;

C. Is an unlawful user of or addicted to any controlled substance;

D. Has been adjudicated as a mental defective or has been committed to a mental institution;

E. Is an alien who is illegally or unlawfully in the United States;

F. Has been discharged from the Armed Forces under dishonorable conditions;

G. Having been a citizen of the United States, has renounced such citizenship;

H. Is subject to a court order that restrains the person from harassing, stalking, or threatening an intimate partner or child of such intimate partner (issued after a hearing of which actual notice was received);

I. Has been convicted in any court of a misdemeanor crime of domestic violence (involving the use or attempted use of physical force committed by a current or former spouse, parent, or guardian of the victim or by a person with a similar relationship with the victim);

J. Is otherwise disqualified from possessing a firearm under State law;

K. Is *or claims to be* a Federal firearms licensee (FFL), i.e., a person licensed by the Bureau of Alcohol, Tobacco and Firearms (ATF), United States Department of Treasury, as a manufacturer, dealer, or importer of firearms; or

L. Has applied for the *transfer* of a firearm or a firearms-related permit or license and has had his or her name forwarded to the NICS as part of a request for a NICS background check. (Identifying information about this category of individual is maintained for system administration and security purposes only in the ''NICS Audit Log,'' a system transaction log described below under the headings ''CATEGORIES OF RECORDS IN THE SYSTEM'' AND ''RETENTION AND DISPOSAL.'' In cases where the NICS background check does not locate a disqualifying record, information about the individual will only be retained temporarily for *the minimum reasonable period necessary for performing audits on the system, but in*

no event more than six months or such shorter period of time that the Department establishes by regulation, provided that such information may be retained for a longer period if necessary to pursue identified cases of misuse of the system. The system will not contain any details about the type of firearm which is the subject of the proposed transfer (other than the fact that it is a handgun or a long gun) or whether a sale or transfer of a firearm has actually taken place.

CATEGORIES OF RECORDS IN THE SYSTEM:

The ''NICS Index'' is the only database maintained by the FBI which was created specifically for the NICS. The NICS Index contains records obtained by the Attorney General from Federal agencies or States on individuals who fall into the categories of individuals listed above under the heading ''CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM,'' C through G. These records contain an individual's name; sex; race; *other personal descriptive data (such as scars and tattoos)*; complete date of birth; state of residence; sometimes a unique identifying number, such as a Social Security number (but NICS does not require it to be furnished), a military number, or a number assigned by Federal, State, or local law enforcement authorities.

The ''NICS Audit Log'' is a chronological record of system (computer) activities that enables the reconstruction and examination of a sequence of events and/or changes in an event related to the NICS. With regard to a specific NICS transaction, the audit log will include: The name and other identifying information about the prospective *transferee*; the type of transaction (inquiry or response); line number; time; date of inquiry; header; message key; Originating Agency Identifier; and inquiry/response data, such as a NICS Transaction Number (a unique number assigned to each valid background request inquiry) and information found by the NICS search.

In addition, the NICS contains information on persons that are FFLs (or claim to be). This information includes the FFL name, address, phone numbers, ATF number, access code words, names of authorized representatives and contact persons, and similar information used by the NICS to identify, validate, and communicate with FFLs in the course of NICS operations.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

(1) 18 U.S.C. 922, as amended by the Brady Handgun Violence Prevention Act (the ''Brady Act'') (Pub. L. 103–159, Nov. 30, 1993); (2) 28 U.S.C. 534, as amended (Pub. L. 103–322, Title IV, 4060(a), Sep. 13, 1994, 105 Stat. 1950).

PURPOSE(S):

The purpose of the NICS, which was established pursuant to the Brady Act, is to provide a means of checking available information to determine whether a person is disqualified from possessing a firearm under Federal or State law.

Prior to the transfer of a firearm, a prospective *transferee*, not licensed under 18 U.S.C. 923, must obtain a firearms transaction form from an FFL and provide the information required by the ATF. The firearms transaction form is returned to the FFL, who is required by the Brady Act to contact the NICS and furnish the name and certain other identifying data provided by the *transferee*. NICS conducts a search which compares the information about the *transferee* with information in or available to NICS.

State and local law enforcement agencies may serve as Points of Contact (POCs) for the NICS. Where there is no POC, the FBI's NICS Operations Center serves in its place. The POC (or the NICS Operations Center) receives inquiries from FFLs, initiates NICS background searches, may check available state and local record systems, determines whether matching records provide *information demonstrating* that an individual is disqualified from possessing a firearm under Federal or State law, and responds back to the FFLs.

In addition to a review of the NICS Index, a NICS search includes a review of the pre-existing, separately-managed FBI criminal history databases of the National Crime Information Center (NCIC)(JUSTICE/FBI–001), including the Interstate Identification Index (III), to the extent such searches are possible with the available information. NCIC and III are cooperative Federal-State programs for the exchange of criminal history record and other information among criminal justice agencies to locate wanted and missing persons and for other identification purposes. The search conducted of the NCIC and III, in conjunction with the search of the NICS Index, attempts to locate only information indicating that an individual firearm *transferee* is identical to an individual in one or more of categories A through J listed above under the heading CATEGORIES OF INDIVIDUALS IN THE SYSTEM, with the search of NCIC and III specifically directed towards locating information that an individual is within categories A, B, *C, D,* H, and I.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

A. Limited information may be provided by a POC or the NICS Operations Center to an FFL who has contacted the NICS concerning a prospective firearm *transferee*. If a matching record found by the NICS provides *information demonstrating* that the prospective *transferee* is disqualified from possessing a firearm under Federal or State law, the FFL will be notified only that the application is ''denied,'' with none of the underlying information provided. If additional record analysis is required by the NICS representative *(e.g to confirm that a record relates to the potential transferee or to pursue supplemental information to clarify whether the potential transferee is disqualified from receiving a firearm),* the response may read ''delayed'' *and may include an estimated time for completing the analysis*. If no disqualifying record is located by the NICS, the FFL will be told that it may ''proceed.'' A unique identification number will be provided to the FFL for all responses received from the NICS, which number shall be recorded on the firearms transaction form.

B. Information in the NICS may be provided through the NCIC lines to Federal criminal justice agencies, criminal justice agencies in the fifty States, the District of Columbia, Puerto Rico, U.S. Possessions, and U.S. Territories, including POCs and contributors of information in the NICS Index, to enable them to determine whether the transfer of a firearm to any person not licensed under 18 U.S.C. 923 would be in violation of Federal or State law; whether the issuance of a license or permit for the possession or sale of a firearm or firearms, *or to carry a concealed firearm, or to import, manufacture, deal in, or purchase explosives* would be in violation of Federal or State law or regulation; whether appeals from denials should be granted or denied; and whether to add to, delete from, revise, or update information previously provided by the contributor. *This includes responding to inquiries by the ATF in connection with enforcement of the Gun Control Act (18 U.S.C. Chapter 44), or the National Firearms Act (26 U.S.C. Chapter 53).*

C. If, during the course of any activity or operation of the system authorized by the regulations governing the system (28 CFR, part 25, subpart A), any record is found by the system which indicates,

either on its face or in conjunction with other information, a violation or potential violation of law (whether criminal or civil) and/or regulation, the pertinent record may be disclosed to the appropriate agency/organization/task force (whether Federal, State, local, joint, or tribal) and/or to the appropriate foreign or international agency/organization charged with the responsibility of investigating, prosecuting, and/or enforcing such law *or* regulation, e.g., disclosure of information from the system to the ATF, United States Department of Treasury, regarding violations or potential violations of 18 U.S.C. 922(a)(6). *(This routine use does not apply to the NICS Index.)*

D. System records may be disclosed to contractors, grantees, experts, consultants, volunteers, detailees, and other non-FBI employees performing or working on a contract, service, grant, cooperative agreement, or job for the Federal Government when necessary to accomplish an agency function related to this system of records and under requirements (including Privacy Act requirements) specified by the FBI.

E. System records may be disclosed to the news media or members of the general public or to a victim or potential victim in furtherance of a legitimate law enforcement or public safety function, e.g., to assist in locating fugitives; to provide notification of arrests; to provide alerts, assessments, or similar information on potential threats to life, health, or property; or to keep the public appropriately informed of other law enforcement or FBI matters of legitimate public interest. *(The availability of information in pending criminal cases will be governed by the provisions of 28 CFR 50.2.) (This routine use does not apply to the NICS Index.)*

F. Where the disclosure of system records has been determined by the FBI to be reasonable and necessary to resolve a matter in litigation or in anticipation thereof, such records may be disclosed to a court or adjudicative body, before which the FBI is authorized to appear, when: (a) The FBI or any FBI employee in his or her official capacity; (b) any FBI employee in his or her individual capacity where the Department of Justice has agreed to represent the employee; or (c) the United States, where the FBI determines it is likely to be affected by the litigation, is or could be a party to the litigation, or has an official interest in the litigation.

G. System records may be made available to a Member of Congress or staff acting on the Member's behalf when the Member or staff requests the information on behalf and at the written request of the individual who is the subject of the record.

H. System records may be disclosed to the National Archives and Records Administration for records management inspections and such other purposes conducted under the authority of 44 U.S.C. 2904 and 2906.

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:

STORAGE:

Records are stored electronically for use in a computer environment in areas safe from access by unauthorized persons or exposure to environmental hazards. In general, the security policy for the NCIC (JUSTICE/FBI–001) is followed.

RETRIEVABILITY:

Records are retrieved by name, sex, race, date of birth, state of residence, *other personal descriptive data,* the NICS Transaction Number, FFL number, and, in some instances, unique numeric identifier, e.g., a Social Security number or a military identification number. (A Social Security number is not required by the NICS.)

SAFEGUARDS:

Records searched by the NICS are located in secure government buildings with limited physical access. Access to the results of a NICS record search is further restricted to authorized employees of Federal, State, and local law enforcement agencies who make inquiries by use of identification numbers and *code words.*

When a Federal, State, or local agency places information in the NICS Index, it uses its agency identifier and a unique agency record identifier for each record provided to the NICS. Federal, State, or local agencies can modify or cancel only the data that they have provided to NICS Index.

RETENTION AND DISPOSAL:

Information provided by other Federal agencies or State or local governments will be maintained in the NICS Index unless updated or deleted by the agency/government which contributed the data.

The FBI will maintain an Audit Log of all NICS transactions. Firearms transaction approvals will be maintained for *the minimum reasonable period necessary for performing audits on the system, but in no event more than six months or such shorter period of time that the Department establishes by regulation (except that such information may be retained for a longer period if necessary to pursue identified cases of misuse of the system).* The NICS Transaction Number (the unique number assigned to the NICS transaction) and the date on which it was assigned will be maintained indefinitely. Information related to firearms transfer denials will be retained for 10 years and then disposed of as directed by the National Archives and Record Administration.

SYSTEM MANAGER(S) AND ADDRESS:

Director, Federal Bureau of Investigation, J. Edgar Hoover FBI Building, 935 Pennsylvania Avenue, NW, Washington, DC 20535–0001.

NOTIFICATION PROCEDURES:

This system of records has been exempted from the notification procedures of subsections (d) and (e)(4)(G), to the extent permitted by subsections (j)(2), (k)(2), and (k)(3) of the Privacy Act. Requests for notification should be addressed to the Systems Manager. Requirements for a request are the same as set forth below under the heading ''RECORD ACCESS PROCEDURES.''

RECORD ACCESS PROCEDURES:

This system of records has been exempted from the access procedures of subsections (d) and (e)(4)(H) to the extent permitted by subsections (j)(2), (k)(2), and (k)(3) of the Privacy Act. A request for access to a non-exempt record from the system should be addressed to the System Manager, shall be made in writing, and should have the envelope and the letter marked ''Privacy Act Request.'' The request must include the full name, complete address, date of birth, and place of birth of the requester. The requester must sign the request; and, to verify it, the signature must be notarized or submitted under 28 U.S.C. 1746, a law that permits statements to be made under penalty of perjury as a substitute for notarization.

Alternative procedures are available to a person who has been denied the *transfer* of, or permit for, a firearm or explosives because of information in the NICS. The procedures provide for an appeal of a denial and a method to seek the correction of erroneous data searched by or maintained in the system. The alternative procedures can be found at 28 CFR, part 25, subpart A.

CONTESTING RECORD PROCEDURES:

This system of records has been exempted from the contest and amendment procedures of subsections (d) and (e)(4)(H) to the extent permitted by subsections (j)(2),(k)(2), and (k)(3) of

the Privacy Act. Requests should be addressed to the System Manager and should clearly and concisely describe the precise information being contested, the reasons for contesting it, and the proposed amendment or correction proposed to the information. In addition, as described above under ''RECORD ACCESS PROCEDURES,'' an alternative procedure is available to a person who has been denied the *transfer* of, or permit for, a firearm or explosives because of information in the NICS, by which the individual may seek the correction of erroneous data in the system. The procedures are further described at 28 CFR, part 25, subpart A.

RECORD SOURCE CATEGORIES:

Information contained in the NICS is obtained from local, State, Federal, and international records.

SYSTEM EXEMPTED FROM CERTAIN PROVISIONS OF THE ACT:

The Attorney General has exempted this system from subsections (c)(3) and (4); (d); (e)(1); (2), and (3) (e)(4)(G) and (H); (e)(5) and (8); and (g) of the Privacy Act, pursuant to 5 U.S.C. 552a(j)(2). In addition, the Attorney General has exempted his system from subsections (c)(3), (d), (e)(1), and (e)(4)(G) and (H) of the Privacy Act, pursuant to 5 U.S.C. 552a (k)(2) and (k)(3). Rules have been promulgated in accordance with the requirements of 5 U.S.C. 553 (b), (c), and (e), and have been published in the **Federal Register**.

[FR Doc. 98–31503 Filed 11–24–98; 8:45 am]

BILLING CODE 4410–12–P

DEPARTMENT OF JUSTICE

Antitrust Division

United States v. Omnipoint Corp.; United States v. 21st Century Bidding Corp.; United States v. Mercury PCS II, L.L.C.; Proposed Final Judgments and Competitive Impact Statements

Notice is hereby given pursuant to the Antitrust Procedures and Penalties Act, 15 U.S.C. Section 16 (b) through (h), that a proposed Final Judgment, Stipulation and Order, and Competitive Impact Statement have been filed with the United States District Court for the District of Columbia in each of the following civil actions: *United States* v. *Omnipoint Corporation,* Civil Action No. 1:98CV02750; *United States* v. *21st Century Bidding Corp.;* Civil Action No. 1:98CV02752, and *United States* v. *Mercury PCS II, L.L.C.,* Civil Action No. 1:98CV02751. The proposed Final Judgments are subject to approval by the Court after expiration of the statutory 60-day public comment period and compliance with the Antitrust Procedures and Penalties Act, 15 U.S.C. 16(b)–(h).

On November 10, 1998, the United States filed separate Complaints against each defendant that allege that defendants used coded bids during a Federal Communications Commission auction of radio spectrum licenses for personal communications services. The Complaints further allege that, through the use of these coded bids, defendants reached agreements to stop bidding against one another in violation of Section 1 of the Sherman Act, 15 U.S.C. 1. The proposal Final Judgments, filed the same time as the Complaints, prohibit defendants from entering into anticompetitive agreements and from using coded bids in future FCC auctions.

Public comment is invited within 60 days of the date of this notice. Such comments, and responses thereto, will be published in the **Federal Register** and filed with the Court. Written comments should be directed to Roger W. Fones, Chief, Transportation, Energy, and Agriculture Section, Antitrust Division, 325 Seventh Street, NW., Suite 500, Washington, DC 20530 (telephone: (202) 307–6351).

Copies of the Complaint, Stipulation and Order, proposed Final Judgment, and Competitive Impact Statement are available for inspection in Room 215 of the U.S. Department of Justice, Antitrust Division, 325 Seventh Street, NW., Washington, DC 20530 (telephone: (202) 514–2481), and at the office of the Clerk of the United States District Court for the District of Columbia, 333 Constitution Avenue, NW., Washington, DC 20001. Copies of any of these materials may be obtained upon request and payment of a copying fee.

Rebecca P. Dick,

Director of Civil Non-Merger Enforcement.

Stipulation and Order

It is hereby *stipulated* by and between the undersigned parties, by their respective attorneys, as follows:

1. The Court has jurisdiction over the subject matter of this action and over each of the parties hereto, and venue of this action is proper in the United States District Court for the District of Columbia.

2. The parties stipulate that a Final Judgment in the form hereto attached may be filed and entered by the Court, upon the motion of any party or upon the Court's own motion, at any time after compliance with the requirements of the Antitrust Procedure and Penalties Act (15 U.S.C. § 16), and without further notice to any party or other proceedings, provided that plaintiff has not withdrawn its consent, which it may do at any time before the entry of the proposed Final Judgment by serving notice thereof on defendants and by filing that notice with the Court.

3. The defendant shall abide by and comply with the provisions of the proposed Final Judgment pending entry of the Final Judgment by the Court and shall, from the date of the signing of this Stipulation by the parties, comply with all the terms and provisions of the proposed Final Judgment as though they were in full force and effect as an order of the Court.

4. In the event that plaintiff withdraws its consent, as provided in paragraph 2 above, then the parties are released from all further obligations under this Stipulation, and the making of this Stipulation shall be without prejudice to any party in this or any other proceedings.

5. The parties request that the Court acknowledge the terms of this stipulation by entering the Order in this Stipulation and Order.

Respectfully submitted,

For Plaintiff United States of America:

Jill A. Ptacek,

J. Richard Doidge,

Attorneys, Antitrust Division, U.S. Department of Justice, 325 Seventh Street, N.W., Washington, D.C. 20004, (202) 307–0468.

For Defendant Omnipoint Corporation:

Michael F. Brockmeyer, Esq.,

Piper & Marbury L.L.P. Charles Center South, 36 South Charles Street, Baltimore, MD 21201–3018, (410) 576–1890.

Order

It is *so ordered, this* _____ day of _____, 1998.

United States District Court Judge

Certificate of Service

I hereby certify that I have caused a copy of the foregoing Complaint, Competitive Impact Statement and proposed Final Judgment to be served on counsel for the defendant in this matter in the manner set forth below:

By first class mail, postage prepaid, and by facsimile:

Michael F. Brockmeyer, Esquire, Piper & Marbury L.L.P., 36 South Charles Street, Baltimore, MD 21201–3018

Jill Ptacek,

Antitrust Division, U.S. Department of Justice, 325 Seventh Street, N.W., Suite 500, Washington, D.C. 20530, (202) 307–6607, (202) 616–2441 (Fax).

Final Judgment

Plaintiff, United States of America, filed its Complaint on November 10,

1998. Plaintiff and the Defendant, by their respective attorneys, have consented to the entry of this Final Judgment without trial or adjudication of any issue of fact or law. This Final Judgment shall not be evidence against or an admission by any party with respect to any issue of fact or law. Therefore, before the taking of any testimony, without trial or adjudication of any issue of fact or law herein, and upon consent of the parties, it is hereby *ordered, adjudged, and decreed,* as follows:

I. Jurisdiction

This Court has jurisdiction of the subject matter of this action and of each of the parties consenting hereto. Venue is proper in the District of Columbia. The Complaint states a claim upon which relief may be granted against the defendant under Section 1 of the Sherman Act, 15 U.S.C. 1.

II. Definitions

As used herein, the term:

(A) ''Defendant'' means Omnipoint Corporation, its successors, assigns, subsidiaries, divisions, groups, affiliates, partnerships and joint ventures, directors, officers, managers, agents, and employees.

(B) ''Document'' means all ''writings and recordings'' as that phrase is defined in Rule 1001(1) of the Federal Rules of Evidence.

(C) ''FCC'' means the Federal Communications Commission.

(D) ''License-identifying information'' means any number, letter, code or description that designates a license or that links licenses.

(E) ''Person'' means any natural person, corporation, firm, company, sole proprietorship, partnership, association, institution, governmental unit, public trust, or other legal entity.

III. Applicability

(A) This Final Judgment applies to the Defendant, to its successors, and assigns, and to all other persons in active concert or participation with any of them who shall have received actual notice of the Final Judgment by personal service or otherwise.

(B) Nothing herein contained shall suggest that any portion of this Final Judgment is or has been created for the benefit of any third party and nothing herein shall be construed to provide any rights to any third party.

IV. Prohibited Conduct

The Defendant is enjoined and restrained from:

(A) Entering into any agreement with any other license applicant to fix, establish, suppress or maintain the price for any license to be awarded by the FCC in an auction, or to allocate any such licenses amongst competitors, provided, however, that nothing in this provision shall prohibit the Defendant from participating in any bidding consortium, teaming arrangement or other joint venture authorized under the rules and regulations of the FCC pertaining to future auctions, and disclosed to the FCC.

(B) In the course of any auction conducted pursuant to the rules and regulations of the FCC, offering any price to the FCC for the lease, purchase, or right to use any FCC-awarded license, that includes within that price any license-identifying information, unless the inclusion of such information is required by the FCC.

V. Compliance Program

The Defendant is ordered to maintain an antitrust compliance program, which shall include the following:

(A) Designating, within 30 days of entry of this Final Judgment, an Antitrust Compliance Officer with responsibility for accomplishing the antitrust compliance program and with the purpose of achieving compliance with this Final Judgment. The Antitrust Compliance Officer shall, on a continuing basis, supervise the review of the current and proposed activities of the Defendant to ensure that it complies with this Final Judgment.

(B) The Antitrust Compliance Officer shall be responsible for:

(1) Distributing within 60 days of the entry of this Final Judgment, a copy of this Final Judgment to (a) all officers and directors of the Defendant, and (b) to all employees who have any responsibility for formulating, proposing, recommending, establishing, approving, implementing or submitting the Defendant's prices in FCC-conducted license auctions;

(2) Distributing in a timely manner a copy of this Final Judgment to any officer, director or employee who succeeds to a position described in Section V (B)(1);

(3) Obtaining from each present or future officer, director or employee designated in Section V(B)(1), within 60 days of entry of this Final Judgment or of the person's succession to a designated position, a written certification that he or she: (1) Has read, understands, and agrees to abide by the terms of this Final Judgment; and (2) has been advised and understands that his or her failure to comply with this Final Judgment may result in conviction for criminal contempt of court;

(4) Maintaining a record of persons to whom the Final Judgment has been distributed and from whom, pursuant to Section V(B)(3), the certification has been obtained; and

(5) Reporting to the Plaintiff any violation of the Final Judgment.

VI. Certification

Within 75 days after the entry of this Final Judgment, the Defendant shall certify to the Plaintiff whether it has complied with Sections V (B)(1) and (B)(3) above.

VII. Plaintiff Access

(A) To determine or secure compliance with this Final Judgment and for no other purpose, duly authorized representatives of the Plaintiff shall, upon written request of the Assistant Attorney General in charge of the Antitrust Division, and on reasonable notice to the defendant made to its principal office, be permitted, subject to any legally recognized privilege:

(1) Access during the Defendant's office hours to inspect and copy all documents in the possession or under the control of the Defendant, who may have counsel present, relating to any matters contained in this Final Judgment, and

(2) Subject to the reasonable convenience of the Defendant and without restraint or interference from it, to interview officers, employees or agents of the Defendant, who may have counsel present, regarding such matters.

(B) Upon the written request of the Assistant Attorney General in charge of the Antitrust Division made to the Defendant's principal office, the Defendant shall submit such written reports, under oath if requested, relating to any matters contained in this Final Judgment as may be reasonably requested, subject to any legally recognized privilege.

(C) No information or documents obtained by the means provided in Section VII shall be divulged by the Plaintiff to any person other than a duly authorized representative of the Executive Branch of the United States, except in the course of legal proceedings to which the United States is a party, or for the purpose of securing compliance with this Final Judgment, or as otherwise required by law.

(D) If at the time information or documents are furnished by the Defendant to Plaintiff, the Defendant represents and identifies in writing the material in any such information or documents to which a claim of protection may be asserted under Rule 26(c)(7) of the Federal Rules of Civil

Procedure, and Defendant marks each pertinent page of such material, ''Subject to claim of protection under Rule 26(c)(7) of the Federal Rules of Civil Procedure,'' then 10 days' notice shall be given by Plaintiff to the Defendant prior to divulging such material in any legal proceeding (other than a grand jury proceeding) to which Defendant is not a party.

VIII. Further Elements of the Final Judgment

(A) This Final Judgment shall expire ten years from the date of its entry.

(B) Jurisdiction is retained by this Court for the purpose of enabling the parties to this Final Judgment to apply to this Court at any time for further orders and directions as may be necessary or appropriate to carry out or construe this Final Judgment, to modify or terminate any of its provisions, to enforce compliance, and to punish violations of its provisions.

(C) Entry of this Final Judgment is in the public interest.

Dated: _____.

_____

United States District Judge

Competitive Impact Statement

The United States of America, pursuant to Section 2(b) of the Antitrust Procedures and Penalties Act (''APPA''), 15 U.S.C. § 16(b)–(h), files this Competitive Impact Statement relating to the proposed Final Judgment submitted for entry in this civil antitrust proceeding.

I. Nature and Purpose of This Proceeding

On November 10, 1998, the United States filed a civil antitrust complaint alleging that the defendant, Omnipoint Corporation (''Omnipoint''), had violated Section 1 of the Sherman Act, 15 U.S.C. § 1. Omnipoint, through its affiliate Omnipoint PCS Entrepreneurs Two, Inc., participated in an auction (the ''DEF auction'') of broadband radio spectrum licenses for personal communication services (''PCS'') that was conducted by the Federal Communications Commission (''FCC'') between August 1996 and January 1997. The Complaint alleges that during the DEF auction Omnipoint submitted bids that ended with three-digit numerical codes to communicate with rival bidders and that, through the use of these coded bids, Omnipoint and one of its rivals reached an agreement to refrain from bidding against one another. As a consequence of this agreement, the complaint alleges Omnipoint and its competitor paid less for certain PCS licenses, resulting in a loss of revenue to the Treasury of the United States.

On November 10, 1998, the United States and Omnipoint filed a Stipulation and Order in which they consented to the entry of a proposed Final Judgment that provides the relief that the United States seeks in the Complaint. Under the proposed Final Judgment, Omnipoint would be enjoined from submitting coded bids in future FCC auctions and entering into any agreement related to bidding for FCC licenses that violates Section 1 of the Sherman Act, 15 U.S.C. § 1.

The United States and Omnipoint have stipulated that the proposed Final Judgment may be entered after compliance with the APPA. Entry of the Final Judgment would terminate the action, except that the Court would retain jurisdiction to construe, modify, or enforce its provisions and to punish violations thereof.

II. Description of the Events Giving Rise to the Alleged Violation

A. Background of the PCS Auctions

In 1993, Congress enacted legislation enabling the FCC to auction licenses for radio spectrum that could be used to provide PCS. Based on a wireless, digital technology, PCS offers an alternative to current traditional telephone services.

The FCC designated six bands of broadband radio spectrum for PCS: A, B, C, D, E and F. The A, B and C bands occupy 30 MHZ each, while the D, E and F licenses are 10 MHZ each. The FCC divided the country into 51 geographic areas called Market Trading Areas (''MTAs''), which were each allotted A and B licenses. The FCC subdivided the MTAs into 493 smaller geographic units called Basic Trading Areas (''BTAs''), which were each allotted C, D, E, and F licenses. Each BTA was assigned a number from 1 to 493.

The authorizing legislation required the FCC to adopt rules ensuring competitive auctions, and the FCC considered numerous auction formats for PCS, ultimately adopting a simultaneous, multiple-round, open format. Under this format, numerous licenses were offered in a single auction, staged over several rounds, with all licenses remaining open for bidding until the auction closed. Auction participants could observe all of the bidding activity in each round. The auction ended only when a round passed in which no bidder submitted a bid on any license.

To keep the auction moving forward, the FCC imposed eligibility limits and activity rules. The FCC gave each license a population value called ''MHZ-pops.'' Each bidder made down payments to the FCC, with the size of the payment entitling it to bid for a certain amount of MHZ-pops. A participant could bid on any combination of licenses as long as the combined MHZ-pops of those licenses did not exceed the MHZ-pops to which the bidder's down payment entitled it (eligibility). Bidders also had to be ''active'' in each round (bid or have the high bid from the prior round) on licenses representing a set percentage of their MHZ-pops; otherwise, the FCC reduced their eligibility for the next round. As the auction proceeded, the bidders had to bid an increasing percentage of their MHZ-pops until in the final stages they had to bid nearly all of their eligibility.

Each round in the auction began with a bid submission period during which participants submitted bids electronically or by telephone for any of the licenses in which they were interested. After each bid submission period, the FCC published electronically to all bidders the results for each license, including the name of each company bidding, the amount of each bid, and the time each bid was submitted. The high bidder for a license in a round became the ''standing high'' bidder for that license with a tie going to the earliest bidder.

A bid withdrawal period then followed. During this period, bidders were permitted to withdraw their standing high bids from any market, subject to a withdrawal penalty specified by the FCC. The FCC then published the results. The bid submission and withdrawal periods comprised an auction round.

At the beginning of an auction, the FCC generally held one round per day. As the auction progressed, the FCC increased the number of rounds held in a single day, providing a period of time between rounds for auction participants to analyze the bidding from the prior round and to plan for the next round.

One goal of the FCC was to ensure the efficient allocation of licenses, that is, that the licenses would go to the bidders who valued them most highly. The simultaneous, multiple-round format of the PCS auctions helped achieve this goal in several ways. It allowed bidders to pursue different license aggregation strategies and change their strategies as the auction proceeded. In addition, it allowed auction participants to observe the value that other bidders placed on the licenses and use that information to refine their own assessment of license values. This was particularly useful

given that the technology used for PCS was new and bidders were uncertain about both the costs of providing the services and the prospective revenues. Ultimately, because the licenses were awarded to the highest bidders, the PCS auction format allowed the marketplace to determine the most efficient allocation of licenses.

Nothwithstanding these benefits of the auction format, the FCC recognized the risk that ''collusive conduct by bidders prior to or during the auction process could undermine the competitiveness of the bidding process.'' Second Report and Order, FCC 94–61, ¶ 223 (Rel. April 20, 1994). The FCC sought to mitigate the risk of collusion by adopting rules restricting the disclosure of bidding strategies during the auction. The FCC noted, however, that Federal antitrust laws applied to the auctions and it would rely primarily on those laws to deter and punish collusion in the auctions. Second Report and Order, *supra,* at ¶ 225; Second Memorandum Opinion and Order, FCC 94–215, ¶ 50 (Rel. August 15, 1994).

B. Illegal Agreement To Allocate Licenses in the DEF Auction

The auction of the D, E and F licenses for all 493 BTAs began in August 1996. Because there were three bands being auctioned, the DEF auction involved a total of 1479 licenses. Lasting 276 rounds, the auction ended in January 1997.

Prior to the DEF auction, bidders analyzed which licenses (or groups of licenses) would best enable them to provide effective and competitive service, assessed the value they placed on those licenses, and developed strategies to obtain the desired licenses for the lowest possible prices. The bidders also speculated about their rivals' business strategies and attempted to identify the key licenses for those strategies, relying on an array of information, including knowledge of the licenses bidders had acquired in prior auctions.

As the auction proceeded, bidders carefully observed their rivals' actions and often adjusted their own market valuations and business strategies, sometimes based on their assessment of their rivals' objectives. Their rivals' bids however, did not necessarily reveal their true objectives. An auction participant might bid for a particular license during a particular round for a number of reasons: It may have always wanted the license, but for strategic reasons refrained from bidding until then; it may have changed its business strategy and decided that it now wanted the license; it may have seen an opportunity to acquire an undervalued license; it may have bid simply to preserve its eligibility to bid on other licenses later in the auction; it may have bid to raise a rival's cost to obtain the license; or it may have bid to send a message to the standing high bidder to refrain from bidding against it for a different license. Thus, the purpose of a particular bid might be procompetitive or anticompetitive.

A bidder's purpose is making a bid might, depending on the circumstances, be ambiguous to its rivals. Where ambiguity remains, it can be difficult to use a bid or bidding pattern alone to send clear messages or invitations to collude. To eliminate or reduce any ambiguity, Omnipoint sometimes placed bids during the DEF auction in which the final three digits intentionally corresponded to the number for a BTA (a ''BTA end code''). Knowing that other bidders could see the bids and hence the BTA end codes, Omnipoint used the codes to better explain the real purpose of certain bids it made—to reach an agreement with a rival. In particular, Omnipoint used the BTA end codes to link the bidding of licenses in two (or more) specific BTA markets, highlight the licenses Omnipoint wanted, and convey to the competing bidders' offers to agree with Omnipoint not to bid against each other for the linked licenses.

Sometimes Omnipoint placed bids in one market with the BTA end code of another market to send the message: ''I'm bidding for this license because you bid for the one I want (indicated by the BTA code) and I'll stop bidding in your market if you stop bidding in mine.'' Other times, Omnipoint used the BTA end codes to tell its rival: ''If you don't stop bidding for this license, I will bid for the one you want (indicated by the BTA code).''

Ominipoint's use of the BTA end codes did not serve any legitimate purpose of the auction. Omnipoint's purpose for using BTA end codes was to send clear and unmistakable invitations to collude to rival bidders and to reach agreements with those rivals to refrain from bidding against each other. Such conduct was not authorized by the applicable FCC rules and was inconsistent with the FCC's goal to encourage competitive bidding.

Over the course of rounds 167 to 172, Omnipoint reached an agreement with NextWave Telecom, Inc. (''NextWave'') to allocate between them the F-band licenses for Toledo, OH (BTA #444), Salisbury, MD (BTA #398), and Lancaster, PA (BTA #240). Omnipoint agreed to stop bidding for the Salisbury and Lancaster-F licenses in exchange for NextWave's agreement not to bid for the Toledo-F license. (The bidding for the Toledo, Salisbury, and Lancaster-F licenses between rounds 167 and 172 is depicted in the table attached as Appendix A to this Competitive Impact Statement.)

Prior to round 167, Omnipoint had the high bid in Salisbury-F and had bid intermittently in earlier rounds for the F license in Lancaster and Toledo. NextWave had the standing high bids for the Lancaster and Toledo-F licenses. In round 167, NextWave placed the high bid for Salisbury-F. Omnipoint bid for Toledo-F in round 168. NextWave won back the Toledo license in round 169.

In round 170, Omnipoint placed bids for the Toledo, Salisbury and Lancaster-F licenses. Omnipoint's bids for Salisbury and Lancaster licenses ended in ''444''—the BTA number for Toledo. Omnipoint withdrew its Salisbury and Lancaster bids that same round, only to bid again for the two licenses in round 171, this time for lower prices than it had bid in round 170. Ominpoint's use of the BTA end codes established a link between the Salisbury and Lancaster-F licenses and the Toledo-F license.

NextWave saw the BTA end codes and understood that Omnipoint proposed to stop bidding in Salisbury and Lancaster in exchange for NextWave ceasing to bid for the Toledo-F license. In round 171, NextWave bid back over Omnipoint for the Salisbury and Lancaster-F licenses. NextWave accepted Omnipoint's offer and stopped bidding for Toledo-F even though it was willing to pay more for the Toledo-F license than Omnipoint's standing high bid for that license. Observing that NextWave had stopped bidding for Toledo-F, Omnipoint then stopped bidding for Salisbury-F and Lancaster-F.

Omnipoint's purpose for using the BTA end codes was to link the Salisbury, Lancaster and Toledo-F licenses, highlight the bids as retaliatory, and communicate an offer to stop bidding for Salisbury and Lancaster if NextWave stopped bidding for Toledo-F. Omnipoint believed that the Salisbury and Lancaster licenses were important to NextWave. The Salisbury and Lancaster licenses complemented the licenses that NextWave was holding in the Philadelphia and Washington, D.C. areas.

As a consequence of Omnipoint's agreement with NextWave, competition for the Toledo-F license was suppressed and the Treasury received less revenue for the Toledo-F license. It was in NextWave's economic self-interest to bid more for the Toledo-F license than Omnipoint's winning bid and, but for

the illegal agreement, it would have done so.

III. Explanation of the Proposed Final Judgment

The provisions of the proposed Final Judgment are designed to ensure that Omnipoint does not enter into anticompetitive agreements when participating in future FCC auctions. The decree supplements any prohibitions on bidding conduct set forth in the FCC's auction rules, and the defendant may violate the decree even if its conduct does not violate an agency statute or rule.

The proposed Final Judgment would enjoin Omnipoint from entering into an agreement with another license applicant to fix, establish, suppress or maintain the price of a license to be awarded by the FCC or to allocate any such licenses among competitors (Section IV(A)). The proposed Final Judgment would not prevent Omnipoint from entering into any joint-venture or similar agreements regarding licenses to be awarded by the FCC that are both disclosed to the FCC and authorized under the FCC's rules and regulations. (Section IV(A)). However, such bidding arrangements would still be subject to scrutiny under the antitrust laws.

The proposed Final Judgment would also prevent Omnipoint from using BTA end codes or any similar signaling mechanism to solicit anticompetitive agreements in future FCC auctions. The proposed Final Judgment would enjoin Omnipoint from submitting bids that contain ''license-identifying information'' in future FCC auctions, unless the inclusion of such information is required by the FCC (Section IV(B)). License-identifying information is defined as ''any number, letter, code or description that designates a license or that links licenses.'' (Section II(D)).

The proposed Final Judgment would further require Omnipoint to establish and maintain an antitrust compliance program (Section V). It would also provide that the United States may obtain information from Omnipoint concerning possible violations of the Final Judgment (Section VII).

IV. Remedies Available to Potential Private Litigants

Section 4 of the Clayton Act, 15 U.S.C. § 15, provides that any person who has been injured as a result of conduct prohibited by the antitrust laws may bring suit in federal court to recover three times the damages the person has suffered, as well as costs and reasonable attorneys' fees. Entry of the proposed Final Judgment will neither impair nor assist the bringing of any private antitrust damage action. Under the provisions of Section 5(a) of the Clayton Act, 15 U.S.C. § 16(a), the proposed Final Judgment has no *prima facie* effect in any subsequent private lawsuit that may be brought against Omnipoint. In this case, the injured person is the United States.

V. Procedures Available for Modification of the Proposed Final Judgment

The United States and Omnipoint have stipulated that the proposed Final Judgment may be entered by the Court after compliance with the provisions of the APPA, provided that the United States has not withdrawn its consent. The APPA conditions entry upon the Court's determination that the proposed Final Judgment is in the public interest.

The APPA provides a period of at least sixty days preceding the effective date of the proposed Final Judgment within which any person may submit to the United States written comments regarding the proposed Final Judgment. Any person who wishes to comment should do so within sixty days of the date of publication of this Competitive Impact Statement in the **Federal Register**. The United States will evalaute and respond to the comments. All comments will be given due consideration by the Department of Justice, which remains free to withdraw its consent to the proposed Final Judgment at any time prior to entry. The comments and the responses of the United States will be filed with the Court and published in the **Federal Register.** Written comments should be submitted to: Roger W. Fones, Chief, Transportation, Energy & Agriculture Section, Antitrust Division, United States Department of Justice, 325 Seventh Street, N.W., Suite 500, Washington, D.C. 20530.

The proposed Final Judgment provides that the Court retains jurisdiction over this action, and the parties may apply to the Court for any order necessary or appropriate for the modification, interpretation, or enforcement of the Final Judgment. The proposed Final Judgment would expire ten (10) years from the date of its entry.

VI. Alternatives to the Proposed Final Judgment

The United States considered, as an alternative to the proposed Final Judgment, seeking damages in this case pursuant to section 4A of the Clayton Act, 15 U.S.C. § 15a. Doing so would likely have required a full trial on the merits against Omnipoint. In the view of the Department of Justice, undertaking the substantial cost and the risk associated with such a trial is not warranted, considering that the proposed Final Judgment provides full injunctive relief for the violations of the Sherman Act set forth in the Complaint.

VII. Standard of Review Under the APPA for Proposed Final Judgment

The APPA requires that proposed consent judgments in antitrust cases brought by the United States be subject to a sixty-day comment period, after which the court shall determine whether entry of the proposed Final Judgment ''is in the public interest.'' In making that determination, the court may consider:

> (1) The competitive impact of such judgment, including termination of alleged violations, provisions for enforcement and modification, duration of relief sought, anticipated effects of alternative remedies actually considered, and any other considerations bearing upon the adequacy of such judgment;
>
> (2) The impact of entry of such judgment upon the public generally and individuals alleging specific injury from the violations set forth in the compliant including consideration of the public benefit, if any, to be derived from a determination of the issues at trial.

15 U.S.C. § 16(e). As the Court of Appeals for the District of Columbia Circuit recently held, the APPA permits a court to consider, among other things, the relationship between the remedy secured and the specific allegations set forth in the government's complaint, whether the decree is sufficiently clear, whether enforcement mechanisms are sufficient, and whether the decree may positively harm third parties. *See United States* v. *Microsoft*, 56 F.3d 1448 (D.C. Cir. 1995).

In conducting that inquiry, ''the Court is nowhere compelled to go to trial or to engage in extended proceedings which might have the effect of vitiating the benefits of prompt and less costly settlement through the consent decree process.'' [1] Rather, absent a showing of corrupt failure of the government to discharge its duty, the Court, in making its public interest finding, should * * * carefully consider the explanations of the government in the competitive

[1] 119 Cong. Rec. 24598 (1973); *see also United States* v. *Gillette Co.*, 406 F. Supp. 713, 715 (D. Mass. 1975). A ''public interest'' determination can be made properly on the basis of the Competitive Impact Statement and Response to Comments filed pursuant to the APPA. Although the APPA authorizes the use of additional procedures, 15 U.S.C. § 16(f), those procedures are discretionary. A court need not invoke any of them unless it believes that the comments have raised significant issues and that further proceedings would aid the court in resolving those issues. *See* H.R. 93–1463, 93rd Cong. 2d Sess. 8–9, reprinted in 1974 U.S. C.C.A.N. 6535, 6538.

impact statement and its responses to comments in order to determine whether those explanations are reasonable under the circumstances. *United States* v. *Mid-America Dairymen, Inc.*, 1977–1 Trade Case ¶61,508, at 71,980 (W.D. Mo. 1977).

Accordingly, with respect to the adequacy of the relief secured by the decree, a court may not ''engage in an unrestricted evaluation of what relief would best serve the public.'' *United States* v. *BNS, Inc.*, 858 F.2d 456, 462 (9th Cir. 1988), *quoting United States* v. *Bechtel Corp.*, 648 F.2d 660, 666 (9th Cir. 1981); *see also, Microsoft*, 56 F.3d 1448 (D.C. Cir. 1995). Precedent requires that:

> [t]he balancing of competing social and political interests affected by a proposed antitrust consent decree must be left, in the first instance, to the discretion of the Attorney General. The court's role in protecting the public interest is one of insuring that the government has not breached its duty to the public in consenting to the decree. The court is required to determine not whether a particular decree is the one that will best serve society, but whether the settlement is '*within the reaches of the public interest.*' More elaborate requirements might undermine the effectiveness of antitrust enforcement by consent decree.[2]

The proposed Final Judgment, therefore, should not be reviewed under a standard of whether it is certain to eliminate every anticompetitive effect of a particular practice or whether it mandates certainty of free competition in the future. Court approval of a final judgment requires a standard more flexible and less strict than the standard required for a finding of liability. ''[A] proposed decree must be approved even if it falls short of the remedy the court would impose on its own, as long as it falls within the range of acceptability or is 'within the reaches of public interest.' (citations omitted).'' [3]

VIII. Determinative Materials and Documents

There are no determinative materials or documents within the meaning of the APPA that were considered by the United States in formulating the proposed Final Judgment.

Dated: _____.

Respectfully submitted,

Jill A. Ptacek

J. Richard Doidge,

Attorneys, Transportation, Energy, and U.S. Department of Justice, Antitrust Division, Transportation, Energy, and Agriculture Section, 325 7th Street, Suite 500, Washington, D.C. 20530, (202) 307–6351.

APPENDIX A

[Bids for Lancaster-F, Salisbury-F, and Toledo-F in rounds 167 through 172]

Round	Lancaster-F (BTA #240)	Salisbury-F (BTA #398)	Toledo-F (BTA #444)
166	[Standing high bidder as of round 47—NextWave].	[Standing high bidder as of round 11—Omnipoint].	[Standing high bidder as of round 146—NextWave].
167		NextWave 51,000	
168			Omnipoint 1,251,015.
169			NextWave 1,377,001.
170	Omnipoint 513,444	Omnipoint 67,444	Omnipoint 1,515,002.
	Omnipoint Withdrawal	Omnipoint Withdrawal	
171	NextWave 514,000	NextWave 68,000	
	Omnipoint 512,444	Omnipoint 66,444	
172 and thereafter	No further bids	No further bids	No further bids.

Stipulation and Order

It is hereby *stipulated* by and between the undersigned parties, by their respective attorneys, as follows:

1. The Court has jurisdiction over the subject matter of this action and over each of the parties hereto, and venue of this action is proper in the United States District Court for the District of Columbia.

2. The parties stipulate that a Final Judgment in the form hereto attached may be filed and entered by the Court, upon the motion of any party or upon the Court's own motion, at any time after compliance with the requirements of the Antitrust Procedure and Penalties Act (15 U.S.C. § 16), and without further notice to any party or other proceeding, provided that plaintiff has not withdrawn its consent, which it may do at any time before the entry of the proposed Final Judgment by serving notice thereof on defendants and by filing that notice with the Court.

3. The defendant shall abide by and comply with the provisions of the proposed Final Judgment pending entry of the Final Judgment by the Court and shall, from the date of the signing of this Stipulation by the parties, comply with all the terms and provisions of the proposed Final Judgment as though they were in full force and effect as an order of the Court.

4. In the event that plaintiff withdraws its consent, as provided in paragraph 2 above, then the parties are released from all further obligations under this Stipulation, and the making of this Stipulation shall be without prejudice to any party in this or any other proceeding.

5. The parties request that the Court acknowledge the terms of this Stipulation by entering the Order in this Stipulation and Order.

Respectfully submitted,

For Plaintiff United States of America:

Jill A. Ptacek

J. Richard Doidge,

Attorneys, Antitrust Division, U.S. Department of Justice, 325 Seventh Street, N.W., Washington, D.C. 20004, (202) 307–0468.

For Defendant Mercury PCS II, L.L.C.:

Charles A. James, Esq.,

Jones, Day, Reavis & Pogue,

Metropolitan Square, 1450 G Street, N.W., Washington, D.C. 20005, (202) 879–3675.

Order

It is *so ordered*, this _____ day of _____, 1998.

_____

United States District Court Judge

[2] *United States* v. *Bechtel*, 648 F.2d at 666 (internal citations omitted) (emphasis added); *see United States* v. *BNS, Inc.*, 858 F.2d at 463; *United States* v. *National Broadcasting Co.*, 449 F. Supp. 1127, 1143 (C.D. Cal. 1978); *Gillette*, 406 F. Supp. at 716; *see also United States* v. *American Cyanamid Co.*, 719 F.2d 558, 565 (2d Cir. 1983).

[3] *United States* v. *American Tel. & Tel. Co.*, 552 F. Supp. 131, 150 (D.D.C. 1982), *aff'd sub nom*, *Maryland* v. *United States*, 460 U.S. 1001 (1983), *quoting Gillette*, 406 F. Supp. at 716; *United States* v. *Alcan Aluminum, Ltd.*, 605 F. Supp. 619, 622 (W.D. Ky. 1985).

Certificate of Service

I hereby certify that I have caused a copy of the foregoing Complaint, Competitive Impact Statement and proposed Final Judgment to be served on counsel for the defendant in this matter in the manner set forth below:

By first class mail, postage prepaid, and by facsimile:

Charles A. James, Esquire, Jones, Day, Reavis & Pogue, Metropolitan Square, 1450 G Street, Washington, D.C. 20005

Jill Ptacek,

Antitrust Division, U.S. Department of Justice, 325 Seventh Street, N.W., Suite 500, Washington, D.C. 20530, (202) 307–6607, (202) 616–2441 (Fax).

Final Judgment

Plaintiff, United States of America, filed its Complaint on November 10, 1998. Plaintiff and the Defendant, by their respective attorneys, have consented to the entry of this Final Judgment without trial or adjudication of any issue of fact or law. This Final Judgment shall not be evidence against or an admission by any party with respect to any issue of fact or law. Therefore, before the taking of any testimony, without trial or adjudication of any issue of fact or law herein, and upon consent of the parties, it is hereby *ordered, adjudged, and decreed,* as follows:

I. Jurisdiction

This Court has jurisdiction of the subject matter of this action and of each of the parties consenting hereto. Venue is proper in the District of Columbia. The Complaint states a claim upon which relief may be granted against the Defendant under Section 1 of the Sherman Act, 15 U.S.C. § 1.

II. Definitions

As used herein, the term:

(A) ''Defendant'' means Mercury PCS II, L.L.C., its successors, assigns, subsidiaries, divisions, groups, affiliates, partnerships and joint ventures, directors, officers, managers, agents, and employees.

(B) ''Document'' means all ''writings and recordings'' as that phrase is defined in Rule 1001(1) of the Federal Rules of Evidence.

(C) ''FCC'' means the Federal Communications Commission.

(D) ''License-identifying information'' means any number, letter, code or description that designates or identifies a license or that links licenses.

(E) ''Person'' means any natural person, corporation, firm, company, sole proprietorship, partnership, association, institution, governmental unit, public trust, or other legal entity.

III. Applicability

(A) This Final Judgment applies to the Defendant, to its successors, and assigns, and to all other persons in active concert or participation with any of them who shall have received actual notice of the Final Judgment by personal service or otherwise.

(B) Nothing herein contained shall suggest that any portion of this Final Judgment is or has been created for the benefit of any third party and nothing herein shall be construed to provide any rights to any third party.

IV. Prohibited Conduct

The Defendant is enjoined and restrained from:

(A) Entering into any agreement with any other license applicant to fix, establish, suppress or maintain the price for any license to be awarded by the FCC in an auction, or to allocate any such licenses amongst competitors, provided, however, that nothing in this provision shall prohibit the Defendant from participating in any bidding consortium, teaming arrangement or other joint venture authorized under the rules and regulations of the FCC pertaining to future auctions, and disclosed to the FCC.

(B) In the course of any auction conducted pursuant to the rules and regulations of the FCC, offering any price to the FCC for the lease, purchase, or right to use any FCC-awarded license, that includes within that price any license-identifying information, unless the inclusion of such information is required by the FCC.

V. Compliance Program

The Defendant is ordered to maintain an antitrust compliance program, which shall include the following:

(A) Designating, within 30 days of entry of this Final Judgment, an Antitrust Compliance Officer with responsibility for accomplishing the antitrust compliance program and with the purpose of achieving compliance with this Final Judgment. The Antitrust Compliance Officer shall, on a continuing basis, supervise the review of the current and proposed activities of the Defendant to ensure that it complies with this Final Judgment.

(B) The Antitrust Compliance Officer shall be responsible for:

(1) Distributing within 60 days of the entry of this Final Judgment, a copy of this Final Judgment to (a) all officers and directors of the Defendant; and (b) to all employees who have any responsibility for formulating, proposing, recommending, establishing, approving, implementing or submitting the Defendant's prices in FCC-conducted license auctions;

(2) Distributing in a timely manner a copy of this Final Judgment to any officer, director or employee who succeeds to a position described in Section V(B)(1);

(3) Obtaining from each present or future officer, director or employee designated in Section V(B)(1), within 60 days of entry of this Final Judgment or of the person's succession to a designated position, a written certification that he or she: (1) has read, understands, and agrees to abide by the terms of this Final Judgment; and (2) has been advised and understands that his or her failure to comply with this Final Judgment may result in conviction for criminal contempt of court;

(4) Maintaining a record of persons to whom the Final Judgment has been distributed and from whom, pursuant to Section VI(B)(3), the certification has been obtained; and

(5) Reporting to the Plaintiff any violation of the Final Judgment.

VI. Certification

Within 75 days after the entry of this Final Judgment, the Defendant shall certify to the Plaintiff whether it has complied with Sections V(B)(1) and (B)(3) above.

VII. Plaintiff Access

(A) To determine or secure compliance with this Final Judgment and for no other purpose, duly authorized representatives of the Plaintiff shall, upon written request of the Assistant Attorney General in charge of the Antitrust Division, and on reasonable notice to the defendant made to its principal office, be permitted, subject to any legally recognized privilege:

(1) Access during the Defendant's office hours to inspect and copy all documents in the possession or under the control of the Defendant, who may have counsel present, relating to any matters contained in this Final Judgment; and

(2) Subject to the reasonable convenience of the Defendant and without restraint or interference from it, to interview officers, employees or agents of the Defendant, who may have counsel present, regarding such matters.

(B) Upon the written request of the Assistant Attorney General in charge of the Antitrust Division made to the Defendant's principal office, the Defendant shall submit such written reports, under oath if requested, relating to any matters contained in this Final

Judgment as may be reasonably requested, subject to any legally recognized privilege.

(C) No information or documents obtained by the means provided in Section VII shall be divulged by the Plaintiff to any person other than a duly authorized representative of the Executive Branch of the United States, except in the course of legal proceedings to which the United States is a party, or for the purpose of securing compliance with this Final Judgment, or as otherwise required by law.

(D) If at the time information or documents are furnished by the Defendant to Plaintiff, the Defendant represents and identifies in writing the material in any such information or documents to which a claim of protection may be asserted under Rule 26(c)(7) of the Federal Rules of Civil Procedure, and Defendant marks each pertinent page of such material, ''Subject to claim of protection under Rule 26(c)(7) of the Federal Rules of Civil Procedure,'' then 10 days' notice shall be given by Plaintiff to the Defendant prior to divulging such material in any legal proceeding (other than a grand jury proceeding) to which Defendant is not a party.

VIII. Further Elements of the Final Judgment

(A) This Final Judgment shall expire ten years from the date of its entry.

(B) Jurisdiction is retained by this Court for the purpose of enabling the parties to this Final Judgment to apply to this Court at any time for further orders and directions as may be necessary or appropriate to carry out or construe this Final Judgment, to modify or terminate any of its provisions, to enforce compliance, and to punish violations of its provisions.

(C) Entry of this Final Judgment is in the public interest.

Dated: _____.

_____

United States District Judge

Competitive Impact Statement

The United States of America, pursuant to Section 2(b) of the Antitrust Procedures and Penalties Act (''APPA''), 15 U.S.C. § 16(b)–(h), files this Competitive Impact Statement relating to the proposed Final Judgment submitted for entry in this civil antitrust proceeding.

I. Nature and Purpose of This Proceeding

On November 10, 1998, the United States filed a civil antitrust complaint alleging that the defendant, Mercury PCS II, L.L.C. (''Mercury''), had violated Section 1 of the Sherman Act, 15 U.S.C. § 1. Mercury participated in an auction (the ''DEF auction'') of broadband radio spectrum licenses for personal communications service (''PCS'') that was conducted by the Federal Communications Commission (''FCC'') between August 1996 and January 1997. The Complaint alleges that during the DEF auction Mercury submitted bids that ended with three-digit numerical codes to communicate with rival bidders and that, through the use of these coded bids, Mercury and one of its rivals reached an agreement to refrain from bidding against one another. As a consequence of this agreement, the complaint alleges Mercury and its competitor paid less for certain PCS licenses, resulting in a loss of revenue of the Treasury of the United States.

On November 10, 1998, the United States and Mercury filed a Stipulation and Order in which they consented to the entry of a proposed Final Judgment that provides the relief that the United States seeks in the Complaint. Under the proposed Final Judgment, Mercury would be enjoined from submitting coded bids in future FCC auctions and entering into any agreement related to bidding for FCC licenses that violates Section 1 of the Sherman Act, 15 U.S.C. § 1.

The United States and Mercury have stipulated that the proposed Final Judgment may be entered after compliance with the APPA. Entry of the Final Judgment would terminate the action, except that the Court would retain jurisdiction to construe, modify, or enforce its provisions and to punish violations thereof.

II. Description of the Events Giving Rise to the Alleged Violation

A. Background of the PCS Auctions

In 1993, Congress enacted legislation enabling the FCC to auction licenses for radio spectrum that could be used to provide PCS. Based on a wireless, digital technology, PCS offers an alternative to current traditional telephone services.

The FCC designated six bands of broadband radio spectrum for PCS: A, B, C, D, E and F. The A, B and C bands occupy 30 MHZ each, while the D, E and F licenses are 10 MHZ each. The FCC divided the country into 51 geographic areas called Market Trading Areas (''MTAs''), which were each allotted A and B licenses. The FCC subdivided the MTAs into 493 smaller geographic units called Basic Trading Areas (''BTAs''), which were each allotted C, D, E, and F licenses. Each BTA was assigned a number from 1 to 493.

The authorizing legislation required the FCC to adopt rules ensuring competitive auctions, and the FCC considered numerous auction formats for PCS, ultimately adopting a simultaneous, multiple-round, open format. Under this format, numerous licenses were offered in a single auction, staged over several rounds, with all licenses remaining open for bidding until the auction closed. Auction participants could observe all of the bidding activity in each round. The auction ended only when a round passed in which no bidder submitted a bid on any license.

To keep the auction moving forward, the FCC imposed eligibility limits and activity rules. The FCC gave each license a population value called ''MHZ-pops.'' Each bidder made down payments to the FCC, with the size of the payment entitling it to bid for a certain amount of MHZ-pops. A participant could bid on any combination of licenses as long as the combined MHZ-pops of those licenses did not exceed the MHZ-pops to which the bidder's down payment entitled it (eligibility). Bidders also had to be ''active'' in each round (bid or have the high bid from the prior round) on licenses representing a set percentage of their MHZ-pops; otherwise, the FCC reduced their eligibility for the next round. As the auction proceeded, the bidders had to bid an increasing percentage of their MHZ-pops until in the final stages they had to bid nearly all of their eligibility.

Each round in the auction began with a bid submission period during which participants submitted bids electronically or by telephone for any of the licenses in which they were interested. After each bid submission period, the FCC published electronically to all bidders the results for each license, including the name of each company bidding, the amount of each bid, and the time each bid was submitted. The high bidder for a license in a round became the ''standing high'' bidder for the license with a tie going to the earliest bidder.

A bid withdrawal period then followed. During this period, bidders were permitted to withdraw their standing high bids from any market, subject to a withdrawal penalty specified by the FCC. The FCC then published the results. The bid submission and withdrawal periods comprised an auction round.

At the beginning of an auction, the FCC generally held one round per day. As the auction progressed, the FCC

increased the number of rounds held in a single day, providing a period of time between rounds for auction participants to analyze the bidding from the prior round and to plan for the next round.

One goal of the FCC was to ensure the efficient allocation of licenses, that is, that the licenses would go to the bidders who valued them most highly. The simultaneous, multiple-round format of the PCS auctions helped achieve this goal in several ways. It allowed bidders to pursue different license aggregation strategies and change their strategies as the auction proceeded. In addition, it allowed auction participants to observe the value that other bidders placed on the licenses and use that information to refine their own assessment of license values. This was particularly useful given that the technology used for PCS was new and bidders were uncertain about both the costs of providing the services and the prospective revenues. Ultimately, because the licenses were awarded to the highest bidders, the PCS auction format allowed the marketplace to determine the most efficient allocation of licenses.

Notwithstanding these benefits of the auction format, the FCC recognized the risk that ''collusive conduct by bidders prior to or during the auction process could undermine the competitiveness of the bidding process.'' Second Report and Order, FCC 94–61, ¶ 223 (Rel. April 20, 1994). The FCC sought to mitigate the risk of collusion by adopting rules restricting the disclosure of bidding strategies during the auction. The FCC noted, however, that Federal antitrust laws applied to the auctions and it would rely primarily on those laws to deter and punish collusion in the auctions. Second Report and Order , *supra* at ¶ 225; Second Memorandum Opinion and Order, FCC 94–215, ¶ 50 (Rel. August 15, 1994).

B. Illegal Agreement To Allocate Licenses in the DEF Auction

The auction of the D, E and F licenses for all 493 BTAs began in August 1996. Because there were three bands being auctioned, the DEF auction involved a total of 1479 licenses. Lasting 276 rounds, the auction ended in January 1997.

Prior to the DEF auction, bidders analyzed which licenses (or groups of licenses) would best enable them to provide effective and competitive service, assessed the value they placed on those licenses, and developed strategies to obtain the desired licenses for the lowest possible prices. The bidders also speculated about their rivals' business strategies and attempted to identify the key licenses for those strategies, relying on an array of information, including knowledge of the licenses bidders had acquired in prior auctions.

As the auction proceeded, bidders carefully observed their rivals' actions and often adjusted their own market valuations and business strategies, sometimes based on their assessment of their rivals' objectives. Their rivals' bids, however, did not necessarily reveal their true objectives. An auction participant might bid for a particular license during a particular round for a number of reasons: It may have always wanted the license, but for strategic reasons refrained from bidding until then; it may have changed its business strategy and decided that it now wanted the license; it may have seen an opportunity to acquire an undervalued license; it may have bid simply to preserve its eligibility to bid on other licenses later in the auction; it may have bid to raise a rival's cost to obtain the license; or it may have bid to send a message to the standing high bidder to refrain from bidding against it for a different license. Thus, the purpose of a particular bid might be procompetitive or anticompetitive.

A bidder's purpose in making a bid might, depending on the circumstances, be ambiguous to its rivals. Where ambiguity remains, it can be difficult to use a bid or bidding pattern alone to send clear messages or invitations to collude. To eliminate or reduce any ambiguity, Mercury sometimes placed bids during the DEF auction in which the final three digits intentionally corresponded to the number for a BTA (a ''BTA end code''). Knowing that other bidders could see the bids and hence the BTA end codes, Mercury used the codes to better explain the real purpose of certain bids it made—to reach an agreement with a rival. In particular, Mercury used the BTA end codes to link the bidding of licenses in two (or more) specific BTA markets, highlight the licenses Mercury wanted, and convey to the competing bidders offers to agree with Mercury not to bid against each other for the linked licenses.

Sometimes Mercury placed bids in one market with the BTA end code of another market to send the message: ''I'm bidding for this license because you bid for the one I want (indicated by the BTA code) and I'll stop bidding in your market if you stop bidding in mine.'' Other times, Mercury used the BTA end codes to tell its rival: ''If you don't stop bidding for this license, I will bid for the one you want (indicated by the BTA code).''

Mercury's use of the BTA end codes did not serve any legitimate purpose of the auction. Mercury's purpose for using BTA end codes was to send clear and unmistakable invitations to collude to rival bidders and to reach agreements with those rivals to refrain from bidding against each other. Such conduct was not authorized by the applicable FCC rules and was inconsistent with the FCC's goal to encourage competitive bidding.

Over the course of rounds 117 to 127, Mercury reached an agreement with High Plains Wireless, L.P. (''High Plains'') to allocate between them the F-band licenses for Amarillo (BTA 013) and Lubbock (BTA #264). Mercury agreed to stop bidding for the Amarillo-F license in exchange for High Plains' agreement not to bid for the Lubbock-F license. (The bidding for the Lubbock-F and Amarillo-F licenses between rounds 114 and 127 is depicted in the table attached as appendix A to this Competitive Impact Statement.)

Prior to round 114, High Plains, Mercury and a third bidder were bidding for the Lubbock-F license. After the third bidder failed to bid for Lubbock-F in rounds 114 through 116, Mercury sought to strike an agreement with the only remaining active bidder on the license—High Plains. In round 117, Mercury attached the Amarillo BTA end code (''013'') to its bid for the Lubbock-F license. By using the BTA end code in round 117, Mercury intended to communicate to High Plains that the bidding for these two licenses was linked and that Mercury would begin bidding for Amarillo-F if High Plains did not stop bidding for Lubbock-F.

Mercury believed that Amarillo was an important license for High Plains. High Plains had placed bids for the Amarillo license in the C auction and had been the standing high bidder for the Amarillo-F license since round 68.

After High Plains continued to bid for Lubbock-F, Mercury placed a bid in round 121 for the Amarillo-F license that ended with the Lubbock BTA end-code (''264''). Mercury's purpose for using the BTA end code was to link the two licenses, highlight the bid as retaliatory, and communicate an offer to stop bidding for Amarillo-F if High Plains stopped bidding for Lubbock-F. Mercury repeated its offer in subsequent rounds by ending its bids in Lubbock-F and Amarillo-F with BTA end codes. In round 128, High Plains accepted Mercury's offer and stopped bidding for Lubbock-F, even though High Plains had been willing to pay more for the Lubbock-F license. (Lying on the southern border of the Amarillo BTA, the Lubbock BTA presented a natural expansion territory for High Plains.)

Observing that High Plains had stopped bidding for Lubbock-F, Mercury stopped bidding for Amarillo-F.

As a consequence of Mercury's agreement with High Plains, competition for the Lubbock-F license was suppressed and the Treasury received less revenue for the Lubbock-F license. It was in High Plains' economic self-interest to bid more for the Lubbock-F license than Mercury's winning bid and, but for the illegal agreement, it would have done so.

III. Explanation of the Proposed Final Judgment

The provisions of the proposed Final Judgment are designed to ensure that Mercury does not enter into anticompetitive agreements when participating in future FCC auctions. The decree supplements any prohibitions on bidding conduct set forth in the FCC's auction rules, and the defendant may violate the decree even if its conduct does not violate an agency statute or rule.

The proposed Final Judgment would enjoin Mercury from entering into an agreement with another license applicant to fix, establish, suppress or maintain the price of a license to be awarded by the FCC or to allocate any such licenses among competitors (Section IV(A)). The proposed Final Judgment would not prevent Mercury from entering into any joint-venture or similar agreements regarding licenses to be awarded by the FCC that are both disclosed to the FCC and authorized under the FCC's rules and regulations. (Section IV(A)). However, such bidding arrangements would still be subject to scrutiny under the antitrust laws.

The proposed Final Judgment would also prevent Mercury from using BTA end codes or any similar signaling mechanism to solicit anticompetitive agreements in future FCC auctions. The proposed Final Judgment would enjoin Mercury from submitting bids that contain ''license-identifying information'' in future FCC auctions, unless the inclusion of such information is required by the FCC (Section IV(B)). License-identifying information is defined as ''any number, letter, code or description that designates or identifies a license or that links licenses.'' (Section II(D)).

The proposed Final Judgment would further require Mercury to establish and maintain an antitrust compliance program (Section V). It would also provide that the United States may obtain information from Mercury concerning possible violations of the Final Judgment (Section VII).

IV. Remedies Available to Potential Private Litigants

Section 4 of the Clayton Act, 15 U.S.C. § 15, provides that any person who has been injured as a result of conduct prohibited by the antitrust laws may bring suit in federal court to recover three times the damages the person has suffered, as well as costs and reasonable attorneys' fees. Entry of the proposed Final Judgment will neither impair nor assist the bringing of any private antitrust damage action. Under the provisions of Section 5(a) of the Clayton Act, 15 U.S.C. § 16(a), the proposed Final Judgment has no *prima facie* effect in any subsequent private lawsuit that may be brought against Mercury. In this case, the injured person is the United States.

V. Procedures Available for Modification of the Proposed Final Judgment

The United States and Mercury has stipulated that the proposed Final Judgment may be entered by the Court after compliance with the provisions of the APPA, provided that the United States has not withdrawn its consent. The APPA conditions entry upon the Court's determination that the proposed Final Judgment is in the public interest.

The APPA provides a period of at least sixty days preceding the effective date of the proposed Final Judgment within which any person may submit to the United States written comments regarding the proposed Final Judgment. Any person who wishes to comment should do so within sixty days of the date of publication of this Competitive Impact Statement in the **Federal Register.** The United States will evaluate and respond to the comments. All comments will be given due consideration by the Department of Justice, which remains free to withdraw its consent to the proposed Final Judgment at any time prior to entry. The comments and the responses of the United States will be filed with the Court and published in the **Federal Register**. Written comments should be submitted to: Roger W. Fones, Chief, Transportation, Energy & Agriculture Section, Antitrust Division, United States Department of Justice, 325 Seventh Street, N.W., Suite 500, Washington, D.C. 20530.

The proposed Final Judgment provides that the Court retains jurisdiction over this action, and the parties may apply to the Court for any order necessary or appropriate for the modification, interpretation, or enforcement of the Final Judgment. The proposed Final Judgment would expire ten (10) years from the date of its entry.

VI. Alternatives to the Proposed Final Judgment

The United States considered, as an alternative to the proposed Final Judgment, seeking damages in this case pursuant to Section 4A of the Clayton Act, 15 U.S.C. § 15a. Doing so would likely have required a full trial on the merits against Mercury. In the view of the Department of Justice, such a trial would involve substantial cost and the risk associated with such a trial is not warranted, considering that the proposed Final Judgment provides full injunctive relief for the violations of the Sherman Act set forth in the Complaint.

VII. Standard of Review Under the APPA for Proposed Final Judgment

The APPA requires that proposed consent judgments in antitrust cases brought by the United States be subject to a sixty-day comment period, after which the court shall determine whether entry of the proposed Final Judgment ''is in the public interest.'' In making that determination, the court may consider:

(1) The competitive impact of such judgment, including termination of alleged violations, provisions for enforcement and modification, duration or relief sought, anticipated effects of alternative remedies actually considered, and any other considerations bearing upon the adequacy of such judgment;

(2) The impact of entry of such judgment upon the public generally and individuals alleging specific injury from the violations set forth in the complaint including consideration of the public benefit, if any, to be derived from a determination of the issues at trial.

15 U.S.C. § 16(e). As the Court of Appeals for the District of Columbia Circuit recently held, the APPA permits a court to consider, among other things, the relationship between the remedy secured and the specific allegations set forth in the government's complaint, whether the decree is sufficiently clear, whether enforcement mechanisms are sufficient, and whether the decree may positively harm third parties. *See United States* v. *Microsoft,* 56 F.3d 1448 (D.C. Cir. 1995).

In conducting this inquiry, ''the Court is nowhere compelled to go to trial or to engage in extended proceedings which might have the effect of vitiating the benefits of prompt and less costly settlement through the consent decree process.'' [1] Rather, absent a showing of

[1] 119 Cong. Rec. 24598 (1973); *see also United States* v. *Gillette Co.,* 406 F. Supp. 713, 715 (D.

Continued

corrupt failure of the government to discharge its duty, the Court, in making its public interest finding, should * * * carefully consider the explanations of the government in the competitive impact statement and its responses to comments in order to determine whether those explanations are reasonable under the circumstances. *United States* v. *Mid-America Dairymen, Inc.*, 1977–1 Trade Case. ¶61,508, at 71,980 (W.D. Mo. 1977).

Accordingly, with respect to the adequacy of the relief secured by the decree, a court may not ''engage in an unrestricted evaluation of what relief would best serve the public.'' *United States* v. *BNS, Inc.*, 858 F.2d 456, 462 (9th Cir. 1988), *quoting United States* v. *Bechtel Corp.*, 648 F. 2d 660, 666 (9th Cir. 1981): *s ee also, Microsoft*, 56 F.3d 1448 (D.C. Cir 1995). Precedent requires that

> [t]he balancing of competing social and political interests affected by a proposed antitrust consent decree must be left, in the first instance, to the discretion of the Attorney General. The court's role in protecting the public interest is one of insuring that the government has not breached its duty to the public in consenting to the decree. The court is required to determine not whether a particular decree is the one that will best serve society, but whether the settlement is '*within the reaches of the public interest.*' More elaborate requirements might undermine the effectiveness of antitrust enforcement by consent decree.[2]

The proposed Final Judgment, therefore, should not be reviewed under a standard of whether it is certain to eliminate every anticompetitive effect of a particular practice or whether it mandates certainty of free competition in the future. Court approval of a final judgment requires a standard more flexible and less strict than the standard required for a finding of liability. ''[A] proposed decree must be approved even if its falls short of the remedy the court would impose on its own, as long as it falls within the range of acceptability or is 'within the reaches of public interest.' (citations omitted).'' [3]

VIII. Determinative Materials and Documents

There are no determinative materials or documents within the meaning of the APPA that were considered by the United States in formulating the proposed Final Judgment.

Dated: November 10, 1998.

Respectfully submitted,

Jill A. Ptacek,

J. Richard Doidge,

Attorneys, U.S. Department of Justice, Antitrust Division, Transportation, Energy, and Agriculture Section, 325 7th Street NW., Suite 500, Washington, DC 20530, (202) 307–6351.

APPENDIX A

[Bids for Lubbock-F and Amarillo-F in Rounds 114 through 127]

Round	Lubbock-F (BTA #264)	Amarillo–F (BTA #013)
114	High Plains 1,033,105	[Standing high bidder as of round 68—High Plains].
	Mercury, 1,032,003	
115	Mercury 1,136,000	
116	High Plains 1,250,100	
117	Mercury 1,375,013	
118	High Plains 1,513,100	
119	Mercury 1,664,000	
120	High Plains 1,830,101	
121		Mercury 1,615,264.
122		High Plains 1,777,101.
123	Mercury 1,922,013	
124	High Plains 2,114,100	
125		Mercury 1,866,264.
126		High Plains 2,053,100.
127	Mercury 2,326,013	
Round 128 (and thereafter)	High Plains Never Bids Again	Mercury Never Bids Again.

Stipulation and Order

It is hereby *stipulated* by and between the undersigned parties, by their respective attorneys, as follows:

1. The Court has jurisdiction over the subject matter of this action and over each of the parties hereto, and venue of this action is proper in the United States District Court for the District of Columbia.

2. The parties stipulate that a Final Judgment in the form hereto attached may be filed and entered by the Court, upon the motion of any party or upon the Court's own motion, at any time after compliance with the requirements of the Antitrust Procedure and Penalties Act (15 U.S.C. § 16), and without further notice to any party or other proceedings, provided that plaintiff has not withdrawn its consent, which it may do at any time before the entry of the proposed Final Judgment by serving notice thereof on defendants and by filing that notice with the Court.

3. The defendant shall abide by and comply with the provisions of the proposed Final Judgment pending entry of the Final Judgment by the Court and shall, from the date of the signing of this Stipulation by the parties, comply with all the terms and provisions of the proposed Final Judgment as though they were in full force and effect as an order of the Court.

4. In the event that plaintiff withdraws its consent, as provided in paragraph 2 above, then the parties are

Mass 1975). A ''public interest'' determination can be made properly on the basis of the Competitive Impact Statement and Response to Comments filed pursuant to the APPA. Although the APPA authorizes the use of additional procedures, 15 U.S.C. § 16(f), those procedures are discretionary. A court need not invoke any of them unless it believes that the comments have raised significant issues and that further proceedings would aid the court in resolving those issues. *See* H.R. 93–1463, 93rd Cong. 2d Sess. 8–9, reprinted in 1974 U.S.C.C.A.N. 6535, 6538.

[2] *United States* v.*Bechtel*, 648 F.2d at 666 (internal citations omitted) (emphasis added); *see United States* v. *BNS, Inc.*, 858 F.2d at 463; *United States* v. *National Broadcasting Co.*, 449 F. Supp. 1127, 1143 (C.D. Cal. 1978); *Gillette*, 406, F.Supp. at 716; *see also United States* v. *American Cyanamid Co.*, 719 F.2d 558, 565 (2d Cir. 1983).

[3] *United States* v. *American Tel. & Tel. Co.*, 552 F. Supp. 131, 150 (D.D.C. 1982), *aff'd sub nom. Maryland* v. *United States*, 460 U.S. 1001 (1983), *quoting Gillette*, 406 F. Supp. at 716; *United States* v. *Alcan Aluminum, Ltd.*, 605 F. Supp. 619, 622 (W.D. Ky. 1985).

released from all further obligations under this Stipulation, and the making of this Stipulation shall be without prejudice to any party in this or any other proceeding.

5. The parties request that the Court acknowledge the terms of this Stipulation by entering the Order in this Stipulation and Order.

Respectfully submitted,

For Plaintiff, United States of America:

Jill A. Ptacek

J. Richard Doidge,

Attorneys, Antitrust Division, U.S. Department of Justice, 325 Seventh Street, N.W., Washington, D.C. 20004, (202) 307–0468.

For Defendant, 21st Century Bidding Corp.:

Timothy J. O'Rourke, Esq.,

Dow, Lohnes & Albertson, PLLC, 1200 New Hampshire Avenue, N.W., Suite 800, Washington, D.C. 20036, (202) 776–2716.

Order

It is *so ordered*, this _____ day of _____, 1998.

United States District Court Judge

Certificate of Service

I hereby certify that I have caused a copy of the foregoing Complaint, Competitive Impact Statement and proposed Final Judgment to be served on counsel for the defendant in this matter in the manner set forth below:

By first class mail, postage prepaid, and by facsimile:

Timothy J. O'Rourke, Esquire, Dow, Lohnes & Albertson, 1200 New Hampshire Avenue, N.W., Suite 800, Washington, D.C. 20036–6802.

Jill Ptacek,

Antitrust Division, U.S. Department of Justice, 325 Seventh Street, N.W., Suite 500, Washington, D.C. 20530, (202) 307–6607, (202) 616–2441 (Fax).

Final Judgment

Plaintiff, United States of America, filed its Complaint on November 10, 1998. Plaintiff and the Defendant, by their respective attorneys, have consented to the entry of this Final Judgment without trial or adjudication of any issue of fact or law. This Final Judgment shall not be evidence against or an admission by any party with respect to any issue of fact or law. Therefore, before the taking of any testimony, without trial or adjudication of any issue of fact or law herein, and upon consent of the parties, it is hereby *ordered, adjudged, and decreed,* as follows:

I. Jurisdiction

This Court has jurisdiction of the subject matter of this action and of each of the parties consenting hereto. Venue is proper in the District of Columbia. The Complaint states a claim upon which relief may be granted against the Defendant under Section 1 of the Sherman Act, 15 U.S.C. § 1.

II. Definitions

As used herein, the term:

(A) ''Defendant'' means 21st Century Bidding Corporation, its successors, assigns, subsidiaries, divisions, groups affiliates, partnerships and joint ventures, directors, officers, managers, agents, and employees.

(B) ''Document'' means all ''writings and recordings'' as that phrase is defined in Rule 1001(1) of the Federal Rules of Evidence.

(C) ''FCC'' means the Federal Communications Commission.

(D) ''License-identifying information'' means any number, letter, code or description that designates or identifies a license or that links licenses.

(E) ''Person'' means any natural person, corporation, firm, company, sole proprietorship, partnership, association, institution, governmental unit, public trust, or other legal entity.

III. Applicability

(A) This Final Judgment applies to the Defendant, to its successors, and assigns, and to all other persons in active concert or participation with any of them who shall have received actual notice of the Final Judgment by personal service or otherwise.

(B) Nothing herein contained shall suggest that any portion of this Final Judgment is or has been created for the benefit of any third party and nothing herein shall be construed to provide any rights to any third party.

IV. Prohibited Conduct

The Defendant is enjoined and restrained from:

(A) Entering into any agreement with any other license applicant to fix, establish, suppress or maintain the price for any license to be awarded by the FCC in an auction, or to allocate any such licenses amongst competitors, provided, however, that nothing in this provision shall prohibit the Defendant from participating in any bidding consortium, teaming arrangement or other joint venture authorized under the rules and regulations of the FCC pertaining to future auctions, and disclosed to the FCC.

(B) In the course of any auction conducted pursuant to the rules and regulations of the FCC, offering any price to the FCC for the lease, purchase, or right to use any FCC-awarded license, that includes within that price any license-identifying information, unless the inclusion of such information is required by the FCC.

V. Compliance Program

The Defendant is ordered to maintain an antitrust compliance program, which shall include the following:

(A) Designating, within 30 days of entry of this Final Judgment, an Antitrust Compliance Officer with responsibility for accomplishing the antitrust compliance program and with the purpose of achieving compliance with this Final Judgment. The Antitrust Compliance Officer shall, on a continuing basis, supervise the review of the current and proposed activities of the Defendant to ensure that it complies with this Final Judgment.

(B) The Antitrust Compliance Officer shall be responsible for:

(1) Distributing within 60 days of the entry of this Final Judgment, a copy of this Final Judgment to (a) all officers and directors of the Defendant; and (b) to all employees who have any responsibility for formulating, proposing, recommending, establishing, approving, implementing or submitting the Defendant's prices in FCC-conducted license auctions;

(2) Distributing in a timely manner a copy of this Final Judgment to any officer, director or employee who succeeds to a position described in Section V(B)(1);

(3) Obtaining from each present or future officer, director or employee designated in Section V(B)(1), within 60 days of entry of this Final Judgment or of the person's succession to a designated position, a written certification that he or she: (1) has read, understands, and agrees to abide by the terms of this Final Judgment; and (2) has been advised and understands that his or her failure to comply with this Final Judgment may result in conviction for criminal contempt of court;

(4) Maintaining a record of persons to whom the Final Judgment has been distributed and from whom, pursuant to Section VI(B)(3), the certification has been obtained; and

(5) Reporting to the Plaintiff any violation of the Final Judgment.

VI. Certification

Within 75 days after the entry of this Final Judgment, the Defendant shall certify to the Plaintiff whether it has complied with Sections V (B)(1) and (B)(3) above.

VII. Plaintiff Access

(A) To determine or secure compliance with this Final Judgment and for no other purpose, duly authorized representatives of the Plaintiff shall, upon written request of the Assistant Attorney General in charge of the Antitrust Division, and on reasonable notice to the Defendant made to its principal office, be permitted, subject to any legally recognized privilege:

(1) Access during the Defendant's office hours to inspect and copy all documents in the possession or under the control of the Defendant, who may have counsel present, relating to any matters contained in this Final Judgment; and

(2) Subject to the reasonable convenience of the Defendant and without restraint or interference from it, to interview officers, employees or agents of the Defendant, who may have counsel present, regarding such matters.

(B) Upon the written request of the Assistant Attorney General in charge of the Antitrust Division made to the Defendant's principal office, the Defendant shall submit such written reports, under oath if requested, relating to any matters contained in this Final Judgment as may be reasonably requested, subject to any legally recognized privilege.

(C) No information or documents obtained by the means provided in Section VII shall be divulged by the Plaintiff to any person other than a duly authorized representative of the Executive Branch of the United States, except in the course of legal proceedings to which the United States is a party, or for the purpose of securing compliance with this Final Judgment, or as otherwise required by law.

(D) If at the time information or documents are furnished by the Defendant to Plaintiff, the Defendant represents and identifies in writing the material in any such information or documents to which a claim of protection may be asserted under Rule 26(c)(7) of the Federal Rules of Civil Procedure, and Defendant marks each pertinent page of such material, ''Subject to claim of protection under Rule 26(c)(7) of the Federal Rules of Civil Procedure,'' then 10 days' notice shall be given by Plaintiff to the Defendant prior to divulging such material in any legal proceeding (other than a grand jury proceeding) to which Defendant is not a party.

VIII. Further Elements of the Final Judgment

(A) This Final Judgment shall expire ten years from the date of its entry.

(B) Jurisdiction is retained by this Court for the purpose of enabling the parties to this Final Judgment to apply to this Court at any time for further orders and directions as may be necessary or appropriate to carry out or construe this Final Judgment, to modify or terminate any of its provisions, to enforce compliance, and to punish violations of its provisions.

(C) Entry of this Final Judgment is in the public interest.

Dated: _____.

_____

United States District Judge

Competitive Impact Statement

The United States of America, pursuant to Section 2(b) of the Antitrust Procedures and Penalties Act (''APPA''), 15 U.S.C. 16(b)–(h), files this Competitive Impact Statement relating to the proposed Final Judgment submitted for entry in this civil antitrust proceeding.

I. Nature and Purpose of This Proceeding

On November 10, 1998, the United States filed a civil antitrust complaint alleging that the defendant, 21st Century Bidding Corp. (''21st Century''), had violated Section 1 of the Sherman Act, 15 U.S.C. 1. 21st Century participated in an auction (the ''DEF auction'') of broadband radio spectrum licenses for personal communication services (''PCS'') that was conducted by the Federal Communications Commission (''FCC'') between August 1996 and January 1997. The Complaint alleges that during the DEF auction 21st Century submitted bids that ended with three-digit numerical codes to communicate with rival bidders and that, through the use of these coded bids, 21st Century and one of its rivals reached an agreement to refrain from bidding against one another. As a consequence of this agreement, the complaint alleges 21st Century and its competitor paid less for certain PCS licenses, resulting in a loss of revenue to the Treasury of the United States.

On November 10, 1998, the United States and 21st Century filed a Stipulation and Order in which they consented to the entry of a proposed Final Judgment that provides the relief that the United States seeks in the Complaint. Under the proposed Final Judgment, 21st Century would be enjoined from submitting coded bids in future FCC auctions and entering into any agreement related to bidding for FCC licenses that violates Section 1 of the Sherman Act, 15 U.S.C. 1.

The United States and 21st Century have stipulated that the proposed Final Judgment may be entered after compliance with the APPA. Entry of the Final Judgment would terminate the action, except that the Court would retain jurisdiction to construe, modify, or enforce its provisions and to punish violations thereof.

II. Description of the Events Giving Rise to the Alleged Violation

A. Background of the PCS Auctions

In 1993, Congress enacted legislation enabling the FCC to auction licenses for radio spectrum that could be used to provide PCS. Based on a wireless, digital technology, PCS offers an alternative to current traditional telephone services.

The FCC designated six bands of broadband radio spectrum for PCS: A, B, C, D, E and F. The A, B and C bands occupy 30 MHZ each, while the D, E and F licenses are 10 MHZ each. The FCC divided the country into 51 geographic areas called Market Trading Areas (''MTAs''), which were each allotted A and B licenses. The FCC subdivided the MTAs into 493 smaller geographic units called Basic Trading Areas (''BTAs''), which were each allotted C, D, E, and F licenses. Each BTA was assigned a number from 1 to 493.

The authorizing legislation required the FCC to adopt rules ensuring competitive auctions, and the FCC considered numerous auction formats for PCS, ultimately adopting a simultaneous, multiple-round, open format. Under this format, numerous licenses were offered in a single auction, staged over several rounds, with all licenses remaining open for bidding until the auction closed. Auction participants could observe all of the bidding activity in each round. The auction ended only when a round passed in which no bidder submitted a bid on any license.

To keep the auction moving forward, the FCC imposed eligibility limits and activity rules. The FCC gave each license a population value called ''MHZ-pops.'' Each bidder made down payments to the FCC, with the size of the payment entitling it to bid for a certain amount of MHZ-pops. A participant could bid on any combination of licenses as long as the combined MHZ-pops of those licenses did not exceed the MHZ-pops to which the bidder's down payment entitled it (eligibility). Bidders also had to be ''active'' in each round (bid or have the high bid from the prior round) on licenses representing a set percentage of their MHZ-pops; otherwise, the FCC reduced their eligibility for the next

round. As the auction proceeded, the bidders had to bid an increasing percentage of their MHZ-pops until in the final stages they had to bid nearly all of their eligibility.

Each round in the auction began with a bid submission period during which participants submitted bids electronically or by telephone for any of the licenses in which they were interested. After each bid submission period, the FCC published electronically to all bidders the results for each license, including the name of each company bidding, the amount of each bid, and the time each bid was submitted. The high bidder for a license in a round became the ''standing high'' bidder for that license with a tie going to the earliest bidder.

A bidder withdrawal period then followed. During this period, bidders were permitted to withdraw their standing high bids from any market, subject to a withdrawal penalty specified by the FCC. The FCC then published the results. The bid submission and withdrawal periods comprised an auction round.

At the beginning of an auction, the FCC generally held one round per day. As the auction progressed, the FCC increased the number of rounds held in a single day, providing a period of time between rounds for auction participants to analyze the bidding from the prior round and to plan for the next round.

One goal of the FCC was to ensure the efficient allocation of licenses, that is, that the licenses would go to the bidders who valued them most highly. The simultaneous, multiple-round format of the PCS auctions helped achieve this goal in several ways. It allowed bidders to pursue different license aggregation strategies and change their strategies as the auction proceeded. In addition, it allowed auction participants to observe the value that other bidders placed on the licenses and use that information to refine their own assessment of license values. This was particularly useful given that the technology used for PCS was new and bidders were uncertain about both the costs of providing the services and the prospective revenues. Ultimately, because the licenses were awarded to the highest bidders, the PCS auction format allowed the marketplace to determine the most efficient allocation of licenses.

Notwithstanding these benefits of the auction format, the FCC recognized the risk that ''collusive conduct by bidders prior to or during the auction process could undermine the competitiveness of the bidding process.'' Second Report and Order, FCC 94–61, ¶ 223 (Rel. April 20, 1994). The FCC sought to mitigate the risk of collusion by adopting rules restricting the disclosure of bidding strategies during the auction. The FCC noted, however, that Federal antitrust laws applied to the auctions and it would rely primarily on those laws to deter and punish collusion in the auctions. Second Report and Order, *supra* at ¶ 225; Second Memorandum Opinion and Order, FCC 94–215, ¶ 50 (Rel. August 15, 1994).

B. Illegal Agreement To Allocate Licenses in the DEF Auction

The auction of the D, E and F licenses for all 493 BTAs began in August 1996. Because there were three bands being auctioned, the DEF auction involved a total of 1,479 licenses. Lasting 276 rounds, the auction ended in January 1997.

Prior to the DEF auction, bidders analyzed which licenses (or groups of licenses) would best enable them to provide effective and competitive service, assessed the value they placed on those licenses, and developed strategies to obtain the desired licenses for the lowest possible prices. The bidders also speculated about their rivals' business strategies and attempted to identify the key licenses for those strategies, relying on an array of information, including knowledge of the licenses bidders had acquired in prior auctions.

As the auction proceeded, bidders carefully observed their rivals' actions and often adjusted their own market valuations and business strategies, sometimes based on their assessment of their rivals' objectives. Their rivals' bids, however, did not necessarily reveal their true objectives. An auction participant might bid for a particular license during a particular round for a number of reasons: it may have always wanted the license, but for strategic reasons refrained from bidding until then; it may have changed its business strategy and decided that it now wanted the license; it may have seen an opportunity to acquire an undervalued license; it may have bid simply to preserve its eligibility to bid on other licenses later in the auction; it may have bid to raise a rival's cost to obtain the license; or it may have bid to send a message to the standing high bidder to refrain from bidding against it for a different license. Thus, the purpose of a particular bid might be procompetitive or anticompetitive.

A bidder's purpose in making a bid might, depending on the circumstances, be ambiguous to its rival. Where ambiguity remains, it can be difficult to use a bid or bidding pattern alone to send clear messages or invitations to collude. To eliminate or reduce any ambiguity, 21st Century sometimes placed bids during the DEF auction in which the final three digits intentionally corresponded to the number for a BTA (a ''BTA end code''). Knowing that other bidders could see the bids and hence the BTA end codes, 21st Century used the codes to better explain the real purpose of certain bids it made—to reach an agreement with a rival. In particular, 21st Century used the BTA end codes to link the bidding of licenses in two (or more) specific BTA markets, highlight the license 21st Century wanted, and convey to the competing bidders offers to agree with 21st Century not to bid against each other for the linked licenses. By placing bids in one market with the BTA end code of another market, 21st Century sent the message: ''I'm bidding for this license because you bid for the one I want (indicated by the BTA code) and I'll stop bidding in your market if you stop bidding in mine.''

21st Century's use of the BTA end codes did not serve any legitimate purpose of the auction. 21st Century's purpose for using BTA end codes was to send clear and unmistakable invitations to collude to rival bidders and to reach agreements with those rivals to refrain from bidding against each other. Such conduct was not authorized by the applicable FCC rules and was inconsistent with the FCC's goal to encourage competitive bidding.

Over the course of rounds 120 to 125, 21st Century reached an agreement with Mercury PCS II, L.L.C. (''Mercury'') to allocate between them the F-band licenses for Indianapolis (BTA #204), Baton Rouge (BTA #32), and Biloxi (BTA #42). 21st Century agreed to stop bidding for the Baton Rouge and Biloxi-F licenses in exchange for Mercury's agreement not to bid for the Indianapolis-F license. (The bidding for the Baton Rouge, Biloxi and Indianapolis-F between rounds 120 and 125 is depicted in the table attached as Appendix A to this Competitive Impact Statement.)

Prior to round 120, 21st Century had been bidding for the Indianapolis-F license and had been the high bidder on that license since round 85. On the other hand, Mercury had been bidding consistently for the Baton Rouge and Biloxi-F licenses and was standing high bidder for both licenses. 21st Century had never bid for licenses in Baton Rouge or Biloxi; Mercury had never bid in Indianapolis.

In round 120, Mercury bid for the first time for the Indianapolis-F license. After 21st Century bid back in round 121, Mercury again bid for Indianapolis-

F. In round 123, 21st Century placed bids for the Baton Rouge and Biloxi-F licenses and attached the Indianapolis BTA end code (''204'') to these bids. 21st Century's purpose for using the BTA end codes was to link the Baton Rouge, Biloxi and Indianapolis-F licenses, highlight the bids as retaliatory, and communicate an offer to stop bidding for Baton Rouge and Biloxi if Mercury stopped bidding for Indianapolis-F.

21st Century believed that the Baton Rouge and Biloxi licenses were important to Mercury. Mercury had been bidding persistently for these licenses since the start of the auction. In addition, Mercury held a number of licenses from the C block in the vicinity and the Baton Rouge and Biloxi-F licenses were contiguous to several other geographic markets where Mercury was the standing high bidder for the F licenses.

Mercury saw the BTA end code and understood that 21st Century proposed to stop bidding for Baton Rouge and Biloxi in exchange for Mercury ceasing to bid for the Indianapolis-F license. In round 124, Mercury bid back over 21st Century for the Baton Rouge and Biloxi-F licenses, attaching the Indianapolis BTA end code to its bids. Mercury's use of the Indianapolis BTA end code in round 124 confirmed that it understood the link between the three licenses. Mercury accepted 21st Century's offer and stopped bidding for Indianapolis-F even though it was willing to pay more for the Indianapolis-F license. Observing that Mercury had stopped bidding for Indianapolis-F, 21st Century stopped bidding for the Baton Rouge and Biloxi-F licenses.

As a consequence of 21st Century's agreement with Mercury, competition for the Indianapolis-F license was suppressed and the Treasury received less revenue for the Indianapolis-F license. It was Mercury's economic self-interest to bid more for the Indianapolis-F license than 21st Century's winning bid and, but for the illegal agreement, it would have done so.

III. Explanation of the Proposed Final Judgment

The provisions of the proposed Final Judgment are designed to ensure that 21st Century does not enter into anticompetitive agreements when participating in future FCC auctions. The decree supplements any prohibitions on bidding conduct set forth in the FCC's auction rules, and the defendant may violate the decree even if its conduct does not violate an agency statute or rule.

The proposed Final Judgment would enjoin 21st Century from entering into an agreement with another license applicant to fix, establish, suppress or maintain the price of a license to be awarded by the FCC or to allocate any such licenses among competitors (Section IV(A)). The proposed Final Judgment would not prevent 21st Century from entering into any joint-venture or similar agreements regarding licenses to be awarded by the FCC that are both disclosed to the FCC and authorized under the FCC's rules and regulations (Section IV(A)). However, such bidding arrangements would still be subject to scrutiny under the antitrust laws.

The proposed Final Judgment would also prevent 21st Century from using BTA end codes or any similar signaling mechanism to solicit anticompetitive agreements in future FCC auctions. The proposed Final Judgment would enjoin 21st Century from submitting bids that contain ''license-identifying information'' in future FCC auctions, unless the inclusion of such information is required by the FCC (Section IV(B)). License-identifying information is defined as ''any number, letter, code, or description that designates or identifies a license or that links licenses.'' (Section II (D)).

The proposed Final Judgment would further require 21st Century to establish and maintain an antitrust compliance program (Section V). It would also provide that the United States may obtain information from 21st Century concerning possible violations of the Final Judgment (Section VII).

IV. Remedies Available to Potential Private Litigants

Section 4 of the Clayton Act, 15 U.S.C. 15, provides that any person who has been injured as a result of conduct prohibited by the antitrust laws may bring suit in federal court to recover three times the damages the person has suffered, as well as costs and reasonable attorneys' fees. Entry of the proposed Final Judgment will neither impair nor assist the bringing of any private antitrust damage action. Under the provisions of Section 59(a) of the Clayton Act, 15 U.S.C. 16(a), the proposed Final Judgment has no prima facie effect in any subsequent private lawsuit that may be brought against 21st Century. In this case, the injured person is the United States.

V. Procedures Available for Modification of the Proposed Final Judgment

The United States and 21st Century have stipulated that the proposed Final Judgment may be entered by the Court after compliance with the provisions of the APPA, provided that the United States has not withdrawn its consent. The APPA conditions entry upon the Court's determination that the proposed Final Judgment is in the public interest.

The APPA provides a period of at least sixty days preceding the effective date of the proposed Final Judgment within which any person may submit to the United States written comments regarding the proposed Final Judgment. Any person who wishes to comment should do so within sixty days of the date of publication of this Competitive Impact Statement in the **Federal Register**. The United States will evaluate and respond to the comments. All comments will be given due consideration by the Department of Justice, which remains free to withdraw its consent to the proposed Final Judgment at any time prior to entry. The comments and the responses of the United States will be filed with the Court and published in the **Federal Register.** Written comments should be submitted to: Roger W. Fones, Chief, Transportation, Energy & Agriculture Section, Antitrust Division, United States Department of Justice, 325 Seventh Street, N.W., Suite 500, Washington, D.C. 20530.

The proposed Final Judgment provides that the Court retains jurisdiction over this action, and the parties may apply to the Court for any order necessary or appropriate for the modification, interpretation, or enforcement of the Final Judgment. The proposed Final Judgment would expire ten (10) years from the date of its entry.

VI. Alternatives to the Proposed Final Judgment

The United States considered, as an alternative to the proposed Final Judgment, seeking damages in this case pursuant to Section 4A of the Clayton Act, 15 U.S.C. 5a. Doing so would likely have required a full trial on the merits against 21st Century. In the view of the Department of Justice, undertaking the substantial cost and the risk associated with such a trial is not warranted, considering that the proposed Final Judgment provides full injunctive relief for the violations of the Sherman Act set forth in the Complaint.

VII. Standard of Review Under the APPA for Proposed Final Judgment

The APPA requires that proposed consent judgments in antitrust cases brought by the United States be subject to a sixty-day comment period, after which the court shall determine whether entry of the proposed Final

Judgment ''is in the public interest.'' In making that determination, the court may consider:

(1) The competitive impact of such judgment, including termination of alleged violations, provisions for enforcement and modification, duration or relief sought, anticipated effects of alternative remedies actually considered, and any other considerations bearing upon the adequacy of such judgment.

(2) The impact of entry of such judgment upon the public generally and individuals alleging specific injury from the violations set forth in the complaint including consideration of the public benefit, if any, to be derived from a determination of the issues at trial.

15 U.S.C. 16(e). As the Court of Appeals for the District of Columbia Circuit recently held, the APPA permits a court to consider, among other things, the relationship between the remedy secured and the specific allegations set forth in the government's complaint, whether the decree is sufficiently clear, whether enforcement mechanisms are sufficient, and whether the decree may positively harm third parties. *See United States* v. *Microsoft.* 56 F.3d 1448 (D.C. Cir. 1995).

In conducting this inquiry, ''the Court is nowhere compelled to go to trial or to engage in extended proceedings which might have the effect of vitiating the benefits of prompt and less costly settlement through the consent decree process.'' [1] Rather, absent a showing of corrupt failure of the government to discharge its duty, the Court, in making its public interest finding, should * * * carefully consider the explanations of the government in the competitive impact statement and its responses to comments in order to determine whether those explanations are reasonable under the circumstances. *United States* v. *Mid-America Dairymen, Inc.*, 1977–1 Trade Case. ¶ 61,508, at 71,980 (W.D. Mo. 1977).

Accordingly, with respect to the adequacy of the relief secured by the decree, a court may not ''engage in an unrestricted evaluation of what relief would best serve the public.'' *United States* v. *BNS, Inc.*, 858 F.2d 456, 462 (9th Cir. 1988), *quoting United States* v. *Bechtel Corp.*, 648 F.2d 660, 666 (9th Cir. 1981), *see also, Microsoft, 56 F.3d 1448 (D.C. Cir. 1995). Precedent requires that*

[t]he balancing of competing social and political interests affected by a proposed antitrust consent decree must be left, in the first instance, to the discretion of the Attorney General. The court's role in protecting the public interest is one of insuring that the government has not breached its duty to the public in consenting to the decree. The court is required to determine not whether a particular decree is the one that will best serve society, but whether the settlement is *'within the reaches of the public interest.'* More elaborate requirements might undermine the effectiveness of antitrust enforcement by consent decree.[2]

The proposed Final Judgment, therefore, should not be reviewed under a standard of whether it is certain to eliminate every anticompetitive effect of a particular practice or whether it mandates certainty of free competition in the future. Court approval of a final judgment requires a standard more flexible and less strict than the standard required for a finding of liability. ''[A] proposed decree must be approved even if it falls short of the remedy the court would impose on its own, as long as it falls within the range of acceptability or is 'within the reaches of public interest.' (citations omitted.'' [3]

VIII. Determinative Materials and Documents

There are no determinative materials or documents within the meaning of the APPA that were considered by the United States in formulating the proposed Final Judgment.

For Plaintiff United States of America.

Dated: November 10, 1998.

Respectfully submitted,

Jill A. Ptacek,

J. Richard Doidge,

Attorneys, U.S. Department of Justice, Antitrust Division, Transportation, Energy, and Agriculture Section, 325 7th Street, Suite 500, Washington, D.C. 20530, (202) 307–6351.

APPENDIX A

[Bids for Baton Rouge-F, Biloxi-F, and Indianapolis-F in rounds 120 through 125]

Round	Baton Rouge-F (BTA #032)	Biloxi-F (BTA #042)	Indianapolis-F (BTA #204)
119	[Standing high bidder as of round 69—Mercury].	[Standing high bidder as of round 96—Mercury].	[Standing high bidder as of round 85—21st Century].
120			Mercury 2,582,000.
121			21st Cent. 2,850,021.
122			Mercury 3,135,123.
123	21st Cent. 3,990,204	21st Cent. 1,650,204	
124	Mercury 4,389,204	Mercury 1,815,204	
125			21st Cent. 3,300,545.
126 and thereafter	No further bids	No further bids	No further bids.

[1] 119 Cong. Rec. 24598 (1973), *See also United States* v. *Gillette Co.*, 406 F. Supp. 713, 715 (D. Mass. 1975). A ''public interest'' determination can be made properly on the basis of the Competitive Impact Statement and Response to Comments filed pursuant to the APPA. Although the APPA authorizes the use of additional procedures, 15 U.S.C. 16(f), those procedures are discretionary. A court need not invoke any of them unless it believes that the comments have raised significant issues and that further proceedings would aid the court in resolving those issues. *See* H.R. 93–1463, 93rd Cong., 2d Sess. 8–9, reprinted in 1974 U.S.C.C.A.N. 6535, 6538.

[2] *United States* v. *Bechtel*, 648 F.2d at 666 (internal citations omitted) (emphasis added), *see United States* v. *BNS, Inc.*, 858 F.2d at 463, *United States* v. *National Broadcasting Co.*, 449 F.Supp. 1127, 1143 (C.D. Cal 1978) *Gillette*, 406 F. Supp. at 716, *see also United States* v. *American Cyanamid Co.*, 719 F.2d 558, 565 (2d Cir. 1983).

[3] *United States* v. *American Tel. & Tel. Co.*, 552 F. Supp. 131, 150 (D.D.C. 1982), *affid sub nom. Maryland* v. *United States*, 460 U.S. 1001 (1983), *quoting Gillette*, 406 F. Supp. at 716, *United States* v. *Alcan Aluminum, Ltd.*, 605 F. Supp. 619, 622 (W.D. Ky. 1985).

[FR Doc. 98–31431 Filed 11–24–98; 8:45 am]
BILLING CODE 4410–11–M

DEPARTMENT OF JUSTICE

Antitrust Division

International Competition Policy Advisory Committee (ICPAC); Notice of Meeting

The International Competition Policy Advisory Committee (the ''Advisory Committee'') will hold its third meeting on December 16, 1998. The Advisory Committee was established by the Department of Justice to provide advice regarding issues relating to international competition policy; specifically, how best to cooperate with foreign authorities to eliminate international anticompetitive cartel agreements, how best to coordinate United States' and foreign antitrust enforcement efforts in the review of multijurisdictional mergers, and how best to address issues that interface international trade and competition policy concerns. The meeting will be held at The Carnegie Endowment for International Peace, Root Conference Room, 1779 Massachusetts Avenue, N.W., Washington, D.C. 20036 and will begin at 10:00 a.m. EST and end at approximately 4:00 p.m. The agenda for the meeting will be as follows:

1. Enforcement Cooperation
2. Multijurisdictional Merger Review
3. Trade and Competition Policy Interface Issues
4. Work Program: Next Steps

Attendance is open to the interested public, limited by the availability of space. Persons needing special assistance, such as sign language interpretation or other special accommodations, should notify the contact person listed below as soon as possible. Members of the public may submit written statements by mail, electronic mail, or facsimile at any time before or after the meeting to the contact person listed below for consideration by the Advisory Committee. All written submissions will be included in the public record of the Advisory Committee. Oral statements from the public will not be solicited or accepted at this meeting. For further information contact: Merit Janow, c/o Eric J. Weiner, U.S. Department of Justice, Antitrust Division, 601 D Street, N.W., Room 10011, Washington, D.C. 20530, Telephone: (202) 616–2578, Facsimile: (202) 514–4508, Electronic mail: icpac.atr@usdoj.gov.

Merit E. Janow,

Executive Director, International Competition Policy Advisory Committee.

[FR Doc. 98–31504 Filed 11–24–98; 8:45 am]
BILLING CODE 4410–11–U

DEPARTMENT OF LABOR

Pension and Welfare Benefits Administration

[Prohibited Transaction Exemption 98–55; Exemption Application No. D–10379, et al.]

Grant of Individual Exemptions; John Taylor Fertilizers Company

AGENCY: Pension and Welfare Benefits Administration, Labor.

ACTION: Grant of individual exemptions.

SUMMARY: This document contains exemptions issued by the Department of Labor (the Department) from certain of the prohibited transaction restrictions of the Employee Retirement Income Security Act of 1974 (the Act) and/or the Internal Revenue Code of 1986 (the Code).

Notices were published in the **Federal Register** of the pendency before the Department of proposals to grant such exemptions. The notices set forth a summary of facts and representations contained in each application for exemption and referred interested persons to the respective applications for a complete statement of the facts and representations. The applications have been available for public inspection at the Department in Washington, D.C. The notices also invited interested persons to submit comments on the requested exemptions to the Department. In addition the notices stated that any interested person might submit a written request that a public hearing be held (where appropriate). The applicants have represented that they have complied with the requirements of the notification to interested persons. No public comments and no requests for a hearing, unless otherwise stated, were received by the Department.

The notices of proposed exemption were issued and the exemptions are being granted solely by the Department because, effective December 31, 1978, section 102 of Reorganization Plan No. 4 of 1978 (43 FR 47713, October 17, 1978) transferred the authority of the Secretary of the Treasury to issue exemptions of the type proposed to the Secretary of Labor.

Statutory Findings

In accordance with section 408(a) of the Act and/or section 4975(c)(2) of the Code and the procedures set forth in 29 CFR Part 2570, Subpart B (55 FR 32836, 32847, August 10, 1990) and based upon the entire record, the Department makes the following findings:

(a) The exemptions are administratively feasible;

(b) They are in the interests of the plans and their participants and beneficiaries; and

(c) They are protective of the rights of the participants and beneficiaries of the plans.

John Taylor Fertilizers Company, Profit Sharing Plan (the Plan), Sacramento, California

[Prohibited Transaction Exemption 98–55; Exemption Application No. D–10379]

Exemption

The restrictions of sections 406(a), 406(b)(1), and 406(b)(2) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1)(A) through (E) of the Code, shall not apply to the proposed sale by the Plan of an undivided 16.28% interest (Leasehold Interest) in a certain leasehold of a professional office complex located in Sacramento, California, to John Taylor Fertilizers Company, a party in interest with respect to the Plan, provided that the following conditions are satisfied:

(A) All terms of the transaction are at least as favorable to the Plan as those which the Plan could obtain in an arm's-length transaction with an unrelated party;

(B) The sale is a one-time transaction for cash;

(C) The Plan pays no commissions or other expenses relating to the sale;

(D) The purchase price is the greater of: (1) the fair market value of the Leasehold Interest as determined by a qualified, independent appraiser, or (2) the original acquisition cost, plus all costs attributable to holding the Leasehold Interest through the date of the sale; and

(E) The Plan receives rental income due and owing to the Plan through the date of the sale.

For a more complete statement of the facts and representations supporting the Department's decision to grant this exemption, refer to the Notice of Proposed Exemption published on September 16, 1998 at 63 FR 49612.

FOR FURTHER INFORMATION CONTACT: Janet L. Schmidt of the Department, telephone (202) 219–8883 (This is not a toll-free number.)

Toyota Motor Credit Corporation (TMCC) and certain of its Affiliates, Located in Torrance, California

[Prohibited Transaction Exemption No. 98–56; Application No. D–10438]

Exemption

Section I—Transactions

A. The restrictions of sections 406(a) and 407(a) of the Act and the taxes imposed by section 4975(a) and (b) of the Code, by reason of section 4975(c)(1)(A) through (D) of the Code, shall not apply, as of September 1, 1997, to the following transactions involving trusts and certificates evidencing interests therein:

(1) The direct or indirect sale, exchange or transfer of certificates in the initial issuance of certificates between the sponsor or underwriter and an employee benefit plan when the sponsor, servicer, trustee or insurer of a trust, the underwriter of the certificates representing an interest in the trust, or an obligor is a party in interest with respect to such plan;

(2) The direct or indirect acquisition or disposition of certificates by a plan in the secondary market for such certificates; and

(3) The continued holding of certificates acquired by a plan pursuant to Section I.A.(1) or (2).

Notwithstanding the foregoing, Section I.A. does not provide an exemption from the restrictions of sections 406(a)(1)(E), 406(a)(2) and 407 for the acquisition or holding of a certificate on behalf of an Excluded Plan, as defined in Section III.K. below, by any person who has discretionary authority or renders investment advice with respect to the assets of that Excluded Plan.[1]

B. The restrictions of sections 406(b)(1) and 406(b)(2) of the Act and the taxes imposed by section 4975(a) and (b) of the Code, by reason of section 4975(c)(1)(E) of the Code, shall not apply, as of September 1, 1997, to:

(1) The direct or indirect sale, exchange or transfer of certificates in the initial issuance of certificates between the sponsor or underwriter and a plan when the person who has discretionary authority or renders investment advice with respect to the investment of plan assets in the certificates is (a) an obligor with respect to 5 percent or less of the fair market value of obligations or receivables contained in the trust, or (b) an affiliate of a person described in (a); if

(i) The plan is not an Excluded Plan;

(ii) Solely in the case of an acquisition of certificates in connection with the initial issuance of the certificates, at least 50 percent of each class of certificates in which plans have invested is acquired by persons independent of the members of the Restricted Group, as defined in Section III.L., and at least 50 percent of the aggregate interest in the trust is acquired by persons independent of the Restricted Group;

(iii) A plan's investment in each class of certificates does not exceed 25 percent of all of the certificates of that class outstanding at the time of the acquisition; and

(iv) Immediately after the acquisition of the certificates, no more than 25 percent of the assets of a plan with respect to which the person has discretionary authority or renders investment advice are invested in certificates representing an interest in a trust containing assets sold or serviced by the same entity.[2] For purposes of this paragraph B.(1)(iv) only, an entity shall not be considered to service assets contained in a trust if it is merely a subservicer of that trust;

(2) The direct or indirect acquisition or disposition of certificates by a plan in the secondary market for such certificates, provided that conditions set forth in paragraphs B.(1)(i), (iii), and (iv) are met; and

(3) The continued holding of certificates acquired by a plan pursuant to Section I.B.(1) or (2).

C. The restrictions of sections 406(a), (b) and 407(a) of the Act and the taxes imposed by section 4975(a) and (b) of the Code, by reason of section 4975(c) of the Code, shall not apply, as of September 1, 1997, to transactions in connection with the servicing, management and operation of a trust, provided;

(1) Such transactions are carried out in accordance with the terms of a binding Pooling and Servicing Agreement; and

(2) The Pooling and Servicing Agreement is provided to, or described in all material respects in the prospectus or private placement memorandum provided to, investing plans before they purchase certificates issued by the trust.[3]

Notwithstanding the foregoing, Section I.C. does not provide an exemption from the restrictions of section 406(b) of the Act, or from the taxes imposed by reason of section 4975(c) of the Code, for the receipt of a fee by the servicer of the trust from a person other than the trustee or sponsor, unless such fee constitutes a ''qualified administrative fee'' as defined in Section III.S. below.

D. The restrictions of sections 406(a) and 407(a) of the Act and the taxes imposed by sections 4975(a) and (b) of the Code, by reason of sections 4975(c)(1)(A) through (D) of the Code, shall not apply, as of September 1, 1997, to any transaction to which those restrictions or taxes would otherwise apply merely because a person is deemed to be a party in interest or disqualified person (including a fiduciary) with respect to a plan by virtue of providing services to the plan (or by virtue of having a relationship to such service provider as described in section 3(14)(F), (G), (H) or (I) of the Act or section 4975(e)(2)(F), (G), (H) or (I) of the Code), solely because of the plan's ownership of certificates.

Section II—General Conditions

A. The relief provided under Section I is available only if the following conditions are met:

(1) The acquisition of certificates by a plan is on terms (including the certificate price) that are at least as favorable to the plan as such terms would be in an arm's-length transaction with an unrelated party;

(2) The rights and interests evidenced by the certificates are not subordinated to the rights and interests evidenced by other certificates of the same trust;

(3) The certificates acquired by the plan have received a rating at the time of such acquisition that is in one of the three highest generic rating categories from either Standard & Poor's Ratings Services, Moody's Investor Service, Inc., Duff & Phelps, Inc., or Fitch IBCA, Inc., or their successors (collectively, the Rating Agencies);

(4) The trustee is not an affiliate of any other member of the Restricted Group. However, the trustee shall not be considered to be an affiliate of a servicer

[1] Section I.A. provides no relief from sections 406(a)(1)(E), 406(a)(2) and 407 for any person rendering investment advice to an Excluded Plan within the meaning of section 3(21)(A)(ii) and regulation 29 CFR 2510.3–21(c).

[2] For purposes of this exemption, each plan participating in a commingled fund (such as a bank collective trust fund or insurance company pooled separate account) shall be considered to own the same proportionate undivided interest in each asset of the commingled fund as its proportionate interest in the total assets of the commingled fund as calculated on the most recent preceding valuation date of the fund.

[3] In the case of a private placement memorandum, such memorandum must contain substantially the same information that would be disclosed in a prospectus if the offering of the certificates were made in a registered public offering under the Securities Act of 1933. In the Department's view, the private placement memorandum must contain sufficient information to permit plan fiduciaries to make informed investment decisions.

solely because the trustee has succeeded to the rights and responsibilities of the servicer pursuant to the terms of the Pooling and Servicing Agreement providing for such succession upon the occurrence of one or more events of default by the servicer;

(5) The sum of all payments made to and retained by the underwriters in connection with the distribution or placement of certificates represents not more than reasonable compensation for underwriting or placing the certificates; the sum of all payments made to or retained by the sponsor pursuant to the assignment of obligations (or interest therein) to the trust represents not more than the fair market value of such obligation (or interest); and the sum of all payments made to and retained by the servicer represents not more than reasonable compensation for the servicer's services under the Pooling and Servicing Agreement and reimbursement of the servicer's reasonable expenses in connection therewith;

(6) The plan investing in such certificates is an ''accredited investor'' as defined in Rule 501(a)(1) of Regulation D of the Securities and Exchange Commission under the Securities Act of 1933;

(7) To the extent that the pool of leases used to create a portfolio for a trust is not closed on the date of the issuance of certificates by the trust, additional leases may be added during a period of no more than 15 consecutive months from the closing date used for the initial allocation of leases that was made to create such portfolio, provided that:

(a) All such additional leases meet the same terms and conditions for eligibility as the original leases used to create the portfolio (as described in the prospectus or private placement memorandum for such certificates), which terms and conditions have been approved by the Rating Agencies. Notwithstanding the foregoing, the terms and conditions for an ''eligible lease'' (as defined in Section III.X below) may be changed if such changes receive prior approval either by a majority vote of the outstanding certificateholders or by the Rating Agencies; and

(b) Such additional leases do not result in the certificates receiving a lower credit rating from the Rating Agencies, upon termination of the period during which additional leases may be added to the portfolio, than the rating that was obtained at the time of the initial issuance of the certificates by the trust;

(8) Any additional period described in Section II.A.(7) must be described in the prospectus or private placement memorandum provided to investing plans;

(9) The average annual percentage lease rate (the Average Lease Rate) for the pool of leases in the portfolio for the trust, after the additional period described in Section II.A.(7), shall not be more than 200 basis points greater than the Average Lease Rate for the original pool of leases that was used to create such portfolio for the trust;

(10) For the duration of the additional period described in Section II.A.(7), principal collections that are reinvested in additional leases are first reinvested in the ''eligible lease contract'' (as defined in Section III.X. below) with the earliest origination date, then in the ''eligible lease contract'' with the next earliest origination date, and so forth, beginning with any lease contracts that have been reserved specifically for such purposes at the time of the initial allocation of leases to the pool of leases used to create the particular portfolio, but excluding those specific lease contracts reserved for allocation to or allocated to other pools of leases used to create other portfolios;

(11) The trustee of the trust (or the agent with which the trustee contracts to provide trust services) is a substantial financial institution or trust company experienced in trust activities and is familiar with its duties, responsibilities, and liabilities as a fiduciary under the Act. The trustee, as the legal owner of the obligations in the trust, enforces all the rights created in favor of certificateholders of such trust, including employee benefit plans subject to the Act;

(12) The Pooling and Servicing Agreement and other governing documents require that funds collected by the servicer with respect to trust assets be deposited on a monthly basis in a trust account, even though distributions on the certificates may be scheduled to be made less frequently than monthly, and invested in certain highly rated debt instruments known as ''permitted investments''; and

(13) The Pooling and Servicing Agreement expressly provides that funds collected by the servicer with respect to trust assets are required to be deposited in a trust account within two business days after such collection, if TMCC's short-term unsecured debt is no longer rated P–1 by Moody's Investors Service and A–1 by Standard & Poor's Ratings Services (or successors thereto), unless such Rating Agencies accept an alternative arrangement.

B. Neither any underwriter, sponsor, trustee, servicer, insurer, or any obligor, unless it or any of its affiliates has discretionary authority or renders investment advice with respect to the plan assets used by a plan to acquire certificates, shall be denied the relief provided under Section I, if the provision in Section II.A.(6) above is not satisfied for the acquisition or holding by a plan of such certificates, provided that (1) such condition is disclosed in the prospectus or private placement memorandum; and (2) in the case of a private placement of certificates, the trustee obtains a representation from each initial purchaser which is a plan that it is in compliance with such condition, and obtains a covenant from each initial purchaser to the effect that, so long as such initial purchaser (or any transferee of such initial purchaser's certificates) is required to obtain from its transferee a representation regarding compliance with the Securities Act of 1933, any such transferees shall be required to make a written representation regarding compliance with the condition set forth in Section II.A.(6).

C. Toyota Motor Credit Corporation (TMCC) and its Affiliates abide by all securities and other laws applicable to any offering of interests in securitized assets, such as certificates in a trust as described herein, including those laws relating to disclosure of material litigation, investigations and contingent liabilities.

Section III—Definitions

For purposes of this exemption:

A. ''Certificate'' means:

(1) A certificate.

(a) That represents a beneficial ownership interest in the assets of a trust; and

(b) That entitles the holder to pass-through payments of principal (except during the period described in Section II.A.(7), if any), interest, and/or other payments made in connection with the assets of such trust; or

(2) A certificate denominated as a debt instrument that is issued by and is an obligation of a trust;

With respect to certificates defined in Section III.A.(1) and (2) above, the underwriter shall be an entity which has received from the Department an individual prohibited transaction exemption relating to certificates which is substantially similar to this exemption (as noted below in Section III.C.) and shall be either (i) the sole underwriter or the manager or co-manager of the underwriting syndicate, or (ii) a selling or placement agent.

For purposes of this exemption, references to ''certificates representing an interest in a trust'' include

certificates denominated as debt which are issued by a trust.

B. ''Trust'' means an investment pool, the corpus of which is held in trust and consists solely of:

(1) Either

(a) Qualified motor vehicle leases (as defined in Section III.T.); or

(b) Fractional undivided interests in a trust containing assets described in paragraph (a) of this Section III.B.(1), where such fractional interest is not subordinated to any other interest in the same pool of qualified motor vehicle leases held by such trust; [4]

(2) Property which has secured any of the obligations described in Section III.B.(1);

(3) Undistributed cash or temporary investments made therewith maturing no later than the next date on which distributions are to be made to certificateholders, except during the period described in Section II.A.(7) above when temporary investments are made until such cash can be reinvested in additional leases described in paragraph (a) of this Section III.B.(1); and

(4) Rights of the trustee under the Pooling and Servicing Agreement, and rights under motor vehicle dealer agreements, any insurance policies, third-party guarantees, contracts of suretyship and other credit support arrangements for any obligations described in Section III.B.(1).

Notwithstanding the foregoing, the term ''trust'' does not include any investment pool unless: (i) the investment pool consists only of assets of the type which have been included in other investment pools, (ii) certificates evidencing interests in such other investment pools have been rated in one of the three highest categories by the Rating Agencies for at least one year prior to the plan's acquisition of certificates pursuant to this exemption, and (iii) certificates evidencing interests in such other investment pools have been purchased by investors other than plans for at least one year prior to the plan's acquisition of certificates pursuant to this exemption.

C. ''Underwriter'' means any investment banking firm that has received an individual prohibited transaction exemption from the Department that provides relief for so-called ''asset-backed'' securities that is substantially similar in format and structure to this exemption (the Underwriter Exemptions); [5] or any person directly or indirectly, through one or more intermediaries, controlling, controlled by or under common control with such investment banking firm; and any member of an underwriting syndicate or selling group of which such firm or person described above is a manager or co-manager with respect to the certificates.

D. ''Sponsor'' means an entity affiliated with Toyota Motor Corporation that organizes a trust by depositing obligations therein in exchange for certificates.

E. ''Master Servicer'' means TMCC or an entity affiliated with TMCC that is a party to the Pooling and Servicing Agreement relating to trust assets and is fully responsible for servicing, directly or through subservicers, the assets of the trust.

F. ''Subservicer'' means TMCC or an entity affiliated with TMCC which, under the supervision of and on behalf of the master servicer, services leases contained in the trust, but is not a party to the Pooling and Servicing Agreement.

G. ''Servicer'' means TMCC or an entity affiliated with TMCC which services leases contained in the trust, including the master servicer and any subservicer.

H. ''Trustee'' means an entity that is independent of TMCC and its Affiliates which is the trustee of the trust. In the case of certificates which are denominated as debt instruments, ''trustee'' also means the trustee of the indenture trust.

I. ''Insurer'' means the insurer or guarantor of, or provider of other credit support for, a trust. Notwithstanding the foregoing, a person is not an insurer solely because it holds securities representing an interest in a trust which are of a class subordinated to certificates representing an interest in the same trust. In addition, a person is not an insurer if such person merely provides: (1) property damage or liability insurance to an Obligor with respect to a lease or leased vehicle; or (2) property damage, excess liability or contingent liability insurance to any lessor, sponsor or servicer, if such entities are included in the same insurance policy, with respect to a lease or leased vehicle.

J. ''Obligor'' means any person, other than the insurer, that is obligated to make payments for a lease in the trust.

K. ''Excluded Plan'' means any plan with respect to which any member of the Restricted Group is a ''plan sponsor'' within the meaning of section 3(16)(B) of the Act.

L. ''Restricted Group'' with respect to a class of certificates means:

(1) Each Underwriter;

(2) Each Insurer;

(3) The Sponsor;

(4) The Trustee;

(5) Each Servicer;

(6) Any Obligor with respect to obligations or receivables included in the trust constituting more than 5 percent of the aggregate unamortized principal balance of the assets in the trust, determined on the date of the initial issuance of certificates by the trust and at the end of the period described in Section II.A.(7); or

(7) Any Affiliate of a person described in (1)–(6) above.

M. ''Affiliate'' of another person includes:

(1) Any person, directly or indirectly, through one or more intermediaries, controlling, controlled by or under common control with such other person;

(2) Any officer, director, partner, employee, relative (as defined in section 3(15) of the Act), a brother, a sister, or a spouse of a brother or sister of such other person; and

(3) Any corporation or partnership of which such other person is an officer, director or partner.

N. ''Control'' means the power to exercise a controlling influence over the management or policies of a person other than an individual.

O. A person shall be ''independent'' of another person only if:

(1) Such person is not an Affiliate of that other person; and

(2) The other person, or an Affiliate thereof, is not a fiduciary who has investment management authority or renders investment advice with respect to assets of such person.

P. ''Sale'' includes the entrance into a forward delivery commitment (as defined in Section III.Q. below), provided:

(1) The terms of the forward delivery commitment (including any fee paid to the investing plan) are no less favorable to the plan than they would be in an arm's-length transaction with an unrelated party;

(2) The prospectus or private placement memorandum is provided to an investing plan prior to the time the plan enters into the forward delivery commitment; and

[4] It is the Department's view that the definition of ''Trust'' contained in Section III.B. includes a two-tier trust structure under which certificates issued by the first trust, which contains a pool of receivables described above, are transferred to a second trust which issues certificates that are sold to plans. However, the Department is of the further view that, since the exemption provides relief for the direct or indirect acquisition or disposition of certificates that are not subordinated, no relief would be available if the certificates held by the second trust were subordinated to the rights and interests evidenced by other certificates issued by the first trust.

[5] For a listing of the Underwriter Exemptions, see the description provided in the text of the operative language of Prohibited Transaction Exemption (PTE) 97–34 (62 FR 39021, July 21, 1997).

(3) At the time of the delivery, all conditions of this exemption applicable to sales are met.

Q. ''Forward Delivery Commitment'' means a contract for the purchase or sale of one or more certificates to be delivered at an agreed future settlement date. The term includes both mandatory contracts (which contemplate obligatory delivery and acceptance of the certificates) and optional contracts (which give one party the right but not the obligation to deliver certificates to, or demand delivery of certificates from, the other party).

R. ''Reasonable Compensation'' has the same meaning as that term is defined in 29 CFR 2550.408c–2.

S. ''Qualified Administrative Fee'' means a fee which meets the following criteria:

(1) The fee is triggered by an act or failure to act by the obligor other than the normal timely payment of amounts owing for the obligations;

(2) The servicer may not charge the fee absent the act or failure to act referred to in (1);

(3) The ability to charge the fee, the circumstances in which the fee may be charged, and an explanation of how the fee is calculated are set forth in the Pooling and Servicing Agreement; and

(4) The amount paid to investors in the trust shall not be reduced by the amount of any such fee waived by the servicer.

T. ''Qualified Motor Vehicle Lease'' means a lease of a motor vehicle where:

(1) The trust owns or holds a security interest in the lease;

(2) The trust owns or holds a security interest in the leased motor vehicle; and

(3) The trust's interest in the leased motor vehicle is at least as protective of the trust's rights as the trust would receive under a motor vehicle installment loan contract.

U. ''Pooling and Servicing Agreement'' means, collectively, (i) the securitization trust agreement between a sponsor and the trustee establishing a trust, (ii) the trust and servicing agreement relating to an origination trust and the servicing supplement thereto, and (iii) the supplemental agreement establishing a beneficial interest in certain specified origination trust assets (referred to herein as a ''special unit of beneficial interest'' or ''SUBI''). In the case of certificates which are denominated as debt instruments, ''Pooling and Servicing Agreement'' also includes the indenture entered into by the trustee of the trust issuing such certificates and the indenture trustee.

V. ''Lease Rate'' means an implicit rate in each lease calculated as an annual percentage rate on a constant yield basis, based on the capitalized cost of the leased vehicle as determined under the particular lease contract for the vehicle. With respect to the determination of a ''Lease Rate'', each lease will provide for equal monthly payments such that at the end of the lease contract term the capitalized cost will have been amortized to an amount equal to the residual value of the leased vehicle established at the time of origination of such contract. The amount to which the capitalized cost has been amortized at any point in time will be the outstanding principal balance for the lease.

W. ''Average Lease Rate'' means the average annual percentage lease rate, as defined in Section III.V. above, for all leases included at any particular time in a portfolio used to create a trust from which certificates are issued.

X. ''Eligible Lease'' or ''Eligible Lease Contract'' means a Qualified Motor Vehicle Lease, as defined in Section III.T. above, which meets the eligibility criteria established for, among other things, the term of the lease, place of origination, date of origination, and provisions for default, as described in the particular prospectus or private placement memorandum for the certificates provided to investors, if such terms and conditions have been approved by the Rating Agencies prior to the issuance of such certificates.

Y. ''Permitted Investments'' means investments which: (i) are direct obligations of, or obligations fully guaranteed as to timely payment of principal and interest by, the United States or any agency or instrumentality thereof, provided that such obligations are backed by the full faith and credit of the United States; or (ii) have been rated (or the obligor has been rated) in one of the three highest generic rating categories by a Rating Agency; or (iii) consist of interests in money market mutual funds that are registered investment companies under the Investment Company Act of 1940, which are managed by parties independent of the Sponsor or Servicer, and which invest in securities described in item (i) above or highly rated short-term securities of the type described in item (ii) above, or which are of comparable credit quality to securities having such ratings; are described in the pooling and servicing agreement; and are permitted by the Rating Agency.

The Department notes that this exemption is included within the meaning of the term ''Underwriter Exemption'' as it is defined in Section V(h) of the Grant of the Class Exemption for Certain Transactions Involving Insurance Company General Accounts, which was published in the **Federal Register** on July 12, 1995 (see PTE 95–60, 60 FR 35925).

EFFECTIVE DATE: This exemption is effective for all transactions described herein occurring on or after September 1, 1997.

For a more complete statement of the facts and representations supporting the Department's decision to grant this exemption refer to the notice of proposed exemption published on July 8, 1998, at 63 FR 36946.

WRITTEN COMMENTS: The applicant (i.e., TMCC) submitted a written comment on the notice of proposed exemption (the Notice) relating to the proposed definition of ''Permitted Investments'' contained in Section III.Y.

''Permitted Investments'' were defined in the Notice as follows:

> * * * investments which (i) are direct obligations of, or obligations fully guaranteed as to timely payment of principal and interest by, the United States or any agency or instrumentality thereof, provided that such obligations are backed by the full faith and credit of the United States, or (ii) have been rated (or the obligor has been rated) in one of the three highest generic rating categories by a Rating Agency; are described in the pooling and servicing agreement; and are permitted by the Rating Agency.

TMCC's comment states that this definition requires that the securitization trust invest directly in the described investments and not through a mutual fund. TMCC states that it prefers to make such investments through a money market mutual fund designed for institutional investors. TMCC currently uses a mutual fund (Fund) managed by Federated Investors which is called the Prime Obligations Fund. The Fund invests in high quality money market instruments that have an average maturity of 90 days or less and are either rated in the highest short-term rating category by one or more of the Rating Agencies or are of comparable quality to securities having such ratings.

TMCC believes that a mutual fund investing in short-term high quality money market investments should be specifically included as a ''permitted investment'' for purposes of the exemption. Therefore, TMCC requests that the definition in Section III.Y. of the Notice be revised as follows:

> ''Permitted Investments'' means investments which: (i) are direct obligations of, or obligations fully guaranteed as to timely payment of principal and interest by, the United States or any agency or instrumentality thereof, provided that such obligations are backed by the full faith and credit of the United States; or (ii) have been rated (or the obligor has been rated) in one

of the three highest generic rating categories by a Rating Agency; *or (iii) consist of interests in money market mutual funds which are registered investment companies under the Investment Company Act of 1940, which are managed by parties independent of the Sponsor or Servicer, and which invest in securities described in item (i) above or highly rated short-term securities of the type described in item (ii) above, or which are of comparable credit quality to securities having such ratings;* are described in the pooling and servicing agreement; and are permitted by the Rating Agency. [emphasis added]

The Department agrees with the proposed revision of the definition and has so revised the language of Section III.Y. of the exemption.

The Department received no other written comments, nor any requests for a hearing.

Accordingly, the Department has determined to grant the exemption as modified.

FOR FURTHER INFORMATION CONTACT: Mr. E.F. Williams of the Department, telephone (202) 219–8194. (This is not a toll-free number.)

General Information

The attention of interested persons is directed to the following:

(1) The fact that a transaction is the subject of an exemption under section 408(a) of the Act and/or section 4975(c)(2) of the Code does not relieve a fiduciary or other party in interest or disqualified person from certain other provisions to which the exemptions does not apply and the general fiduciary responsibility provisions of section 404 of the Act, which among other things require a fiduciary to discharge his duties respecting the plan solely in the interest of the participants and beneficiaries of the plan and in a prudent fashion in accordance with section 404(a)(1)(B) of the Act; nor does it affect the requirement of section 401(a) of the Code that the plan must operate for the exclusive benefit of the employees of the employer maintaining the plan and their beneficiaries;

(2) These exemptions are supplemental to and not in derogation of, any other provisions of the Act and/or the Code, including statutory or administrative exemptions and transactional rules. Furthermore, the fact that a transaction is subject to an administrative or statutory exemption is not dispositive of whether the transaction is in fact a prohibited transaction; and

(3) The availability of these exemptions is subject to the express condition that the material facts and representations contained in each application accurately describes all material terms of the transaction which is the subject of the exemption.

Signed at Washington, D.C., this 20th day of November, 1998.

Ivan Strasfeld,

Director of Exemption Determinations, Pension and Welfare Benefits Administration, U.S. Department of Labor.

[FR Doc. 98–31510 Filed 11–24–98; 8:45 am]

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DEPARTMENT OF LABOR

Pension and Welfare Benefits Administration

[Application No. D–10372, et al.]

Proposed Exemptions; Keystone Financial, Inc.

AGENCY: Pension and Welfare Benefits Administration, Labor.

ACTION: Notice of Proposed Exemptions.

SUMMARY: This document contains notices of pendency before the Department of Labor (the Department) of proposed exemptions from certain of the prohibited transaction restrictions of the Employee Retirement Income Security Act of 1974 (the Act) and/or the Internal Revenue Code of 1986 (the Code).

Written Comments and Hearing Requests

All interested persons are invited to submit written comments or request for a hearing on the pending exemptions, unless otherwise stated in the Notice of Proposed Exemption, within 45 days from the date of publication of this **Federal Register** Notice. Comments and requests for a hearing should state: (1) the name, address, and telephone number of the person making the comment or request, and (2) the nature of the person's interest in the exemption and the manner in which the person would be adversely affected by the exemption. A request for a hearing must also state the issues to be addressed and include a general description of the evidence to be presented at the hearing.

ADDRESSES: All written comments and request for a hearing (at least three copies) should be sent to the Pension and Welfare Benefits Administration, Office of Exemption Determinations, Room N–5649, U.S. Department of Labor, 200 Constitution Avenue, N.W., Washington, D.C. 20210. Attention: Application No. _____, stated in each Notice of Proposed Exemption. The applications for exemption and the comments received will be available for public inspection in the Public Documents Room of Pension and Welfare Benefits Administration, U.S. Department of Labor, Room N–5507, 200 Constitution Avenue, N.W., Washington, D.C. 20210.

Notice to Interested Persons

Notice of the proposed exemptions will be provided to all interested persons in the manner agreed upon by the applicant and the Department within 15 days of the date of publication in the **Federal Register**. Such notice shall include a copy of the notice of proposed exemption as published in the **Federal Register** and shall inform interested persons of their right to comment and to request a hearing (where appropriate).

SUPPLEMENTARY INFORMATION: The proposed exemptions were requested in applications filed pursuant to section 408(a) of the Act and/or section 4975(c)(2) of the Code, and in accordance with procedures set forth in 29 CFR Part 2570, Subpart B (55 FR 32836, 32847, August 10, 1990). Effective December 31, 1978, section 102 of Reorganization Plan No. 4 of 1978 (43 FR 47713, October 17, 1978) transferred the authority of the Secretary of the Treasury to issue exemptions of the type requested to the Secretary of Labor. Therefore, these notices of proposed exemption are issued solely by the Department.

The applications contain representations with regard to the proposed exemptions which are summarized below. Interested persons are referred to the applications on file with the Department for a complete statement of the facts and representations.

Keystone Financial, Inc., and Certain of Its Affiliates (Keystone), Located in Harrisburg, Pennsylvania

[Application Nos. D–10372]

Proposed Exemption

The Department is considering granting an exemption under the authority of section 408(a) of the Act and section 4975(c)(2) of the Code and in accordance with the procedures set forth in 29 CFR Part 2570, Subpart B (55 FR 32836, 32847, August 10, 1990).

Section I—Proposed Exemption for In-Kind Transfers of CIF Assets

If the exemption is granted, the restrictions of section 406(a) and 406(b) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1)(A) through (F) of the Code, shall not apply to the past in-kind transfers of assets of various employee benefit plans for which Keystone served as a fiduciary (the Client Plans), that

were held in certain collective investment funds (CIFs) maintained by Keystone, in exchange for shares of the KeyPremier Funds (the Funds), an open-ended investment company registered under the Investment Company Act of 1940 (the ICA), for which Keystone is an investment adviser and may provide other services (i.e., Secondary Services, as defined below in Section II(h)), which occurred on December 2, 1996, February 3, 1997 and July 1, 1997,[1] provided that the following conditions were met:

(a) A fiduciary (the Second Fiduciary) who was acting on behalf of each affected Client Plan and who was independent of and unrelated to Keystone, as defined in Section II(g) below, received advance written notice of the in-kind transfer of assets of the CIFs in exchange for shares of the Fund and the disclosures described in paragraph (c) below.

(b) On the basis of the information described in paragraph (c) below, the Second Fiduciary provided prior written authorization for the in-kind transfer of the Client Plan's CIF assets in exchange for shares of the Funds, the investment of such assets in corresponding portfolios of the Funds, and the fees to be received by Keystone in connection with its services to the Fund. Such authorization by the Second Fiduciary must have been consistent with the responsibilities, obligations, and duties imposed on fiduciaries by Part 4 of Title I of the Act.

(c) The Second Fiduciary who was acting on behalf of a Client Plan received in advance of the investment by the Plan in any of the Funds, a full and detailed written disclosure of information concerning the Funds which included, but was not limited to:

(1) A current prospectus for each portfolio of each of the Funds in which such Client Plan was considering investing;

(2) A statement describing the fees for investment management, investment advisory, or other similar services, and any fees for Secondary Services, as defined in Section II(h) below, including the nature and extent of any differential between the rates of such fees;

(3) The reasons why Keystone considered such investments to be appropriate for the Client Plan; and

(4) A statement describing whether there were any limitations applicable to Keystone with respect to which assets of the Client Plan may be invested in the Funds, and, if so, the nature of such limitations.

(d) For each Client Plan, the combined total of all fees received by Keystone for the provision of services to the Client Plan, and in connection with the provision of services to any of the Funds in which the Client Plans invested, was not in excess of ''reasonable compensation'' within the meaning of section 408(b)(2) of the Act.

(e) Neither Keystone nor an Affiliate received any fees payable pursuant to Rule 12b–1 under the ICA (the 12b–1 Fees) in connection with the transactions.

(f) All dealings between the Client Plans and any of the Funds were on a basis no less favorable to such Plans than dealings between the Funds and other shareholders holding the same class of shares as the Client Plans.

(g) No sales commissions were paid by the Client Plans in connection with the in-kind transfers of CIF assets in exchange for shares of the Funds.

(h) The transferred assets constituted the Client Plan's pro rata portion of all assets that were held by the CIF immediately prior to the transfer.

(i) Following the termination of each CIF, each Client Plan received shares of the Funds that had a total net asset value equal to the Client Plan's pro rata share of the assets of the CIFs that were exchanged for such Fund shares on the date of transfer.

(j) With respect to each in-kind transfer of CIF assets to a Fund, each Client Plan received shares of the Fund which had a total net asset value that was equal to the value of the Plan's pro rata share of the assets of the corresponding CIF on the date of the transfer, based on the current market value of the CIF's assets, as determined in a single valuation performed in the same manner as of the close of the same business day with respect to all such Plans participating in the transaction on such day, using independent sources in accordance with the procedures set forth by the Securities and Exchange Commission (SEC) Rule 17a–7(b) under the ICA (Rule 17a–7) for the valuation of such assets. Such procedures must have required that all securities for which a current market price was not obtained by reference to the last sale price for transactions reported on a recognized securities exchange or NASDAQ[2] were to be valued based on an average of the highest current independent bid and lowest current independent offer, as of the close of business on the last business day prior to the in-kind transfers, determined on the basis of reasonable inquiry from at least three sources that are broker-dealers or pricing services independent of Keystone.

(k) Not later than thirty (30) days after completion of each in-kind transfer of CIF assets in exchange for shares of the Funds which occurred on December 2, 1996, February 3, 1997, and July 1, 1997, Keystone sent by regular mail to the Second Fiduciary, a written confirmation which contained:

(i) The identity of each of the assets that was valued for purposes of the transaction in accordance with SEC Rule 17a–7(b)(4) under the ICA;

(ii) The price of each of the assets involved in the transaction; and

(iii) The identity of each pricing service or market maker consulted in determining the value of such assets.

(l) For each in-kind transfer of CIF assets, Keystone sent by regular mail to the Second Fiduciary, no later than one-hundred and twenty (120) days after completion of the asset transfer made in exchange for shares of the Funds,[3] a written confirmation which contained:

(1) The number of CIF units held by each affected Client Plan immediately before the in-kind transfer, the related per unit value, and the aggregate dollar value of the units transferred; and

(2) The number of shares in the Funds that were held by each affected Client Plan immediately following the in-kind transfer, the related per share net asset value, and the aggregate dollar value of the shares received.

(m) Keystone maintains for a period of six (6) years the records necessary to enable the persons, as described in paragraph (n) below, to determine whether the conditions of the exemption have been, except that:

(1) A prohibited transaction will not be considered to have occurred if, due to circumstances beyond the control of Keystone, the records are lost or

[1] In this regard, Keystone represents that any further in-kind transfers of CIF assets to the Funds will comply with the conditions of Prohibited Transaction Exemption (PTE) 97–41 (62 FR 42830, August 8, 1997.) PTE 97–41 permits the purchase by an employee benefit plan (i.e. a Client Plan) of shares of one or more open-end management investment companies (i.e mutual funds) registered under the ICA, in exchange for assets of the Client Plan transferred in-kind to the mutual fund from a collective investment fund (i.e. a CIF) maintained by a bank or a plan adviser, where the bank or plan adviser is the investment adviser to the mutual fund and also a fiduciary to the Client Plan, if the conditions of the exemption are met. However, as noted further below, Keystone distributed written confirmation to the Client Plans regarding the in-kind transfer of CIF assets made to the Funds within 120 days, rather than within the 105-day period required by Section I(g) of PTE 97–41. Thus, an individual exemption to cover these specific CIF conversions is necessary to provide the appropriate retroactive relief.

[2] The National Association of Securities Dealers Automated Quotation Nation Market System.

[3] See Footnote 1 above.

destroyed prior to the end of the six (6) year period, and

(2) No party in interest, other than Keystone, shall be subject to the civil penalty that may be assessed under section 502(i) of the Act, or to the taxes imposed by section 4975(a) and (b) of the Code, if the records are not maintained, or are not available for examination as required by paragraph (n) below.

(n)(1) Except as provided in paragraph (n)(2) and notwithstanding any provisions of Section 504(a)(2) and (b) of the Act, the records referred to in paragraph (n) above are unconditionally available at their customary location for examination during normal business hours by—

(i) Any duly authorized employee or representative of the Department or the Internal Revenue Service;

(ii) Any fiduciary of each of the Client Plans who has authority to acquire or dispose of shares of any of the Funds owned by such Plan, or any duly authorized employee or representative of such fiduciary; and

(iii) Any participant or beneficiary of the Client Plans or duly authorized employee or representative of such participant or beneficiary; and

(2) None of the persons described in paragraph (n)(1)(ii) and (iii) of this Section I shall be authorized to examine trade secrets of Keystone, or commercial or financial information which is privileged or confidential.

Section II—Definitions

For purposes of this proposed exemption,

(a) The term ''Keystone'' means Keystone Financial, Inc., and affiliates, as defined in Section II(b)(1).

(b) An ''affiliate'' of a person includes:

(1) Any person directly or indirectly through one or more intermediaries, controlling, controlled by, or under common control with the person;

(2) any officer, director, employee, relative, or partner in any such person; and

(3) Any corporation or partnership of which such person is an officer, director, partner, or employee.

(c) The term ''control'' means the power to exercise a controlling influence over the management or policies of a person other than an individual.

(d) The term ''Fund'' or ''Funds'' means the KeyPremier Funds for which Keystone served as investment adviser, and provided certain ''Secondary Services'' (as defined paragraph (h) below), for the Funds that were involved in the in-kind transfers of CIF assets which occurred on December 2, 1996, February 3, 1997, and July 1, 1997.

(e) The term ''net asset value'' means the amount for purposes of pricing all purchases and sales of Fund Shares, as calculated by dividing the value of all securities, determined by a method as set forth in a Fund's prospectus and statement of additional information, and other assets belonging to each of the portfolios in such Fund, less the liabilities charged to each portfolio, by the number of outstanding shares.

(f) The term ''relative'' means a ''relative'' as that term is defined in section 3(15) of the Act (or a ''member of the family'' as that term is defined in section 4975(e)(6) of the Code), or a brother, a sister, or a spouse of a brother or a sister.

(g) The term ''Second Fiduciary'' means a fiduciary of a Client Plan who was independent of and unrelated to Keystone at the time of the subject transaction. For purposes of this proposed exemption, the Second Fiduciary will not be deemed to have been independent of and unrelated to Keystone if:

(1) Such Second Fiduciary was directly or indirectly controlled, was controlled by, or was under common control with Keystone;

(2) Such Second Fiduciary, or any officer, director, partner, employee, or relative of such Second Fiduciary was an officer, director, partner, or employee of Keystone (or is a relative of such persons);

(3) Such Second Fiduciary directly or indirectly received any compensation or other consideration for his or her own personal account in connection with any transaction described in this proposed exemption.

With respect to the Client Plans, if an officer, director, partner, or employee of Keystone (or a relative of such persons), was a director of such Second Fiduciary, and if he or she abstained from participation in (i) the choice of the Plan's investment manager/advisor, (ii) the approval of any purchase or sale by the Plan of shares of the Funds, and (iii) the approval of any fees charged to or paid by the Plan, in connection with any of the transactions described in Section I above, then Section II(g)(2) above shall not apply.

(h) The term ''Secondary Service'' means a service, other than an investment management, investment advisory, or similar service, which was provided by Keystone to the Funds involved in the subject transaction, including but not limited to custodial, accounting, administrative, brokerage or any other service.

EFFECTIVE DATE: This proposed exemption, if granted, will be effective as of December 2, 1996, February 3, 1997 and July 1, 1997, for transactions described in Section I.

Summary of Facts and Representations

1. *Keystone.* Keystone Financial, Inc., is a bank holding company with its principal offices in Harrisburg, Pennsylvania. Keystone's subsidiaries include Mid-State Bank and Trust Company, Northern Central Bank and Trust Company, and Martindale Andres & Company, Inc. (collectively, Keystone). Keystone provides trust and banking services to individuals, corporations, and institutions, both nationally and internationally. Keystone serves as trustee, investment manager, and/or custodian to the Plans described below and as an investment adviser to certain of the Funds. As of August 31, 1996, Keystone had total assets under management of approximately $754 million.

Other Affiliates of Keystone including Mid-State Bank and Trust Company, and Pennsylvania National Bank and Trust Company, Inc., may offer shares of the Funds to their fiduciary customers. However, these Affiliates did not have Client Plan assets or any other customer assets invested in the CIFs that were involved in the subject in-kind transfer of assets to the Funds which occurred on December 2, 1996, February 3, 1997 and July 1, 1997.

2. *The Client Plans.* The Client Plans were retirement plans qualified under section 401(a) of the Code for which Keystone served as a trustee or investment manager. The Client Plans were considered ''pension plans'' under section 3(2) of the Act. The Client Plans covered by this proposed exemption were those Plans invested in the subject CIFs at the time of each in-kind transfer of CIF assets to the Funds. The Client Plans participated in the conversion of the CIFs to the Funds based solely upon the decisions made in each case by a Plan fiduciary independent of Keystone (collectively, the Second Fiduciaries). In addition to the Client Plans, the CIFs also held assets of two qualified retirement plans sponsored by Keystone (collectively, the Bank Plans), which participated in the subject CIF asset transfer to the Funds. The Bank Plans were:

(i) The Keystone Financial Pension Plan (the Keystone DB Plan); and

(ii) The Keystone Financial 401(k) Plan (the Keystone DC Plan).

However, as discussed further below, the Bank Plans are not included in the relief that would be provided by this proposed exemption.

3. *The CIFs.* The CIFs comprised certain individual portfolios of the Client Plans and the Bank Plans.

Specifically, the CIFs were: (i) the Employee Benefit Intermediate Term Income Fund (Intermediate Term Income Fund); (ii) the Employee Benefit Core Equity Fund (Core Equity Fund); (iii) the Employee Benefit Growth Equity Fund (Growth Equity Fund); and (iv) the Short-Term Income Fund (Short Term Fund).

As a result of the transfer of CIF assets to the Funds, each of these CIFs have been terminated and the assets are now held in one of the corresponding Funds described below. These Funds are: (i) the KeyPremier Intermediate Term Income Fund (''Intermediate Income''); (ii) the KeyPremier Established Growth Fund (''Growth Fund''); and (iii) the KeyPremier Aggressive Growth Fund (''Aggressive Growth''); (iv) the KeyPremier Limited Duration Fund (''Limited Duration Fund''). The applicant states that each CIF's assets were transferred to a new Fund that had investment objectives corresponding directly to the investment objectives of the terminating CIF.

The following table shows which particular CIF assets were transferred to which particular Fund.

CIF	Corresponding fund portfolio
Intermediate Term	KeyPremier. Intermediate Term. Income Fund.
Core Equity Fund	KeyPremier. Established Growth. Fund.
Growth Equity Fund ..	KeyPremier. Aggressive Growth. Fund.
Short Term Income ...	KeyPremier Limited. Duration Government. Bond Fund.

4. *The Funds.* The Funds are all part of the KeyPremier Funds of the Session Group (collectively referred to as the ''Trust''), an open-end investment company registered under the ICA. The Trust is comprised of a series of Funds (each a ''Fund''). Each Fund is a separate investment portfolio available to the Client Plans, as well as certain other investors. Keystone also performs certain Secondary Services for the Funds, including co-administration and shareholder services, for which it receives fees.

Martindale Andres & Company, Inc. (Martindale), a wholly-owned subsidiary of Keystone, serves as investment advisor to the Funds.

Various parties unrelated to Keystone also provide Secondary Services to the Funds, including custodial, transfer agent, recordkeeping, and other non-advisory services.

Description of the Transactions

5. Keystone represents that the CIFs in which the Client Plans invested were maintained in accordance with the laws that apply to collective investment trusts. Keystone decided to terminate the CIFs and offer to the Client Plans participating therein shares of the corresponding Funds as alternative investments. Because interests in a CIF generally must be liquidated or withdrawn to effect distributions, Keystone believed that the interests of the Client Plans invested in the CIFs would be better served by investment in shares of the Funds which could be distributed in-kind. Keystone also believed that the Funds offered the Client Plans advantages over the CIFs as pooled investment vehicles. For example, as shareholders of the Funds, the Client Plans have opportunities to exercise voting and other shareholder rights. In addition, Client Plans can benefit from lower fees, daily valuation available with the Funds as well as more investment information.

The Plans, as Fund shareholders, periodically receive certain disclosures concerning the Funds. Such information includes: (i) a copy of the Fund prospectus, which is updated at least annually; (ii) an annual report containing audited financial statements of the Funds and information regarding such Funds' investment performance; and (iii) a semi-annual report containing unaudited financial statements. With respect to the Client Plans, Keystone reports all transactions in shares of the Funds in periodic account statements provided to each Client Plan. Further, Keystone maintains that the net asset value of the portfolios of the Funds can be monitored daily from information available in newspapers of general circulation.

Keystone states that the transfers in-kind of the CIF assets in exchange for Fund shares were ministerial transactions which were performed in accordance with pre-established objective procedures which were approved by the Board of Trustees of each Fund. Such procedures required that assets transferred to a Fund: (i) must be consistent with the investment objectives, policies, and restrictions of the Fund; (ii) must be marketable securities; (iii) must satisfy the applicable requirements of the ICA and the Code; and (iv) must have a readily ascertainable market value. Prior to entering into an in-kind transfer, a Second Fiduciary of each affected Client Plan received certain disclosures from Keystone and approved the transaction in writing.

6. *The Conversion Transactions.* Keystone specifically requests a retroactive exemption for the in-kind transfers of CIF assets to certain corresponding Funds which have already occurred with respect to Client Plans. With respect to the Bank Plans, Keystone states that the in-kind transfer of CIF assets to the Funds representing the interest held by the Bank Plans in such CIFs met the conditions of Prohibited Transaction Exemption (PTE) 77–3 (42 FR 18734, April 8, 1977).[4]

The in-kind transfers of assets with respect to the CIFs occurred on December 2, 1996, February 3, 1998, and July 1, 1997, respectively (the CIF Conversions). Each was a complete termination of the assets held in the CIFs by the Client Plans that elected to participate in the CIF Conversions. No brokerage commissions, fees or expenses (other than customary transfer charges paid to parties other than Keystone) were charged to the Plans or the CIFs in connection with the in-kind transfers of CIF assets to the Funds in exchange for shares of the Funds.

Each in-kind transfer of the assets of each of the CIFs was completed in a single transaction on a single day. In each case, the in-kind transfer transactions were accomplished by

[4] The Department is expressing no opinion as to whether the terms and conditions of PTE 77–3 were met with respect to the conversion of the Bank Plans' pro rata share of CIF assets to the Funds.

In this regard, Keystone filed a request for exemptive relief on October 23, 1996, which included the in-kind transfer of assets of the Bank Plans held in CIFs that were exchanged for shares of the Funds. However, on July 30, 1998, the Department issued Advisory Opinion 98–06 (A.O. 98–6). A.O. 98–06 states that PTE 77–3 provides relief for the acquisition of a proprietary mutual fund's shares by an in-house plan (i.e. an employee benefit plan sponsored by the mutual fund's investment adviser or an affiliate of such adviser) in exchange for assets that are transferred from a CIF, if the conditions of that exemption are met. As a result, Keystone withdrew its request for an individual exemption to cover the in-kind transfer of CIF assets by the Bank Plans.

The Department notes that prior to Keystone's withdrawal of its request for relief to cover the Bank Plans, Keystone retained Wilmington Trust Company (WTC) as a Second Fiduciary for the Bank Plans in connection with the in-kind transfer of CIF assets to the Funds. WTC is a banking corporation with trust powers, organized under the laws of the State of Delaware. As of December 31, 1995, WTC exercised discretionary authority over approximately $29.8 billion of fiduciary assets, including approximately $15.5 billion of benefit plan investors. WTC made the same determination and approval for the Bank Plans' participation in the CIF asset transfers, prior to each transaction, as were made by the Second Fiduciary of each Client Plan. Accordingly, Keystone states that a proportionate share of each CIF's assets representing the interests of the Bank Plans therein was transferred to the corresponding Fund.

transferring from the converting CIF a Client Plan's proportionate share of all of the assets then held by the CIF to the corresponding Fund in exchange for an appropriate number of Fund shares. Once all of a CIF's assets were transferred to a Fund, the CIF was terminated and its assets, then consisting of Fund shares, were distributed in-kind to the Plans participating in the CIFs based on each Plan's pro rata share of the assets of the CIFs on the date of the transaction.

7. *Advance Disclosure/Approval for Client Plans.* Keystone represents that it provided disclosures to each affected Plan in connection with the termination of the particular CIF, summarized the transaction, and complied with all of the provisions of Section I of this proposed exemption. Based on these disclosures, the Second Fiduciary for each affected Client Plan approved in writing the Plan's participation in the CIF Conversion, including the fees that were to be paid by the Funds to Keystone as a result of the CIF Conversion.

8. *Valuation Procedures.* The assets transferred by a CIF to its corresponding Fund consisted entirely of cash and marketable securities. For purposes of a transfer in-kind, the value of the securities in the CIFs were determined based on their market value as of the close of business on the last business date prior to the transfer (the CIF Valuation Date). The values on the CIF Valuation Date were determined using the valuation procedures described in SEC Rule 17a–7 under the ICA. In this regard, the ''current market price'' for specific types of CIF securities involved in the transaction was determined as follows:

a. If the security was a ''reported security'' as the term is defined in Rule 11Aa3–1 under the Securities Exchange Act of 1934 (the '34 Act), the last sale price with respect to such security reported in the consolidated transaction reporting system (the Consolidated System) for the CIF Valuation Date; or, if there were no reported transactions in the Consolidated System that day, the average of the highest current independent bid and the lowest current independent offer for such security (reported pursuant to Rule 11Ac1–1 under the '34 Act), as of the close of business on the CIF Valuation Date.

b. If the security was not a reported security, and the principal market for such security was an exchange, then the last sale on such exchange on the CIF Valuation Date or, if there were no reported transactions on such exchange that day, the average of the highest current independent bid and lowest current independent offer on the exchange as of the close of business on the CIF Valuation Date.

c. If the security was not a reported security and was quoted in the NASDAQ system, then the average of the highest current independent bid and lowest current independent offer reported on NASDAQ as of the close of business on the CIF Valuation Date.

d. For all other securities, the average of the highest current independent bid and lowest current independent offer, as of the close of business on the CIF valuation date, determined on the basis of reasonable inquiry. For securities in this category, Keystone obtained quotations from at least three sources that were either broker-dealers or pricing services independent of and unrelated to Keystone and, when more than one valid quotation was available, used the average of the quotations to value the securities, in conformance with interpretations by the SEC and practices under SEC Rule 17a–7.

The securities received by a transferee Fund portfolio were valued by such portfolio for purposes of the transfer in the same manner and as of the same day as such securities were valued by the corresponding transferor CIF. The per share value of the shares of each Fund portfolio issued to the CIFs was based on the corresponding portfolio's then-current net asset value. Thus, the value of a Plan's investment in shares of each Fund was, as of the opening of business on the first business day after the CIF Conversion, equal to the value of such Plan's investment in the CIFs as of the close of business on the last business day prior to the CIF Conversion.

Not later than thirty (30) business days after completion of each in-kind transfer transaction, Keystone sent by regular mail to each affected Client Plan a written statement that included a confirmation of the transaction. Such confirmation contained: (i) the identity of each security that was valued in accordance with SEC Rule 17a–7(b)(4), as described above; (ii) the price of each such security for purposes of the transaction; and (iii) the identity of each pricing service or market-maker consulted in determining the value of such securities.

Not later than one-hundred and twenty (120) days after completion of each in-kind transfer of CIF assets in exchange for shares of the Funds, Keystone mailed to the Client Plans a written confirmation of the number of CIF units held by each affected Client Plan immediately before the CIF Conversion (and the related per unit value and the aggregate dollar value of the units transferred), and the number of shares in the Funds that were held by each affected Plan following the CIF Conversion (and the related per share net asset value and the aggregate dollar value of the shares received). In this regard, Keystone represents that with respect to the CIF Conversions described herein, it was unable to distribute such confirmation to the Client Plans within 105 days, as required by Section I(g) of PTE 97–41. However, for purposes of future CIF Conversions, Keystone represents that it will meet this condition (as required by Section II(g) for transactions which occur after August 8, 1997), as well as the other conditions of PTE 97–41.

Receipt of Fees by Keystone From the Funds

9. Keystone represents that PTE 77–4 (42 FR 18732, April 8, 1977)[5] permits it to receive fees from the Funds which result from investments made by the Client Plans in the Funds, if the conditions of that exemption are met. Section II(c) of PTE 77–4 requires that either: (i) the Client Plan may not pay any investment management, investment advisory, or similar fees for the assets of such Plan invested in shares of a Fund for the entire period of such investment; or (ii) the Client Plan may pay investment management, investment advisory, or similar fees to Keystone based on the total assets of such Plans invested in shares of a Fund from which a credit has been subtracted representing such Plan's pro rata share of such investment advisory fees paid to Keystone by the Fund. Further, Section II(f) of PTE 77–4 requires that the second fiduciary be notified of any change in the rates of fees charged by the Fund and approve in writing the continued holding of shares acquired by the plan prior to such change.

Keystone represents that its fee structure and any future approval of fee increases with respect to investments by the Client Plans in the Funds will comply with PTE 77–4.[6] Accordingly, the Applicant has not requested an individual exemption for the receipt of fees by Keystone from the Funds for

[5] PTE 77–4, in pertinent part, permits the purchase and sale by an employee benefit plan of shares of a registered, open-end investment company when a fiduciary with respect to the plan is also the investment adviser for the investment company, provided that the conditions of the exemption are met.

In addition, PTE 77–3 permits the acquisition or sale of shares of a registered, open-end investment company by an employee benefit plan covering only employees of such investment company, employees of the investment adviser or principal underwriter for such investment company, or employees of any affiliated person (as defined therein) of such investment adviser or principal underwriter, provided certain conditions are met.

[6] In this regard, the Department is expressing no opinion in this proposed exemption regarding whether any of the transactions with the Funds by Keystone involving either the Bank Plans or the Client Plans met the conditions of PTE 77–3 or PTE 77–4, respectively.

investment management, investment advisory, or similar services provided to the Funds, or for the receipt of fees for any Secondary Services provided by Keystone. Thus, the Department is not providing relief for the receipt of such fees attributable to investment in the Funds by the Client Plans in this proposed exemption.

10. In summary, Keystone represents that the transactions described herein satisfy the statutory criteria for an exemption under section 408(a) of the Act because:

(a) The Funds provide the Client Plans with a more effective investment vehicle than the CIFs that were maintained by Keystone.

(b) With respect to each in-kind transfer of a Client Plan's CIF assets into a Fund in exchange for Fund shares, a Second Fiduciary for the Client Plan authorized, in writing, such transfer prior to the transaction only after receiving full written disclosure of information concerning the Fund.

(c) Each Client Plan received shares of the Funds, in connection with the in-kind transfer of CIF assets, which had a total net asset value that was equal to the value of the Client Plan's pro rata share of the CIF on the date of the transfer, as determined in a single valuation performed in the same manner and at the close of the business day, using independent sources in accordance with procedures established by the Funds which comply with SEC Rule 17a–7 of the ICA, as amended, for the valuation of such assets.

(d) For all in-kind transfers of CIF assets to a Fund covered by the proposed exemption, Keystone sent to each affected Client Plan written confirmation by regular mail, not later than 30 days after the completion of the transaction, that contained the following information: (1) the identity of each security that was valued for purposes of the transaction in accordance with SEC Rule 17a–7(b)(4) of the ICA; (2) the price of each such security involved in the transaction; and (3) the identity of each pricing service or market maker consulted in determining the value of such securities.

(e) For all in-kind transfers of CIF assets to a Fund, made on behalf of Client Plans, Keystone sent by regular mail, no later than 120 days after completion of each CIF asset transfer, a written confirmation that contained the following information: (1) the number of CIF units held by the Client Plan immediately before the transfer, the related per unit value and the total dollar amount of such CIF units; and (2) the number of shares in the Funds that were held by the Client Plan following the Conversion, the related per share net asset value and the total dollar amount of such shares.

(f) The price paid or received by a Client Plan for shares of the Funds was the net asset value per share at the time of the transaction and was the same price for the Fund shares which was paid or received by any other investor at that time.

(g) The transferred assets constituted the Client Plan's pro rata portion of all assets that were held by the CIF immediately prior to the transfer.

(h) No sales commissions were paid by a Client Plan in connection with the in-kind transfers of CIF assets in exchange for shares of the Funds.

(i) Keystone did not receive any 12b–1 fees in connection with the transactions.

(j) All dealings between the Client Plans and any of the Funds were on a basis no less favorable to such Plans than dealings between the Funds and other shareholders holding the same class of shares as the Client Plans.

Notice to Interested Persons

Notice of the proposed exemption should be given to Client Plans that had investments in the terminating CIFs, including the Second Fiduciaries from whom approval was sought for the in-kind transfer of Client Plan assets to the Funds. Notice will be provided to each Second Fiduciary by first class mail within 30 days following the publication of this notice of pendency of the proposed exemption in the **Federal Register**. The notice should include a copy of this notice of proposed exemption, as published herein, and make interested persons aware of their right to comment or request a hearing on the proposed exemption. Comments and requests for a public hearing must be received by the Department within 60 days of the publication date for this proposed exemption in the **Federal Register**.

FOR FURTHER INFORMATION CONTACT: Ms. Janet L. Schmidt of the Department, telephone (202) 219–8883. (This is not a toll-free number.)

Bankers Trust Company (BTC), Located in New York, New York

[Application Nos. D–10592 through D–10594]

Proposed Exemption

The Department is considering granting an exemption under the authority of section 408(a) of the Act and section 4975(c)(2) of the Code and in accordance with the procedures set forth in 29 CFR Part 2570, Subpart B (55 FR 32836, 32847, August 10, 1990). If the exemption is granted, the restrictions of section 406(a) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1)(A) through (D) of the Code, shall not apply to (1) the proposed granting to BTC by certain employee benefit plans (the Plans) investing in Hometown America L.L.C. (the LLC) of security interests in the capital commitments of the Plans to the LLC, where BTC is the representative of certain lenders (the Lenders) that will fund a so-called ''credit facility'' providing loans to the LLC, and the Lenders are parties in interest with respect to the Plans; and (2) the proposed agreements by the Plans to honor capital calls made to the Plans by BTC, in lieu of the LLC's sole managing member, in connection with the Plan's capital commitments to the LLC where such capital calls relate to the security interests in the capital commitments previously granted to BTC; provided that (a) the proposed grants and agreements are on terms no less favorable to the Plans than those which the Plans could obtain in arm's-length transactions with unrelated parties; (b) the decisions on behalf of each Plan to invest in the LLC and to execute such grants and agreements in favor of BTC are made by a fiduciary which is not included among, and is independent of and unaffiliated with, the Lenders and BTC; and (c) with respect to Plans that may invest in the LLC in the future, such Plans will have assets of not less than $100 million and not more than 5% of the assets of such Plan will be invested in the LLC.

Summary of Facts and Representations

1. The LLC is a Delaware limited liability company, the sole managing member of which is Hometown America Communities, Inc. (the Manager), a Delaware corporation. The Manager is a separate affiliate of Transwestern Investment Company, L.L.C. (TWIC), a Delaware limited liability company, which is the sponsor of the LLC. The LLC shall have a perpetual existence until it is dissolved, wound up or liquidated in accordance with the agreement dated December 10, 1997 which established its organization and functions (the Agreement). The LLC was formed by the Manager (as sole managing member) and Transwestern Hometown America, L.L.C. (TWHA), an affiliate of TWIC (as non-managing member), with the intent of seeking capital commitments from a limited number of prospective investors who would become members (the Members) of the LLC. There are six current and prospective Members having, in the

aggregate, irrevocable, unconditional capital commitments of at least $100,000,000; and there are four other Members who have contributed property to the LLC.

2. The LLC has been organized to establish an integrated, self-administered and self-managed real estate operating company (see rep. 11, below) to acquire manufactured housing communities. The LLC will make acquisitions and provide property management services. As described in the Private Placement Memorandum, the LLC believes that significant opportunities exist to achieve superior risk-adjusted returns on its investments in excess of 15% over a five-year period. The LLC will identify and commit to all investments within five years of closing (the Investment Period). Strategies to maximize proceeds and create liquidity for the LLC include single asset sales, portfolio transactions, formation and exchange of assets for equity and a public offering for shares of the Manager in which Members will be granted the right to convert their membership interests into shares of the Manager.

3. The LLC may issue a variety of securities in connection with its investment activities, including operating company units, preferred operating company units, convertible preferred operating company units, warrants, options, debt, participating debt, convertible debt and other securities; the LLC may also purchase real estate manufactured housing-related securities, including publicly-traded or private debt or equity instruments. The LLC will distribute to the Members 100% of the LLC's taxable income from operations, dispositions, financing of investments and other events giving rise to distributable proceeds. Until a public offering occurs, Members will have the right (but not an obligation) to reinvest all or any part of any such distributions for an increased interest in the LLC.

4. The Agreement requires each Member to execute a subscription agreement that obligates the Member to make contributions of capital up to a specified maximum. The Agreement requires Members to make capital contributions to fulfill this obligation upon receipt of notice from the Manager. Under the Agreement, the Manager may make calls for cash contributions (Capital Calls) up to the total amount of a Member's capital commitment upon 10 business days' notice, subject to certain limitations. The Members' capital commitments are structured as unconditional, binding commitments to contribute equity when Capital Calls are made by the Manager. In the event of a default by a Member, the LLC may exercise any of a number of specific remedies.

The Members constituting over 90% of the equity interests and their investments in the LLC are:

Name of member	Capital commitment (in millions)
Northwestern Mutual Life Ins. Co.	$20
Public Employees' Ret. Assn. of CO	25
Allstate Life Ins. Co.	25
Ameritech Pension Trust	25
The Manager	1
TWHA	4

5. The applicant states that the LLC will incur indebtedness in connection with many of its investments. In addition to mortgage indebtedness, the LLC will incur short-term indebtedness for the acquisition of particular investments. This indebtedness will take the form of a credit facility (the Credit Facility) secured by, among other things, a pledge and assignment of each Member's capital commitment. This type of facility will allow the LLC to consummate investments quickly without having to finalize the debt/equity structure for an investment or having to arrange for interim or permanent financing prior to making an investment, and will have additional advantages to the Members and the LLC. Under the Agreement, the Manager may encumber Member's capital commitments, including the right to call for capital contributions, to one or more financial institutions as security for the Credit Facility. Each of the Members has appointed the Manager as its attorney-in-fact to execute all documents and instruments of transfer necessary to implement the provisions of the Agreement. In connection with this Credit Facility, each of the Members is required to execute documents customarily required in secured financings, including an agreement to unconditionally honor Capital Calls.

6. BTC will become agent for a group of Lenders providing a $63 million revolving Credit Facility to the LLC. BTC will also be a participating Lender. Some of the Lenders may be parties in interest with respect to some of the Plans that invest in the LLC by virtue of such Lenders' (or their affiliates') provisions of fiduciary services to such Plans for assets other than the Plans' interests in the LLC. BTC is requesting an exemption to permit the Plans to enter into security agreements with BTC, as the representative of the Lenders, whereby such Plans' capital commitments to the LLC will be used as collateral for loans made by the Credit Facility to the LLC, when such loans are funded by Lenders who are parties in interest to one or more of the Plans.

The Credit Facility will be used to provide immediate funds for real estate acquisitions made by the LLC, as well as for the payment of LLC expenses. Repayments will be secured generally by the LLC from the Members' capital contributions, and Capital Calls on the Members' capital commitments. The Credit Facility is intended to be available until December 11, 2000. The LLC can use its credit under the Credit Facility either by direct or indirect borrowings or by requesting that letters of credit be issued. All Lenders will participate on a pro rata basis with respect to all cash loans and letters of credit up to the maximum of the Lenders' respective commitments. All such loans and letters of credit will be issued to the LLC or an entity in which the LLC owns a direct or indirect interest (a Qualified Borrower), and not to any individual Member. All payments of principal and interest made by the LLC or a Qualified Borrower will be allocated pro rata among all Lenders. The applicant represents that the aggregate capital commitments to be pledged will be at least 1.5 times the maximum amount of the credit available under the Credit Facility.

7. The Credit Facility will be a recourse obligation of the LLC, the repayment of which is secured primarily by the grant of a security interest to BTC, as agent under the Credit Facility for the benefit of the Lenders, from the LLC, in both: (a) the Members' capital commitments and (b) a collateral account (the Borrower Collateral Account) under which the LLC must deposit all Members' capital contributions when paid. In addition, the LLC and the Manager will grant BTC, as agent under the Credit Facility for the benefit of the Lenders, a security interest in: (a) the right to call capital under the Agreement; (b) Capital Call notices; and (c) the Members' capital commitments. The Borrower Collateral Account will be assigned to BTC to secure repayment of the indebtedness incurred under the Credit Facility. BTC has the right to apply any or all funds in the Borrower Collateral Account toward payment of the indebtedness in any manner it may elect. The capital commitments are fully recourse to all the Members and to the Manager. In the event of default under the Credit Facility, the agent (i.e., BTC) has the right to unilaterally make capital calls on the Members to pay their unfunded

capital commitments, and will apply cash received from such capital calls to any outstanding debt.

8. Under the Credit Facility, each Member that is a Plan will execute an acknowledgment (the Estoppel) pursuant to which it acknowledges that the LLC and the Manager have pledged and assigned to BTC, for the benefit of each Lender which may be a party in interest (as defined in Act section 3(14)) of such Member, all of their rights under the Agreement relating to capital commitments and Capital Call notices. The Estoppel will include an acknowledgment and covenant by the Plan that, if an event of default exists, such Plan will unconditionally honor any capital call made by BTC in accordance with the Agreement up to the unfunded capital commitment of such Plan to the LLC.

9. The applicant represents that at the present time the Ameritech Pension Trust (the Ameritech Trust) holds the assets of three defined benefit plans (the Ameritech Plans), which own interests in the LLC. The Ameritech Trust has made a capital commitment of $25 million to the LLC. The applicant states that some of the Lenders may be parties in interest with respect to some of the Ameritech Plans in the Ameritech Trust by virtue of such Lenders' (or their affiliates') provisions of fiduciary services to such Ameritech Plans with respect to Ameritech Trust assets other than their membership interests in the LLC. Thus, BTC states that there is an immediate need for the Ameritech Trust to enter into the Estoppel under the terms and conditions described herein. The total number of participants in the three Ameritech Plans is approximately 108,000, and the approximate fair market value of the total assets of the Ameritech Plans held in the Ameritech Trust as of December 31, 1996 is $12.15 billion.

The applicant represents that the fiduciary of the Ameritech Plans generally responsible for investment decisions in real estate assets which are managed internally could be, depending on the size and type of the investment, the Ameritech Corporation Asset Management Committee, the Chief Investment Officer of Ameritech Corporation, or the Ameritech Corporation Investment Management Department's Real Estate Committee (comprised of the staff real estate professionals and another Investment Management Department director). The fiduciaries responsible for reviewing and authorizing the investments in the LLC under this proposed exemption currently are William M. Stephens, Chief Investment Officer of Ameritech Corporation, and the Ameritech Corporation Investment Management Department's Real Estate Committee.

10. The applicant represents that the Ameritech Plans are currently the only employee benefit plans subject to the Act that are Members of the LLC. However, the applicant states that it is possible that one or more other Plans will become Members of the LLC in the future. Thus, the applicant requests relief for any such Plan under this proposed exemption, provided the Plan meets the standards and conditions set forth herein. In this regard, such Plan must be represented by an independent fiduciary, and the Manager must receive from the Plan one of the following:

(1) A representation letter from the applicable fiduciary with respect to such Plan substantially identical to the representation letter submitted by the fiduciaries of the Ameritech Trust, in which case this proposed exemption, if granted, will apply to the investments made by such Plan if the conditions required herein are met; or

(2) Evidence that such Plan and its responsible fiduciaries are eligible for relief under Prohibited Transaction Exemption 96–23 (PTE 96–23, 61 FR 15975, April 10, 1996), the class exemption for transactions by a plan with certain parties in interest where such plan's assets are managed by an in-house asset manager (INHAM) that has total assets under its management, attributable to plans maintained by its affiliates, in excess of $50 million (see Part IV(a) of PTE 96–23); or

(3) Evidence that such Plan is eligible for another class exemption or has obtained an individual exemption from the Department covering the potential prohibited transactions which are the subject of this proposed exemption.

11. BTC represents that the LLC will obtain an opinion of counsel that the LLC will constitute an ''operating company'' under the Department's plan asset regulations [see 29 CFR 2510.3–101(c)] if the LLC is operated in accordance with the Agreement and the private placement memorandum distributed in connection with the private placement of the LLC membership interests.[7]

12. BTC represents that the Estoppel constitutes a form of credit security which is customary among financing arrangements for real estate limited partnerships or limited liability companies, wherein the financing institutions do not obtain security interests in the real property assets of the partnership or limited liability companies. BTC also represents that the obligatory execution of the Estoppel by the Members for the benefit of the Lenders was fully disclosed in the Private Placement Memorandum as a requisite condition of investment in the LLC during the private placement of the membership interests. BTC represents that the only direct relationship between any of the Members and any of the Lenders is the execution of the Estoppel. All other aspects of the transaction, including the negotiation of all terms of the Credit Facility, are exclusively between the Lenders and the LLC. BTC represents that the proposed execution of the Estoppel will not affect the abilities of the Trust to withdraw from investment and participation in the LLC. The only Plan assets to be affected by the proposed transactions are any funds which must be contributed to the LLC in accordance with requirements under the Agreement to make Capital Calls to honor a Member's capital commitments.

13. BTC represents that neither it nor any Lender acts or has acted in any fiduciary capacity with respect to the Ameritech Trust's investment in the LLC and that BTC is independent of and unrelated to those fiduciaries (the Ameritech Trust Fiduciaries) responsible for authorizing and overseeing the Ameritech Trust's investments in the LLC. Each Ameritech Trust Fiduciary represents independently that its authorization of Trust investments in the LLC was free of any influence, authority or control by the Lenders. The Ameritech Trust Fiduciaries represent that the Ameritech Trust's investments in and capital commitments to the LLC were made with the knowledge that each Member would be required subsequently to grant a security interest in Capital Calls and capital commitments to the Lenders and to honor requests for cash contributions, also known as ''drawdowns'', made on behalf of the Lenders without recourse to any defenses against the Manager. Each Ameritech Trust Fiduciary

[7] The Department notes that the term ''operating company'' as used in the Department's plan asset regulation cited above includes an entity that is considered a ''real estate operating company'' as described therein (see 29 CFR 2510.3–101(e)). However, the Department expresses no opinion in this proposed exemption regarding whether the LLC would be considered either an operating company or a real estate operating company under such regulations. In this regard, the Department notes that it is providing no relief for either internal transactions involving the operation of the LLC or for transactions involving third parties other than the specific relief proposed herein. In addition, the Department encourages potential Plan investors and their independent fiduciaries to carefully examine all aspects of the LLC's proposed real estate investment program in order to determine whether the requirements of the Department's regulations will be met.

individually represents that it is independent of and unrelated to BTC and the Lenders and that the investment by the Ameritech Trust for which that Ameritech Trust Fiduciary is responsible continues to constitute a favorable investment for the Ameritech Plans participating in that Trust and that the execution of the Estoppel is in the best interests and protective of the participants and beneficiaries of such Ameritech Plans. In the event another Plan proposes to become a Member, the applicant represents that it will require similar representations to be made by such Plan's independent fiduciary. Any Plan proposing to become a Member in the future and needing to avail itself of the exemption proposed herein will have assets of not less than $100 million, and not more than 5% of the assets of such Plan will be invested in the LLC.

14. In summary, the applicant represents that the proposed transactions satisfy the criteria of section 408(a) of the Act for the following reasons: (1) The Ameritech Plans' investments in the LLC were authorized and are overseen by the Ameritech Trust Fiduciaries, which are independent of the Lenders, and other Plan investments in the LLC from other employee benefit plans subject to the Act will be authorized and monitored by independent Plan fiduciaries; (2) None of the Lenders have any influence, authority or control with respect to the Ameritech Trust's investment in the LLC or the Ameritech Trust's execution of the Estoppel; (3) The Ameritech Trust Fiduciaries invested in the LLC on behalf of the Ameritech Plans with the knowledge that the Estoppel is required of all Members investing in the LLC, and all other Plan fiduciaries that invest their Plan's assets in the LLC will be treated the same as other Members are currently treated with regard to the Estoppel; and (4) Any Plan which may invest in the LLC in the future, which needs to avail itself of the exemption proposed herein, will have assets of not less than $100 million, and not more than 5% of the assets of any such Plan will be invested in the LLC.

FOR FURTHER INFORMATION CONTACT: Gary H. Lefkowitz of the Department, telephone (202) 219–8881. (This is not a toll-free number.)

Toledo Clinic, Inc. Employees 401(k) and Profit Sharing Plan (the T/C Plan); Hart Associates, Inc.; Profit Sharing Plan (the H/A Plan); and Midwest Fluid Power Company, Inc. Savings and Profit Sharing Plan and Trust (the M/F Plan, collectively; the Plans), Located in Toledo, Ohio

[Application Nos. D–10633, D–10634 and D–10635, respectively]

Proposed Exemption

The Department is considering granting an exemption under the authority of section 408(a) of the Act and section 4975(c)(2) of the Code and in accordance with the procedures set forth in 29 CFR Part 2570, Subpart B (55 FR 32836, 32847, August 10, 1990). If the exemption is granted, the restrictions of sections 406(a), 406(b)(1) and (b)(2) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1)(A) through (E) of the Code, shall not apply to: (1) the cash sale of certain shares of preferred stock (the Preferred Stock) issued by TTC Holdings Inc. (TTC), by the individually-directed account of Dr. Edward Orrechio in the T/C Plan (the Orrechio Account), by the individually-directed account of Michael Hart in the H/A Plan (the Hart Account), and by the individually-directed account of Larry Peterson in the M/F Plan (the Peterson Account; collectively, the Accounts) to TTC, a party in interest with respect to the H/A Plan and M/F Plan; and (2) the arrangement for the subsequent purchase of certain shares of Common Stock (the Common Stock) issued by TTC by Messrs. Orecchio, Hart and Peterson (collectively; the Participants), in their own name, from TTC pursuant to an agreement with TTC that the purchase will occur immediately after the sale of the Preferred Stock by the Plans to TTC; provided that the following conditions are met:

1. The sale of the Preferred Stock to TTC by the Accounts and the purchase of the Common Stock from TTC by the Participants, in their individual capacity, are one-time transactions for cash;

2. The transactions described in (1) above take place on the same business day;

3. The amount paid to the Accounts by TTC is the fair market value of the Preferred Stock, as determined by a qualified independent appraiser at the time of the sale;

4. The Participants, in their individual capacity, purchase from TTC shares of the Common Stock which are equal in number to the shares of Preferred Stock sold by the Accounts to TTC;

5. A qualified independent fiduciary (the Independent Fiduciary) determines that the transactions described herein are in the best interest and protective of the Accounts at the time of the transactions; and

6. The Independent Fiduciary supervises the transactions; assures that the conditions of this proposed exemption are met; and takes whatever actions are necessary to protect the interests of the Accounts, including reviewing amounts paid by TTC for the Preferred Stock.

EFFECTIVE DATE: This exemption, if granted, will be effective as of December 1, 1998.

Summary of Facts and Representations

1. The Plans are profit sharing, defined contribution plans that provide for individually directed accounts.

The T/C Plan is sponsored by the Toledo Clinic, Inc. (the Toledo Clinic), an Ohio corporation with its principal place of business in Toledo, Ohio. The Toledo Clinic is a large consortium of physicians and medical specialists which provide a broad range of health and medical services. Dr. Edward Orrechio (Dr. Orrechio) is a physician employed by the Toledo Clinic.

United Missouri Bank of Kansas City, N.A. is the trustee of the T/C Plan. As of July 1998, the T/C Plan had 490 participants and approximately $79,000,000 in assets. Dr. Orrechio is a participant in the T/C Plan. The Orrechio Account referred to herein is his individually-directed account in the T/C Plan.

2. TTC, the issuer of the Preferred Stock, is an Ohio corporation that was incorporated in April 1990. The Trust Company of Toledo (TTCOT) is a wholly-owned subsidiary of TTC. The applicant represents that TTCOT is a ''bank'' as that term is defined in Section 202(a)(2) of the Investment Advisers Act of 1940.[8]

[8] The applicant represents that under Section 202(a)(2) of the Investment Advisers Act of 1940, a ''Bank'' means (A) banking institution organized under the laws of the United States, (B) a member bank of the Federal Reserve System, (C) any other institution or trust company, whether incorporated or not, doing business under the laws of any State of the United States, a substantial portion of the business of which consists of receiving deposits or exercising fiduciary powers similar to those permitted to national banks under the authority of the U.S. Comptroller of the Currency, and which is supervised and examined by State or Federal authority having supervision over banks, and which is not operated for the purpose of evading the provisions of this subchapter, and (D) a receiver, conservator, or other liquidating agent of any institution or firm included in clauses (A), (B), or (C) of this paragraph.

3. The H/A Plan is sponsored by Hart Associates, Inc. (the Hart Associates), an Ohio corporation in the business of marketing and public relations. Michael Hart (Mr. Hart) is the president and chief executive officer of Hart Associates.

TTCOT became the directed trustee for the H/A Plan effective March 31, 1991. As of July 1998, the H/A Plan had 30 participants and approximately $2,000,000 in assets. Mr. Hart is a participant in the H/A Plan. The Hart Account referred to herein is his individually-directed account in the H/A Plan.

4. The M/F Plan is sponsored by Midwest Fluid Power Company, Inc. (the MFP Company), an Ohio corporation which is a distributor of industrial materials and parts used in fluid power applications in certain industries. Larry Peterson (Mr. Peterson) is the president and chief executive officer of the MFP Company.

As of July 1998, the M/F Plan had 70 participants and approximately $4,800,000 in assets. TTCOT became the directed trustee for the M/F Plan effective July 1, 1993. Mr. Peterson is a participant in the M/F Plan. The Peterson Account referred to herein is his individually-directed account in the M/F Plan.

5. The following table illustrates the percentage of assets of each Account which was represented by the shares of Preferred Stock at the time of original acquisition by the Accounts, and at the time of the sale of such Preferred Stock by the Accounts to TTC. In addition, this table shows the percentage of each Account's assets which was represented by the related debentures (the Debentures, as discussed below) at the time of original acquisition and prior to the sale of the Preferred Stock.

Accounts in the plans	Shares of preferred stock	Cost	Debenture	% assets at orig. purchase	% assets at sale
Orrechio	200	$20,000	$10,000	9.0	6.4
Hart	200	$20,000	10,000	55.5	18.1
Peterson	200	$20,000	10,000	16.5	10.6

6. It is represented that the Participants did not own shares of Preferred Stock as individuals prior to the subject transactions. In addition, the purchasing of shares of the Common Stock by the Participants from TTC did not cause any of the Participants to become majority shareholders of TTC. None of the Participants was or is currently an officer, director, principal or employee of TTC or TTCOT. At the time of original acquisition of the Preferred Stock by the Accounts, neither TTC nor TTCOT was a fiduciary or other party in interest under the Act with respect to the Plans.

Further, it is represented that TTCOT does not have the authority to make investment decisions for any of the Plans to which it acts as directed trustee (i.e., the H/A Plan and the M/F Plan) without written directions from the Participants.

7. TTC had two classes of Stock—the Preferred Stock and the Common Stock. There were 3,531 shares of the Common Stock outstanding prior to the subject transactions, which were owned in equal amounts by Theodore T. Hahn, Julie B. Higgins and David A. Snavely. These individuals are the three founders, principals and partners of TTC.

In addition, there were 20,000 shares of Preferred Stock outstanding prior to the subject transactions, which were held by 65 different shareholders. Among the shareholders of the Preferred Stock were the Orrechio Account in the T/C Plan, the Hart Account in the H/A Plan, and the Peterson Account in the M/F Plan.

8. The Preferred Stock was issued by TTC through a private offering that was made in 1990. The Initial Offering Memorandum (the Memorandum) was prepared on May 31, 1990. The offering allowed an investor to acquire 200 shares of Preferred Stock and a $10,000 subordinated debenture (the Debenture). The Debenture was issued in October 1990, with a due date of December 31, 2000. The Debenture accrued a nine percent (9%) per annum coupon rate, which was payable, along with installments of principal, on a semiannual basis. The Stock and the Debenture were offered to investors as constituent parts of a single offering unit which could not be severed by the investor. The price for each unit was $30,000, of which $20,000 was allocated to the Preferred Stock and $10,000 was allocated to the Debenture. Thus, each of the Accounts paid TTC $30,000 in cash and purchased one unit which consisted of 200 shares of the Preferred Stock and the Debenture, as described above.

Under the information described in the Memorandum, dividends were not expected to be paid on the Preferred Stock, and no dividends were paid on such shares.

It is represented that the Participants were aware of the identity of TTC as the issuer of the Preferred Stock and the Debentures. As a result of the acquisitions of the Preferred Stock, each of the Accounts became a minority shareholder in TTC. No fees or commissions were incurred or paid in connection with the acquisition of the Preferred Stock or the Debenture. No subsequent acquisitions of Preferred Stock or other Debentures were made by the Accounts.

The outstanding principal amount of the Debentures held by the Accounts and other investors will be prepaid by TTC in December 1998, prior to the subject transactions, in accordance with terms of the Debentures.[9]

9. The subject transactions were precipitated by TTC's desire to amend its Articles of Incorporation (the Articles). The amendment of the Articles enabled TTC to change its tax status to a Subchapter ''S'' corporation in accordance with Section 1362(a) of the Code. The change in tax status will be effective as of January 1, 1999. The Board of Directors of TTC determined that by eliminating its ''C'' Corporation tax status, TTC could increase the return to its shareholders. Furthermore, the switch by TTC to a Subchapter ''S''

[9] The Department notes that the holding of the Debentures by the Plans at any time during which TTCOT was a directed trustee to the Plans would have resulted in a prohibited transaction under section 406(a)(1)(B) of the Act because TTC, the parent corporation of TTCOT, was the issuer of the Debentures. TTCOT, as the directed trustee of the H/A Plan and the M/F Plan, was a party in interest with respect to these Plans under section 3(14)(B) of the Act. Thus, TTC was a party in interest under section 3(14)(H) of the Act as a 10 percent or more shareholder of a person described in section 3(14)(B). However, TTC was not a ''disqualified person'' under section 4975(e)(2)(H) of the Code because that provision of the Code does not include the parent corporation of a service provider within the definition of that term. As a result, the holding of the Debentures would not constitute a prohibited transaction under section 4975(c)(1)(B) of the Code. In addition, the Department notes that under section 502(i) of the Act, no civil penalty shall apply to a transaction with respect to a plan described under section 4975(e)(1) of the Code. In any event, no relief is being provided herein for the past acquisition and holding of the Debentures.

status under the Code (the Conversion) required the conversion of the outstanding shares of the Preferred Stock into Common Stock.

The applicant states that the Participants and their respective Accounts in the Plans would have suffered adverse federal income tax consequences if they had continued to hold shares of the Preferred Stock in their Accounts after the Conversion. The Participants were informed by TTC that if the Plans continued to hold shares of the Preferred Stock after the Conversion, the Plans would be subject to unrelated business taxable income on all Subchapter ''S'' distributions, which could have resulted in a loss of each Plan's tax-free status under section 501(a) of the Code.

Accordingly, the Participants concluded that it was in the best interest of their Accounts and of the Plans to dispose of the investment in the Preferred Stock, to avoid the tax liabilities that would be incurred, once TTC becomes a Subchapter ''S'' corporation.

10. On May 1, 1998, TTC sent certain documents to its shareholders, including the Participants, as a result of their ownership of Preferred Stock and the Debentures in the Accounts. The documents stated that TTC desired to redeem, via cancellation, all shares of the Preferred Stock which were held by any shareholders that would have adverse tax consequences from continued ownership of shares in an ''S'' corporation after the conversion.

TTC has provided a mechanism whereby eligible shareholders and those who own shares through exempt employee benefit plans (i.e., the Accounts in the Plans) would designate a related party to purchase shares of TTC Stock equal to the number of shares sold by the Accounts in the Plans. Such purchase would be for cash and would be at the same price per share as that paid by TTC for redemption of the Stock.

11. Therefore, the Participants and TTC are requesting relief for the following transactions: (1) the proposed cash sale of shares of the Preferred Stock by the Orrechio Account in the T/C Plan, by the Hart Account in the H/A Plan, and by the Peterson Account in the M/F Plan to TTC; and (2) the arrangement for the subsequent purchase under the above described agreement with TTC of an equal number of shares of the Common Stock by Messrs. Orecchio, Hart and Peterson (i.e., the Participants), in their own name, from TTC immediately after the sale by the Accounts to TTC.

12. The redemption price for the shares of the Preferred Stock was determined by the parties based upon a written valuation dated May 6, 1998, prepared by Austin Financial Services, Inc. (Austin), a consulting firm with experience in the financial services industry. Austin was retained by the Board of Directors of TTC for the purpose of valuing TTC and its shares of Preferred Stock and Common Stock (together, the Stock). In determining fair market value of the Stock, Austin relied on the discounted cash flow method and the capitalization of earnings method. After weighing these two methods, Austin determined that the fair market value of all the outstanding shares of the Stock was approximately $7,263,035. This amount equates to $308.66 per share for each outstanding share of Preferred and Common Stock. Austin's valuation of the Stock was updated at the time of the transaction, but its conclusions for the fair market value of the Stock were unchanged. Therefore, based on the Austin valuation, each Account received a total of $61,732 for its shares of Preferred Stock, as of the date of Conversion.

13. TTC also engaged the law firm of Callister Nebeker & McCullough of Salt Lake City, Utah (CNM) to serve as the Independent Fiduciary for the Plans to review the offer of redemption of the Preferred stock, to render an opinion as to the prudence of the investment decisions relating thereto, and to direct the sale of shares as appropriate. In a report dated April 29, 1998 (the Report), CNM acknowledged its appointment as the Independent Fiduciary for the Plans in connection with TTC's proposed change from a Subchapter ''C'' corporation to a Subchapter ''S'' corporation.

As the Independent Fiduciary for the Plans, CNM determined whether the subject transactions, and the actions taken by the Plans in connection with the transactions, were in the best interest of such Plans and the Accounts, in accordance with the requirements of the Act. In this regard, each of the Participants (i.e., Dr. Orrechio, Mr. Hart and Mr. Peterson) made separate determinations that the proposed transactions would be in the best interests of their Accounts. Upon arriving at this conclusion, a determination was made to retain CNM as an independent fiduciary for the Plans in order to ensure that the terms of such transactions, including the appraisal made of the fair market value of the Stock, would be protective of the Plans and the Accounts.

In a supplemental statement dated August 25, 1998 (the Statement), CNM acknowledged its duties as an independent fiduciary for the transactions described herein. CNM represented that it had experience in acting as an independent fiduciary for employee benefit plans. CNM concluded that the subject transactions would be prudent and in the best interest of each of the Accounts. CNM represented that it would ensure, among other things, that the fair market value of the Stock, as determined by Austin, would be updated on the date of the transactions, and that each Account would receive the correct amount of cash for its shares of Preferred Stock. Thus, the Independent Fiduciary supervised the subject transactions to protect the interests of the Plans and the Accounts.

14. The applicant also obtained an opinion regarding the subject transactions from Houlihan Valuation Advisors dated June 16, 1998 (the Fairness Opinion). The Fairness Opinion stated that the Preferred Stock was essentially equivalent to the Common Stock because the Preferred Stock: (i) was convertible at the option of the holder into Common Stock; (ii) had voting privileges identical to the Common Stock; and (iii) paid no preferred dividends. The differences between the Preferred Stock and the Common Stock in terms of the liquidation value of the Preferred Stock was determined to be meaningless because the fair market value of the Preferred and Common Stock is much higher than its liquidation value.

The Fairness Opinion concluded that the sale of the Preferred Stock by the Accounts to TTC would be fair to the Accounts because the Accounts would receive adequate consideration for their shares of the Preferred Stock, based on an independent appraisal.

15. In summary, the applicant represents that the subject transactions satisfied the statutory criteria of section 408(a) of the Act and section 4975(c)(2) of the Code because:

a. The sale of the Preferred Stock to TTC by the Accounts and the purchase of the Common Stock from TTC by the Participants were one-time transactions for cash;

b. The transactions described in (1) above took place on the same business day;

c. The amount paid to the Accounts by TTC was the fair market value of the Preferred Stock, as determined by a qualified independent appraiser at the time of the sale; and

d. The Independent Fiduciary determined that the subject transactions were in the best interest and protective of the Accounts. The Independent

Fiduciary supervised the subject transactions to protect the interests of the Accounts.

Notice to Interested Persons

Because the only assets of the Plans' involved in the subject transactions are those held in the Accounts, and no other participants in the Plans are affected by the transactions, it has been determined that there is no need to distribute this notice of proposed exemption to any interested persons other than the Participants. Comments and requests for a hearing on the proposed exemption are due 30 days after the date of publication of this notice in the **Federal Register**.

FOR FURTHER INFORMATION CONTACT: Ekaterina A. Uzlyan of the Department, telephone (202) 219–8883. (This is not a toll-free number.)

Sprinx Inc. Retirement Plan (the Plan), Located in Grand Prairie, Texas

[Application No. D–10660]

Proposed Exemption

The Department is considering granting an exemption under the authority of section 408(a) of the Act and section 4975(c)(2) of the Code and in accordance with the procedures set forth in 29 C.F.R. Part 2570, Subpart B (55 FR 32836, 32847, August 10, 1990). If the exemption is granted, the restrictions of sections 406(a), 406(b)(1) and (b)(2) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1)(A) through (E) of the Code, shall not apply to: (1) the proposed loan of $90,000 (the Loan) by the Plan to Sprinx, Inc. (the Employer), the sponsor of the Plan; and (2) the guarantee of repayment of the Loan by Harry D. Spring, a party in interest with respect to the Plan; provided that the following conditions are satisfied:

1. The Loan does not exceed 25% of the total assets of the Plan at any time;

2. The terms of the Loan are at least as favorable to the Plan as those terms which would exist in an arm's-length transaction with an unrelated party;

3. The Loan is secured by common stock issued by the Employer, which has a fair market value, as determined by an independent qualified appraiser, which will remain at least 200% of the outstanding principal balance of the Loan throughout its duration;

4. The Plan has a first priority perfected security interest in the Stock, which is properly filed and perfected under applicable state law;

5. An independent fiduciary reviews the terms and conditions of the Loan and determines that the Loan is in the best interest and protective of the Plan and its participants and beneficiaries;

6. An independent fiduciary monitors the Loan throughout its duration and takes whatever action is necessary to protect the interests of the Plan; and

7. The independent fiduciary monitors the parties' compliance with the terms and conditions of this proposed exemption, if granted.

Summary of Facts and Representations

1. The Plan is a pension plan that was established on August 18, 1993. The Plan currently has approximately eighteen (18) participants and beneficiaries. As of June 30, 1998, the Plan had total assets of $435,368. Harry D. Spring (Mr. Spring) is the trustee of the Plan.

2. The sponsor of the Plan is Sprinx, Inc. (the Employer). The Employer is a Subchapter ''S'' corporation, incorporated in the State of Texas. The Employer is in the business of health care consulting and billing. A primary part of the Employer's business is consulting with medical service companies to bill the health care services provided by these companies. Mr. Spring is an officer and director of the Employer, and is the sole shareholder of the Stock.

3. The Loan will have a principal amount of $90,000 and a ten year duration. The Loan will bear an interest rate equal to the lesser of (i) nine and one-half percent (9.5%) per annum, or (ii) the highest lawful non-usurious rate of interest permitted under Texas law provided that such rate is never less than 9.5% per annum.[10] The Loan provides for equal amortization of principal and interest, and will be payable in forty (40) quarterly installments. The first thirty-nine (39) installments, based on an interest rate of 9.5% per annum, will be equal to $3,510.20. The 40th and final installment on the Loan will be equal to the total unpaid balance at that time. The applicant represents that the Loan will at all times represent less than twenty-five percent (25%) of the Plan's total assets.

The Loan proceeds will be used to purchase additional equipment for the Employer, and to hire additional employees.

4. The Loan will be secured at all times by the total outstanding shares of the Stock, all of which is owned by Mr. Spring. The Plan will have a first priority perfected security interest in the Stock, which will be properly filed and perfected under applicable state law.

The Stock was appraised by Saville, Dodgen & Company, Professional Corporation, Cerified Public Accountants (the SDC Appraisal) as of June 30, 1998, as having a fair market value of $3.8 million. The SDC Appraisal used the capitalization of earnings method to estimate the fair market value of the Stock, and the Employer's business as evidenced thereby. The capitalization of earnings method is based on the future estimated earnings of the Employer. The SDC Appraisal has been supplemented by a statement from Clint Pugh (Mr. Pugh) of Saville, Dodgen & Company, P.C. (SDC) which states that the procedures and analysis utilized in the SDC Appraisal represent a reasonable estimate of fair market value of the Stock and the Employer's business at the present time. There are currently 10,800 shares of the Stock with an estimated value per share of $351.85, based on the SDC Appraisal.

In a further statement dated November 5, 1998, Mr. Pugh represents that SDC is independent of the Employer and Mr. Spring. In this regard, SDC performs tax compliance work for the Employer, but the fees collected from the Employer for these services represent less than one percent (1%) of the total annual revenue of SDC. Mr. Pugh also states that he is a qualified appraiser of the Stock and that he has been performing appraisals for ten (10) years for various corporations. Mr. Pugh represents that he adheres to the guidelines provided by the American Institute of Certified Public Accountants for business valuations.

5. Frost National Bank (the Bank) has examined the terms of the Loan. By letter dated August 19, 1998, the Bank represents that it would make the same loan on the same terms to the Employer, based on its assumptions regarding the creditworthiness of the Employer and Mr. Spring.

6. The Loan will be monitored by Richard S. Tucker (Mr. Tucker), who will serve as the independent fiduciary (the Independent Fiduciary) on behalf of the Plan for purposes of the Loan. Mr. Tucker has submitted a statement in which he discusses his proposed role as the Independent Fiduciary. Mr. Tucker states that the Loan will be in the best interest of the Plan and its participants and beneficiaries. Mr. Tucker believes that the Loan will be an appropriate investment for the Plan with adequate safeguards and protections to ensure repayment of all principal and interest. The Loan will also permit the Employer to satisfy its needs for additional

[10] The Department agreed to this provision at the request of the applicant in order to comply with Texas usury law. However, for purposes of this proposed exemption, the Department understands that the rate on this Loan will in no event be less than 9.5% per annum.

equipment and employees, which will increase its profitability.

Mr. Tucker states that the Loan will be protective of the Plan because the principal amount of the Loan will be adequately secured and will represent less than twenty-five percent (25%) of the Plan's total assets. The Stock, as collateral for the Loan, will have a fair market value which exceeds the outstanding principal amount of the Loan by at least two hundred percent (200%) at all times.

With respect to Mr. Tucker's qualifications to act as the Independent Fiduciary for the Plan for purposes of the Loan, Mr. Tucker represents that he is attorney with experience in evaluating transactions, such as the Loan, and ensuring that such transactions have proper legal documentation. Thus, Mr. Tucker states that he has experience in protecting the rights of the parties involved in such transactions.

Mr. Tucker represents that he is independent of the Employer, Mr. Spring and their affiliates for purposes of his proposed duties as the Independent Fiduciary. In this regard, Mr. Tucker states that he performs legal services for the Employer. However, Mr. Tucker's fees from the Employer for such services are less than one percent (1%) of his total revenues. In addition, the fees generated from the Employer represent less than one percent (1%) of the annual revenues received by Mr. Tucker's firm.

Mr. Tucker represents that he has been apprised of the duties and responsibilities of a fiduciary under the Act. Mr. Tucker states that he will obtain, if necessary, appropriate advice from an experienced ERISA counsel as to what is required to properly execute the duties of an independent fiduciary for the Plan. Mr. Tucker acknowledges and accepts his responsibilities and duties as the Independent Fiduciary for this Loan transaction.

As the Independent Fiduciary, Mr. Tucker will represent the interests of the Plan at all times. Mr. Tucker will monitor compliance by the Employer with the terms and conditions of the Loan, and take whatever action is necessary to safeguard the interests of the Plan and its participants and beneficiaries.[11]

[11] In this regard, the applicant makes a request regarding a successor independent fiduciary. Specifically, if it becomes necessary in the future to appoint a successor independent fiduciary (the Successor) to replace Mr. Tucker, the applicant will notify the Department sixty (60) days in advance of the appointment of the Successor. Any Successor will have the responsibilities, experience and independence similar to those of Mr. Tucker.

7. Mr. Spring also unconditionally guarantees the prompt and full repayment of the Loan, pursuant to the terms of a written guarantee agreement (the Guarantee). Mr. Tucker, as the Independent Fiduciary, has examined the terms of the Guarantee. Mr. Tucker believes that the Guarantee is in the best interest of the Plan for several reasons: (a) it is an unconditional Guarantee, which is not conditioned on any other actions that may occur on the part of the Plan or the Employer; (b) the Guarantee covers the full amount of the indebtedness, including any additional costs or expenses associated with the liability; (c) if there are any changes in the collateral provided by the Employer for the Loan (i.e., the Stock), such changes will not affect the obligations of Mr. Spring under the Guarantee; and (d) the Guarantee is a guarantee of payment, under which the guarantor (i.e., Mr. Spring) is immediately required to perform by making payments.

Mr. Tucker represents that the Guarantee satisfies the applicable requirements for such agreements under Texas law and is protective of the Plan because it creates the maximum enforceable rights against Mr. Spring, as the Loan guarantor. Mr. Spring represents that he has an adequate net worth to honor the Guarantee, if necessary. Mr. Tucker states that Mr. Spring has sufficient personal assets, in addition to the Stock, to satisfy his obligations under the Guarantee. Mr. Tucker also states that he will monitor the financial status of Mr. Spring, as guarantor, and will ensure that the Loan remains adequately secured by the Stock and the Guarantee.

8. In summary, the applicant represents that the proposed transaction satisfies the statutory criteria of section 408(a) of the Act and section 4975(c)(2) of the Code because:

a. The Loan will not exceed 25% of the total assets of the Plan at any time;

b. The terms of the Loan are at least as favorable to the Plan as those terms which would exist in an arm's-length transaction with an unrelated party;

c. The Loan will be secured by the Stock, which has a fair market value, as determined by an independent qualified appraiser, of at least 200% of the outstanding principal balance of the Loan;

d. The Plan has a first priority perfected security interest in the Stock, which will be properly filed and perfected under applicable state law;

e. Mr. Tucker, as the Independent Fiduciary, has reviewed the proposed terms and conditions of the Loan and determined that the Loan would be in the best interest and protective of the Plan and its participants and beneficiaries;

f. Mr. Tucker, as the Independent Fiduciary, will monitor the Loan throughout its duration and take whatever actions are necessary to safeguard the interests of the Plan and its participants and beneficiaries; and

g. The Loan is personally and unconditionally guaranteed by Mr. Spring, who has an adequate net worth to honor the Guarantee, if necessary.

FOR FURTHER INFORMATION CONTACT: Ekaterina A. Uzlyan of the Department, telephone (202) 219–8883. (This is not a toll-free number.)

General Information

The attention of interested persons is directed to the following:

(1) The fact that a transaction is the subject of an exemption under section 408(a) of the Act and/or section 4975(c)(2) of the Code does not relieve a fiduciary or other party in interest of disqualified person from certain other provisions of the Act and/or the Code, including any prohibited transaction provisions to which the exemption does not apply and the general fiduciary responsibility provisions of section 404 of the Act, which among other things require a fiduciary to discharge his duties respecting the plan solely in the interest of the participants and beneficiaries of the plan and in a prudent fashion in accordance with section 404(a)(1)(b) of the act; nor does it affect the requirement of section 401(a) of the Code that the plan must operate for the exclusive benefit of the employees of the employer maintaining the plan and their beneficiaries;

(2) Before an exemption may be granted under section 408(a) of the Act and/or section 4975(c)(2) of the Code, the Department must find that the exemption is administratively feasible, in the interests of the plan and of its participants and beneficiaries and protective of the rights of participants and beneficiaries of the plan;

(3) The proposed exemptions, if granted, will be supplemental to, and not in derogation of, any other provisions of the Act and/or the Code, including statutory or administrative exemptions and transitional rules. Furthermore, the fact that a transaction is subject to an administrative or statutory exemption is not dispositive of whether the transaction is in fact a prohibited transaction; and

(4) The proposed exemptions, if granted, will be subject to the express condition that the material facts and representations contained in each application are true and complete, and that each application accurately

describes all material terms of the transaction which is the subject of the exemption.

Signed at Washington, DC, this 20th day of November, 1998.

Ivan Strasfeld,

Director of Exemption Determinations, Pension and Welfare Benefits Administration, U.S. Department of Labor.

[FR Doc. 98–31511 Filed 11–24–98; 8:45 am]

BILLING CODE 4510–29–P

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[Notice 98–163]

NASA Advisory Council; Meeting

AGENCY: National Aeronautics and Space Administration.

ACTION: Notice of meeting.

SUMMARY: In accordance with the Federal Advisory Committee Act, Public Law 92–463, as amended, the National Aeronautics and Space Administration announces a meeting of the NASA Advisory Council.

DATES: Thursday, December 3, 1998, 9:00 a.m. to 4:30 p.m. and Friday, December 4, 1998, 9:00 a.m. to Noon.

ADDRESSES: Jet Propulsion Laboratory, National Aeronautics and Space Administration, Building 180, Room 101, 4800 Oak Grove Drive, Pasadena, CA 91109–8099.

FOR FURTHER INFORMATION CONTACT: Ms. Kathy Dakon, Code Z, National Aeronautics and Space Administration, Washington, DC 20546, 202/358–0732.

SUPPLEMENTARY INFORMATION: The meeting will be open to the public up to the seating capacity of the room. The agenda for the meeting is as follows:

—JPL Update
—AXAF
—SOHO
—TRIANA
—MARS Exploration Architecture
—Faster-Better-Cheaper
—ISS Software
—IORTF Status Report
—Committee/TaskForce/Working Group Reports
—Discussion of Findings and Recommendations

It is imperative that the meeting be held on these dates to accommodate the scheduling priorities of the key participants. Visitors will be requested to sign a visitor's register.

Dated: November 18, 1998.

Lori B. Garver,

Acting Associate Administrator For Policy and Plans.

[FR Doc. 98–31496 Filed 11–24–98; 8:45 am]

BILLING CODE 7510–01–P

NATIONAL GAMBLING IMPACT STUDY COMMISSION

Meeting

AGENCY: National Gambling Impact Study Commission, Regulation, Enforcement, & Internet Subcommittee.

ACTION: Notice of public meeting.

DATES: Tuesday, December 1, 1998, 5:00 p.m. to 7:00 p.m. (EST).

ADDRESSES: The meeting site will be: 800 North Capitol Street, NW, Suite 450, Washington, D.C. 20002.

DATES: Wednesday, December 2, 1998, 8:00 a.m. to 4:30 p.m. (EST).

ADDRESSES: The meeting site will be: 2358 Rayburn House Office Building, Washington, D.C. 20515.

STATUS: The meeting will take place in two separate locations on different days. The meeting is open to the public both days. However, seating may be limited. Members of the public wishing to attend should contact Craig Stevens at (202) 523–8217 to make arrangements for attendance.

SUMMARY: At the December 1 meeting of the Regulation, Enforcement, and Internet Subcommittee of the National Gambling Impact Study Commission, established under Public Law 104–169, dated August 3, 1996, the Members of the Subcommittee will discuss and hear telephonic presentations related to gambling and the Internet. On December 2, the Subcommittee will hold further discussions and hear additional in-person presentations, as well as hold a public comment period.

CONTACT PERSONS: For further information on the agenda, meeting location or other matters contact Craig Stevens at (202) 523–8217 or write to 800 North Capitol St., N.W., Suite 450, Washington, D.C. 20002.

SUPPLEMENTARY INFORMATION: An open forum for public participation will be held from 4:00 to 4:30 p.m. on December 2. Anyone wishing to make an oral presentation must contact Craig Stevens by telephone at (202) 523–8217 no later than November 30, 1998. Written comments can be sent to the Commission at any time at 800 North Capitol St., N.W., Suite 450, Washington, D.C. 20002. Visit the Commission's Website at *www.ngisc.gov*.

Tim Bidwill,

Special Assistant to the Chairman.

[FR Doc. 98–31548 Filed 11–24–98; 8:45 am]

BILLING CODE 6802–ET–U

NUCLEAR REGULATORY COMMISSION

[Docket Nos. 50–387 and 388]

PP&L, Inc.; Notice of Withdrawal of Application for Amendments to Facility Operating Licenses

The U.S. Nuclear Regulatory Commission (the Commission) has granted the request of PP&L, Inc. (the licensee) to withdraw its March 20, 1996, application for proposed amendments to Facility Operating License Nos. NPF–17 and NPF–22 for the Susquehanna Steam Electric Station, Unit Nos. 1 and 2, located in Luzerne County, Pennsylvania.

The proposed amendments would have revised the Susquehanna Steam Electric Station's Technical Specifications (TSs) to eliminate the high pressure coolant injection pump auto-transfer on high suppression pool level.

The Commission had previously issued a Notice of Consideration of Issuance of Amendments published in the **Federal Register** on December 18, 1996 (61 FR 66713). However, by letter dated October 29, 1998, the licensee withdrew the proposed change.

For further details with respect to this action, see the application for amendments dated March 20, 1996, and the licensee's letter dated October 29, 1998, which withdrew the application for license amendments. The above documents are available for public inspection at the Commission's Public Document Room, the Gelman Building, 2120 L Street, NW., Washington, DC, and at the local public document room located at the Osterhout Free Library, Reference Department, 71 South Franklin Street, Wilkes-Barre, PA 18701.

Dated at Rockville, Maryland, this 18th day of November 1998.

For The Nuclear Regulatory Commission.

Victor Nerses,

Senior Project Manager, Project Directorate I–2, Division of Reactor Projects—I/II, Office of Nuclear Reactor Regulation.

[FR Doc. 98–31500 Filed 11–24–98; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[Docket No. 50–482]

Wolf Creek Nuclear Operating Corporation; Notice of Withdrawal of Application for Amendment to Facility Operating License

The U.S. Nuclear Regulatory Commission (the Commission) has

granted the request of Wolf Creek Nuclear Operating Corporation (the licensee) to withdraw its September 2, 1997, as supplemented by letter dated January 15, 1998. Application for proposed amendment to Facility Operating License No. NPF–42 for the Wolf Creek Nuclear Generating Station, Unit No. 1, located in Coffey County, Kansas.

The proposed amendment would have revised the technical specifications related to the auxiliary feedwater system.

The Commission had previously issued a Notice of Consideration of Issuance of Amendment published in the **Federal Register** on October 22, 1997 (62 FR 54878). However, by letter dated November 6, 1998, the licensee withdrew the proposed change.

For further details with respect to this action, see the application for amendment dated September 2, 1997, and supplemental letter dated January 15, 1998, and the licensee's letter dated November 6, 1998, which withdrew the application for license amendment. The above documents are available for public inspection at the Commission's Public Document Room, the Gelman Building, 2120 L Street, NW., Washington, DC, and at the local public document rooms located at the Emporia State University, William Allen White Library, 1200 Commercial Street, Emporia, Kansas 66801 and Washburn University School of Law Library, Topeka, Kansas 66621.

Dated at Rockville, Maryland, this 19th day of November 1998.

For The Nuclear Regulatory Commission.

Kristine M. Thomas,

Project Manager, Project Directorate IV–2, Division of Reactor Projects—III/IV, Office of Nuclear Reactor Regulation.

[FR Doc. 98–31497 Filed 11–24–98; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[Dockets 70–7001 and 70–7002]

Notice of Renewal for Certificates of Compliance GDP–1 and GDP–2 for the U.S. Enrichment Corporation, Paducah and Portsmouth Gaseous Diffusion Plants, Paducah, Kentucky, and Portsmouth, Ohio

The U.S. Nuclear Regulatory Commission (NRC) is issuing a certification decision for the United States Enrichment Corporation (USEC) to allow continued operation of the two gaseous diffusion plants (GDPs) located near Paducah, Kentucky, and Piketon, Ohio. The Director's Decision is to issue renewed Certificates of Compliance for the GDPs that cover a five-year period. USEC submitted its renewal applications on April 15, 1998. Notice of Receipt of the applications appeared in the **Federal Register** (63 FR 24832) on May 5, 1998, allowing a 45-day public comment period on the applications. As required by the Energy Policy Act, NRC consulted with the U.S. Environmental Protection Agency (EPA) about certification. EPA did not identify any significant compliance issues.

The NRC staff has reviewed the certificate renewal applications for the gaseous diffusion plants located near Paducah, Kentucky, and Piketon, Ohio, and concluded that in combination with certificate conditions, they provide reasonable assurance of adequate safety, safeguards, and security, and compliance with NRC requirements. Therefore, the Director, Office of Nuclear Material Safety and Safeguards, is prepared to issue a renewed Certificate of Compliance for each plant. The staff has prepared Compliance Evaluation Reports which provide details of the staff's evaluations.

The NRC staff has determined that the renewals satisfy the criteria for a categorical exclusion in accordance with 10 CFR 51.22(c)(19). Therefore, pursuant to 10 CFR 51.22(b), no environmental impact statement or environmental assessment need be prepared for the renewal.

USEC or any person whose interest may be affected and who submitted written comments in response to the **Federal Register** Notice on the renewal application under Section 76.37 may file a petition, not exceeding 30 pages, requesting review of the Director's Decision. The petition must be filed with the Commission not later than 15 days after publication of this **Federal Register** Notice. A petition for review of the Director's Decision shall set forth with particularity the interest of the petitioner and how that interest may be affected by the results of the decision. The petition should specifically explain the reasons why review of the Decision should be permitted with particular reference to the following factors: (1) The interest of the petitioner; (2) how that interest may be affected by the Decision, including the reasons why the petitioner should be permitted a review of the Decision; and (3) the petitioner's areas of concern about the activity that is the subject matter of the Decision. Any person described in this paragraph (USEC or any person who filed a petition) may file a response to any petition for review, not to exceed 30 pages, within 10 days after filing of the petition. If no petition is received within the designated 15-day period, the Director will issue the final amendment to the Certificate of Compliance without further delay. If a petition for review is received, the decision on the amendment application will become final in 60 days, unless the Commission grants the petition for review or otherwise acts within 60 days after publication of this **Federal Register** Notice.

A petition for review must be filed with the Secretary, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, Attention: Rulemakings and Adjudications Staff, or may be delivered to the Commission's Public Document Room, the Gelman Building, 2120 L Street, NW, Washington, DC, by the above date.

For further details with respect to the action see (1) the applications for renewal and (2) the Commission's Compliance Evaluation Reports. These items (except for classified and proprietary portions which are withheld in accordance with 10 CFR 2.790, ''Availability of Public Records'') are available for public inspection at the Commission's Public Document Room, the Gelman Building, 2120 L Street, NW, Washington, DC, and at the Local Public Document Rooms established for these facilities.

Date of renewal requests: April 15, 1998.

Brief description of renewal applications: USEC did not request any changes to the existing documentation; previous applications, statements, and reports are incorporated by reference into the renewal application. These include the Technical Safety Requirements, Safety Analysis Report, Compliance Plan, Quality Assurance Program, Emergency Plan, Security and Safeguards Plans, Waste Management Program, and Decommissioning Funding Program, etc. Certificate of Compliance GDP–1 for the Paducah GDP and Certificate of Compliance GDP–2 for the Portsmouth GDP will be renewed for a 5-year period. This will allow continued operation of the GDPs.

Effective date: The renewal of Certificates of Compliance GDP–1 and GDP–2 becomes effective immediately after being signed by the Director, Office of Nuclear Material Safety and Safeguards.

Local Public Document Room locations: Paducah Public Library, 555 Washington Street, Paducah, Kentucky 42003 and Portsmouth Public Library, 1220 Gallia Street, Portsmouth, Ohio 45662.

FOR FURTHER INFORMATION CONTACT: Ms. Merri Horn, (301) 415–8126 or Mr.

Yawar Faraz (301) 415–8113; Office of Nuclear Material Safety and Safeguards, U.S. Nuclear Regulatory Commission, Washington, DC 20555.

Dated at Rockville, Maryland, this 18th day of November 1998.

For the Nuclear Regulatory Commission.

Elizabeth Q. Ten Eyck,

Acting Director, Office of Nuclear Material Safety and Safeguards.

[FR Doc. 98–31498 Filed 11–24–98; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[Docket 70–7001]

Notice of Amendment to Certificate of Compliance GDP–1 for the U.S. Enrichment Corp., Paducah Gaseous Diffusion Plant, Paducah, KY

The Director, Office of Nuclear Material Safety and Safeguards, has made a determination that the following amendment request is not significant in accordance with 10 CFR 76.45. In making that determination the staff concluded that: (1) There is no change in the types or significant increase in the amounts of any effluents that may be released offsite; (2) there is no significant increase in individual or cumulative occupational radiation exposure; (3) there is no significant construction impact; (4) there is no significant increase in the potential for, or radiological or chemical consequences from, previously analyzed accidents; (5) the proposed changes do not result in the possibility of a new or different kind of accident; (6) there is no significant reduction in any margin of safety; and (7) the proposed changes will not result in an overall decrease in the effectiveness of the plant's safety, safeguards or security programs. The basis for this determination for the amendment request is shown below.

The NRC staff has reviewed the certificate amendment application and concluded that it provides reasonable assurance of adequate safety, safeguards, and security, and compliance with NRC requirements. Therefore, the Director, Office of Nuclear Material Safety and Safeguards, is prepared to issue an amendment to the Certificate of Compliance for the Paducah Gaseous Diffusion Plant. The staff has prepared a Compliance Evaluation Report which provides details of the staff's evaluation.

The NRC staff has determined that this amendment satisfies the criteria for a categorical exclusion in accordance with 10 CFR 51.22(c)(19). Therefore, pursuant to 10 CFR 51.22(b), no environmental impact statement or environmental assessment need be prepared for this amendment.

USEC or any person whose interest may be affected may file a petition, not exceeding 30 pages, requesting review of the Director's Decision. The petition must be filed with the Commission not later than 15 days after publication of this **Federal Register** Notice. A petition for review of the Director's Decision shall set forth with particularity the interest of the petitioner and how that interest may be affected by the results of the decision. The petition should specifically explain the reasons why review of the Decision should be permitted with particular reference to the following factors: (1) The interest of the petitioner; (2) how that interest may be affected by the Decision, including the reasons why the petitioner should be permitted a review of the Decision; and (3) the petitioner's areas of concern about the activity that is the subject matter of the Decision. Any person described in this paragraph (USEC or any person who filed a petition) may file a response to any petition for review, not to exceed 30 pages, within 10 days after filing of the petition. If no petition is received within the designated 15-day period, the Director will issue the final amendment to the Certificate of Compliance without further delay. If a petition for review is received, the decision on the amendment application will become final in 60 days, unless the Commission grants the petition for review or otherwise acts within 60 days after publication of this **Federal Register** Notice.

A petition for review must be filed with the Secretary of the Commission, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, Attention: Rulemakings and Adjudications Staff, or may be delivered to the Commission's Public Document Room, the Gelman Building, 2120 L Street, NW, Washington, DC, by the above date.

For further details with respect to the action see (1) the application for amendment and (2) the Commission's Compliance Evaluation Report. These items are available for public inspection at the Commission's Public Document Room, the Gelman Building, 2120 L Street, NW, Washington, DC, and at the Local Public Document Room.

Date of amendment request: September 11, 1998.

Brief description of amendment: The amendment proposes to delete Technical Safety Requirements (TSRs) 2.3.2.1, ''Normetex Pump Discharge Pressure,'' and 2.3.3.1, ''Normetex Pump High Discharge Pressure System.'' The request also includes changes to related sections of the Safety Analysis Report (SAR) to support deletion of the TSR requirements.

Basis for finding of no significance:

1. The proposed amendment will not result in a change in the types or significant increase in the amounts of any effluents that may be released offsite.

The proposed amendment deletes TSR requirements for the Normetex Pump High Discharge Pressure System. The accident scenario that the system was designed to prevent did not change so uranium hexafluoride (UF_6) remains the only effluent that may be released, and the amount remains bounded by the 250 lbs controlled by the Normetex UF_6 Release Detection System. Therefore, there is no change in the effluents that may be released offsite.

2. The proposed amendment will not result in a significant increase in individual or cumulative occupational radiation exposure.

The proposed amendment does not propose any new or unanalyzed activity for the facility. Therefore, the amendment would not result in a significant increase in individual or cumulative occupational radiation exposure.

3. The proposed amendment will not result in a significant construction impact.

The proposed amendment does not involve any construction, therefore, there will be no construction impacts.

4. The proposed amendment will not result in a significant increase in the potential for, or radiological or chemical consequences from, previously analyzed accidents.

The proposed amendment deletes TSR requirements for the Normetex Pump High Discharge Pressure System. The accident scenario that the system was designed to prevent did not change, and the potential source term for UF_6 remains bounded by the 250 lbs controlled by the Normetex UF_6 Release Detection System. The downgrading of the Normetex Pump High Discharge Pressure System from a quality (Q) safety system to a non-safety safety system is offset by the upgrading of the Normetex Pump discharge block valve interlock to a Q safety system. Both systems were designed to prevent an overpressure of the pump discharge line when the pump discharge block valve closes with the pump still running. Worker protection practices would limit any exposure to the worker from any potential smaller release. Therefore, the proposed change will not result in a significant increase in the potential for, or radiological or chemical

consequences from, previously analyzed accidents.

5. The proposed amendment will not result in the possibility of a new or different kind of accident.

The proposed amendment does not propose any new or unanalyzed activity for the facility. The downgrading of the Normetex Pump High Discharge Pressure System from a quality (Q) safety system to a non-safety safety system is offset by the upgrading of the Normetex Pump discharge block valve interlock to a Q safety system. Both systems were designed to prevent an overpressure of the pump discharge line when the pump discharge block valve closes with the pump still running. Therefore, the amendment does not raise the possibility of a new or different kind of accident.

6. The proposed amendment will not result in a significant reduction in any margin of safety.

The safety limit proposed for deletion did not change the bounding accident release of 250 lbs. The downgrading of the Normetex Pump High Discharge Pressure System from a quality (Q) safety system to a non-safety safety system is offset by the upgrading of the Normetex Pump discharge block valve interlock to a Q safety system. Both systems were designed to prevent an overpressure of the pump discharge line when the pump discharge block valve closes with the pump still running. With no increase in the potential amount of hazardous material released and the switching of one Q safety system for another equivalent system, the accident remains unlikely. Therefore, there is no significant reduction in the margin of safety.

7. The proposed amendment will not result in an overall decrease in the effectiveness of the plant's safety, safeguards or security programs.

The proposed amendment would delete a safety limit that was determined not to be safety significant. The safety margin remains the same. While one safety system has been downgraded, an equivalent safety system has been upgraded. Therefore, the deletion of the TSRs and supporting SAR changes do not decrease the effectiveness of the plant's safety program. It also does not propose any change to or affect the safeguards and security programs. Therefore, the proposed amendment will not result in an overall decrease in the effectiveness of the plant's safeguards or security programs.

Effective date: The amendment to Certificate of Compliance GDP–1 becomes effective 5 days after being signed by the Director, Office of Nuclear Material Safety and Safeguards.

Certificate of Compliance No. GDP–1: The amendment will delete the safety limit for the Normetex Pump discharge pressure (TSR 2.3.2.1) and TSR 2.3.3.1, ''Normetex Pump High Discharge Pressure System.''

Local Public Document Room location: Paducah Public Library, 555 Washington Street, Paducah, Kentucky 42003.

Dated at Rockville, MD, this 18th day of November 1998.

For the Nuclear Regulatory Commission.

Elizabeth Q. Ten Eyck,

Acting Director, Office of Nuclear Material Safety and Safeguards.

[FR Doc. 98–31501 Filed 11–24–98; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[Docket No. 50–305]

Wisconsin Public Service Corporation, Wisconsin Power and Light Company, Madison Gas and Electric Company, Kewaunee Nuclear Power Plant; Environmental Assessment and Finding of No Significant Impact

The U.S. Nuclear Regulatory Commission (the Commission) is considering issuance of an exemption from the requirements of 10 CFR 50.60 to Wisconsin Public Service Corporation, Wisconsin Power and Light Company, and Madison Gas and Electric Company (the licensee), for the Kewaunee Nuclear Power Plant located in Kewaunee County, Wisconsin.

Environmental Assessment

Identification of the Proposed Action

By application dated August 6, 1998, the licensee requested an exemption from certain requirements of 10 CFR 50.60, ''Acceptance criteria for fracture prevention measures for lightwater nuclear power reactors for normal operation,'' and 10 CFR Part 50, Appendix G, ''Fracture Toughness Requirements.'' The proposed action would permit the licensee to use American Society of Mechanical Engineers (ASME) Code Case N–588 for analyses used to develop reactor pressure vessel (RPV) pressure-temperature (PT) limits, and the low temperature overpressure protection (LTOP) system pressure setpoint .

Note: The application also encompassed the proposed use of Code Case N–514; however, this assessment applies only to N–588.

The Need for the Proposed Action

Pursuant to 10 CFR 50.60(a), all lightwater nuclear power reactors must meet the fracture toughness requirements for the reactor coolant pressure boundary as set forth in 10 CFR Part 50, Appendix G. Appendix G of 10 CFR Part 50 defines PT limits during any condition of normal operation, including anticipated operational occurrences and system hydrostatic tests to which the pressure boundary may be subjected over its service lifetime, and Appendix G.IV.2. specifies that these PT limits must be at least as conservative as the limits obtained by the following methods of analysis and the margins of safety of the ASME Code, Section XI, Appendix G.

By application dated August 6, 1998, the licensee submitted an exemption request to enable use of ASME Code Case N–588. Code Case N–588 provides benefits in terms of calculating PT limits by revising the Section XI, Appendix G, to assume that a circumferential flaw, rather than an axial flaw, exists in each circumferential weld in a reactor vessel. This reference flaw is a postulated flaw that accounts for the possibility of a prior existing defect that may have gone undetected during the fabrication process. Any significant, undetected flaw in a circumferential weld in the beltline region of an RPV would be circumferentially oriented thereby having a lesser effect than an assumed axial flaw.

The effect of the change in reference flaw orientation for circumferential welds, in the calculation of PT limits, is to expand the resulting PT ''operating window.'' For Kewaunee, this larger operating window will eliminate the current requirement to disable one reactor coolant pump during conditions of low reactor coolant system temperature.

Environmental Impacts of the Proposed Action

The staff has completed its evaluation of the proposed action and concludes that it is acceptable because, with the application of Code Case N–588, the RPV will continue to be adequately protected against the possibility of brittle fracture. The proposed action will not increase the probability or consequences of accidents, no significant changes are being made in the types of any effluents that may be released offsite, and there is no significant increase in the allowable occupational or public radiation exposure. The staff has concluded that there is no significant radiological

environmental impact associated with the proposed action.

The proposed action does not affect nonradiological plant effluents and has no other environmental impact. Accordingly, the Commission concludes that there are no significant environmental impacts associated with the proposed action.

Alternatives to the Proposed Action

Since the staff has concluded that there is no significant environmental impact associated with the proposed action, any alternatives with equal or greater environmental impact need not be evaluated. As an alternative to the proposed action, the staff considered denial of the action (no-action alternative). Denial of the application would result in no change in current environmental impacts. The environmental impacts of the proposed action and the alternative action are similar.

Alternative Use of Resources

This action does not involve the use of any resources not previously considered in the Final Environmental Statement which was issued December 20, 1972.

Agencies and Persons Consulted

In accordance with its stated policy, on November 19, 1998, the staff consulted with Ms. Sarah Denkins, of the Public Service Commission of the State of Wisconsin, regarding the environmental impact of the proposed action. The State official had no comments.

Finding of No Significant Impact

Based upon the environmental assessment, the staff concludes that the proposed action will not have a significant effect on the quality of the human environment. Accordingly, the staff has determined not to prepare an environmental impact statement for the proposed action.

For further details with respect to the proposed action, see the licensee's letter dated August 6, 1998, which is available for public inspection at the Commission's Public Document Room, The Gelman Building, 2120 L Street, NW, Washington, D.C., and at the local public document room located at the University of Wisconsin, Cofrin Library, 2420 Nicolet Drive, Green Bay, Wisconsin 54311–7001.

Dated at Rockville, Maryland, this 19th day of November 1998.

For The Nuclear Regulatory Commission.

William O. Long,

Senior Project Manager, Project Directorate III–1, Division of Reactor Projects—III/IV, Office of Nuclear Reactor Regulation.

[FR Doc. 98–31499 Filed 11–24–98; 8:45 am]

BILLING CODE 7590–01–P

POSTAL SERVICE

Sunshine Act Meeting

TIMES AND DATES: 1:00 p.m., Monday, December 7, 1998; 8:30 a.m., Tuesday, December 8, 1998.

PLACE: Washington, D.C., at U.S. Postal Service Headquarters, 475 L'Enfant Plaza, S.W., in the Benjamin Franklin Room.

STATUS: December 7 (Closed); December 8 (Open).

MATTERS TO BE CONSIDERED:

Monday, December 7—1:00 p.m. (Closed)

1. Audit Committee Report and Review of Year-End Financial Statements.
2. Compensation Issues.
3. Tray Management System.

Tuesday, December 8—8:30 a.m. (Open)

1. Minutes of the Previous Meeting, November 2–3, 1998.
2. Remarks of the Postmaster General/Chief Executive Officer.
3. Consideration of FY 1998 Audited Financial Statements.
4. Consideration of the FY 1998 Annual Report.
5. Final FY 2000 Appropriation Request.
6. Tentative Agenda for the January 4–5, 1999 meeting in Washington, D.C.

CONTACT PERSON FOR MORE INFORMATION: Thomas J. Koerber, Secretary of the Board, U.S. Postal Service, 475 L'Enfant Plaza, S.W., Washington, D.C. 20260–1000. Telephone (202) 268–4800.

Thomas J. Koerber,

Secretary.

[FR Doc. 98–31670 Filed 11–23–98; 3:39 pm]

BILLING CODE 7710–12–M

SECURITIES AND EXCHANGE COMMISSION

[Rel. No. IC–23540; File No. 812–11258]

INVESCO Value Trust; Notice of Application

November 18, 1998.

AGENCY: The Securities and Exchange Commission (''Commission'').

ACTION: Notice of application under Section 17(b) of the Investment Company Act of 1940 (the ''Act'') for an exemption from Section 17(a) of the Act.

SUMMARY OF APPLICATION: INVESCO Value Trust (the ''Trust'') on behalf of INVESCO Total Return Fund (the ''Fund''), seeks an exemption permitting an in-kind redemption of Fund shares held by an affiliated person of the Trust.

APPLICANT: The Trust on behalf of the Fund.

FILING DATE: The application was filed on August 12, 1998.

HEARING OR NOTIFICATION OF HEARING: An order granting the application will be issued unless the Commission orders a hearing. Interested persons may request a hearing by writing to the Secretary of the Commission 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 December 14, 1998, and should be accompanied by proof of service on Applicants, in the form of an affidavit or, for lawyers, a certificate of service. Hearing requests should state the nature of the writer's interest, the reason for the request, and the issues contested. Persons may request notification of a hearing by writing to the Secretary of the Commission.

ADDRESSES: Secretary, Securities and Exchange Commission, 450 Fifth Street, N.W., Washington, D.C. 20549. Applicant, c/o Glen A. Payne, Esq., INVESCO Funds Group, Inc., 7800 East Union Avenue, Denver, Colorado 80237.

FOR FURTHER INFORMATION CONTACT: Ethan D. Corey, Senior Counsel, at (202) 942–0675, or Kevin M. Kirchoff, Branch Chief, at (202) 942–0672, Office of Insurance Products, Division of Investment Management.

SUPPLEMENTARY INFORMATION: The following is a summary of the application; the complete application may be obtained for a fee from the Public Reference Branch of the Commission, 450 5th Street, N.W., Washington, D.C. 20549 (tel. (202) 942–8090).

Applicant's Representations

1. The Trust, a Massachusetts business trust, currently offers three series, including the Fund. INVESCO Funds Group, Inc. (''Adviser'') is the Trust's investment adviser. INVESCO Capital Management, Inc. serves as the Fund's sub-adviser.

2. Connecticut General Life Insurance Company (''Connecticut General'') is a Connecticut life insurance company. Separate Account 55K is a pooled separate account established and maintained by Connecticut General for receipt of amounts allocated to it in

accordance with the terms of group annuity contracts and funding agreements. All amounts allocated to Separate Account 55K are invested in shares of the Fund. Connecticut General, on behalf of Separate Account 55K (the ''Affiliated Shareholder'') owned beneficially, as of June 30, 1998, 14.15% of the outstanding shares of the Fund.

3. Connecticut General has determined that it would be in the best interest of pension, profit-sharing and annuity plans invested in Separate Account 55K if the shares of the Fund owned by the Affiliated Shareholder were redeemed and the proceeds placed in Separate Account 55K, which thereafter will be separately managed by Adviser or its affiliate. Consequently, the Affiliated Shareholder has advised the Trust that it expects to redeem all of its shares of the Fund and reinvest the proceeds in Separate Account 55K.

4. The Fund's prospectus and statement of additional information provide that shares may be redeemed at the net asset value per share next determined after receipt of a proper redemption request. If, however, the Board of Trustees of the Trust (the ''Board'') determines that conditions exist which make payment of redemption proceeds wholly in cash unwise or undesirable, the Fund may satisfy all or part of a redemption request by delivering readily marketable portfolio securities to a redeeming shareholder. The Board has determined that it would be in the best interests of the Fund and its shareholders to redeem the shares of the Affiliated Shareholder in-kind as described below.

5. Applicant proposes to redeem the shares of the Affiliated Shareholder in the form of a pro rata distribution of each portfolio security held by the Fund after excluding: (a) Securities which, if distributed, would be required to be registered under the Securities Act of 1933; and (b) certain portfolio assets (such as futures and options contracts and repurchase agreements) that, although they may be liquid and marketable, must be traded through the marketplace or with the counterparty to the transaction in order to effect a change in beneficial ownership.

6. Securities to be distributed to the Affiliated Shareholder through the in-kind redemption will be further limited to securities which are traded on a public securities market or for which quoted bid prices are available. Cash will be paid for that portion of the Fund's assets represented by cash equivalents (such as certificates of deposit, commercial paper and repurchase agreements) and other assets which are not readily distributable (including receivables and prepaid expenses), net of all liabilities (including accounts payable). In addition, the Fund will distribute cash in lieu of securities held in its portfolio not amounting to round lots (or which would not amount to round lots if included in the in-kind distribution), fractional shares and accruals on such securities.

Applicant's Legal Analysis

1. Section 17(a)(2) of the Act prohibits affiliated persons of a registered investment company from knowingly purchasing any security from the company. Section 2(a)(3)(A) of the Act defines ''affiliated person'' of another person to include any person owning 5% or more of the outstanding voting securities of the other person. The Affiliated Shareholder is an affiliated person of the Fund under section 2(a)(3)(A) of the Act because it owns beneficially in excess of 5% of the Funds shares. In addition, the Affiliated Shareholder may be deemed to be an affiliated person of the Fund under Section 2(a)(3)(C) of the Act because the Affiliated Shareholder and the Fund may be deemed to be under the common control of Adviser, which serves as investment adviser of the Fund and which (or its affiliate), following the redemption, will be retained by the Affiliated Shareholder to serve as investment adviser to Separate Account 55K. To the extent that the proposed in-kind redemption would be considered to involve the ''purchase'' of portfolio securities (of which the Fund is not the issuer) by the Affiliated Shareholder, the proposed in-kind redemption would be prohibited by Section 17(a)(2) of the Act.

2. Section 17(b) of the Act provides that the Commission shall exempt a proposed transaction from Section 17(a) if evidence establishes that: (a) the terms of the proposed transaction are reasonable and fair and do not involve overreaching; (b) the proposed transaction is consistent with the policy of each registered investment company involved; and (c) the proposed transaction is consistent with the general purposes of the Act. Applicant submits that the terms of the proposed in-kind redemption by the Affiliated Shareholder meet the standards set forth in Section 17(b).

3. Applicant asserts that the terms of the proposed in-kind redemption do not involve overreaching on the part of any person and are reasonable and fair to the Fund, its shareholders and the Affiliated Shareholder. The Affiliated Shareholder will have no choice as to the type of consideration to be received in connection with its redemption request, and neither the Adviser nor the Affiliated Shareholder will have any opportunity to select the specific portfolio securities to be distributed. In addition, the Fund will use an objective, verifiable standard to value any security to be distributed pursuant to the proposed in-kind redemption. In addition, the proposed in-kind redemption is consistent with the investment policies of the Fund, as set forth in its prospectus, which expressly discloses the Fund's ability to redeem shares in-kind. Finally, applicant asserts that the proposed in-kind redemption is consistent with the general purposes of the Act to protect shareholders of investment companies from self-dealing on the part of investment company affiliates to the detriment of other shareholders because the Affiliated Shareholder would not receive any advantage not available to other shareholders if the proposed in-kind redemption is permitted.

Applicant's Conditions

1. Applicant has consented to the following conditions:

a. The protfolio securities of the Fund distributed to the Affiliated Shareholder pursuant to the redemption in-kind (the ''In-Kind Securities'') will be limited to securities that are traded on a public securities market or for which quoted bid prices are available.

b. The In-Kind Securities will be distributed by the Fund on a *pro rate* basis after excluding: (1) Securities which, if distributed, would be required to be register under the Securities Act of 1933; and (2) certain portfolio assets (such as futures and options contracts and repurchase agreements) that, although they may be liquid and marketable, must be traded through the marketplace or with the counterparty to the transaction in order to effect a change in beneficial ownership. Cash will be paid for that portion of the Fund's assets represnted by cash equivalents (such as certificates of deposit, commercail paper, and repurchase agreements) and other assets which are not readily distrutable (including receivables and prepaid expenses), net of all liabilities (including accounts payable.) In addition, the Fund will distribute cash in lieu of securities held in its portfolio not amounting to round lots (or which would not amount to round lots if included in the in-kind distridution), fractional shares, and accruals on such securities.

c. The In-Kind Securities distributed to the Affiliated Shareholder will be

valued in the same manner as they would be valued for purposes of computing the Fund's net asset value, which, in the case of securities traded on a public securities market for which quotations are avaialble, is their last reported sales price on the exhange on which the securities are primarily traded or at the last sales price on the national securities market, or, if the securities are not listed on an exchange or the national securities market or if there is no such reported price, the average of the most recent bid and asked prices (or, if no asked price is available, the last quoted bid price).

2. The Fund will maintain and preserve for a period of not less than six years from the end of the fiscal year in which the proposed in-kind redemption occurs the first two years in an easily security distributed, the terms of the distribution, and the information or materials upon which the valuation was made.

Conclusion

For the reasons summarized above, Applicant assets that the requested exemption is appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of the Act.

For the Commission, by the Division of Investment Management, pursuant to delegated authority.

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 98–31443 Filed 11–24–98; 8:45 am]

BILLING CODE 8010–01–M

SECURITIES AND EXCHANGE COMMISSION

[Investment Company Act Release No. 23541; 812–11336]

SunAmerica Asset Management Corp., et al.; Notice of Aapplication

November 19, 1998.

AGENCY: Securities and Exchange Commission (''SEC'').

ACTION: Notice of application for exemption under Section 6(c) of the Investment Company Act of 1940 (the ''Act'') from Section 15(a) of the Act.

SUMMARY OF APPLICATION: The requested order would permit the implementation, without prior shareholder approval, of new investment advisory and sub-advisory agreements (the ''New Agreements'') for a period of not more than 120 days beginning on the later of the date on which the acquisition by American International Group (''AIG'') of SunAmerica Inc. (''SunAmerica'') is consummated or the date on which the requested order is issued and continuing through the date the New Agreements are approved or disapproved by the shareholders (but in no event later than April 30, 1999) (''Interim Period''). The order would also permit payment of all fees earned under the New Agreements during the Interim Period following shareholder approval.

APPLICANTS: SunAmerica Asset Management Corp. (''Adviser''), SunAmerica Series Trust, Anchor Series Trust, Seasons Series Trust, Style Select Series, Inc., SunAmerica Equity Funds, SunAmerica Income Funds, SunAmerica Money Market Funds, Inc. (each a ''Fund'', collectively, the ''Funds''), each on behalf of its separate portfolios (each a ''Portfolio'', collectively the ''Portfolios'').

FILING DATES: The application was filed on October 2, 1998, and amended on November 9, 1998, and November 18, 1998.

HEARING OR NOTIFICATION OF HEARING: An order granting the application will be issued unless the SEC orders a hearing. Interested persons may request a hearing by writing to the SEC's Secretary and serving applicants with a copy of the request, personally or by mail. Hearing requests should be received by the SEC by 5:30 p.m. on December 14, 1998, and should be accompanied by proof of service on applicants in the form of an affidavit or, for lawyers, a certificate of service. Hearing requests should state the nature of the writer's interest, the reason for the request, and the issues contested. Persons who wish to be notified of a hearing may request notification by writing to the SEC's Secretary.

ADDRESSES: Secretary, SEC, 450 Fifth Street, NW, Washington, DC 20549. Applicants, The SunAmerica Center, 733 Third Avenue, New York, New York 10017.

FOR FURTHER INFORMATION CONTACT: Bruce R. MacNeil, Staff Attorney, at (202) 942–0634, or Edward P. Macdonald, Branch Chief, at (202) 942–0564 (Division of Investment Management, Office of Investment Company Regulation).

SUPPLEMENTARY INFORMATION: The following is a summary of the application. The complete application may be obtained for a fee at the SEC's Public Reference Branch, 450 Fifth Street, NW, Washington, DC 20549 (tel. no. 202–942–8090).

Applicants' Representations

1. Each Fund is an open-end management investment company registered under the Act. SunAmerica Series Trust is comprised of twenty-five Portfolios,[1] Anchor Series Trust is comprised of twelve Portfolios,[2] Style Select Series, Inc. is comprised of nine Portfolios, Seasons Series Trust and SunAmerica Equity Funds each are comprised of six Portfolios, SunAmerica Income Funds is comprised of five Portfolios, and SunAmerica Money Market Funds, Inc. is comprised of one Portfolio. SunAmerica Money Market Funds and Style Select Series, Inc. are organized as Maryland corporations. All other Funds are organized as Massachusetts business trusts.

2. The Adviser, an indirect wholly-owned subsidiary of SunAmerica, is registered under the Investment Advisers Act of 1940 (''Advisers Act''). The Adviser manages the assets of each Fund pursuant to an investment advisory contract between each Fund, on behalf of each of its Portfolios, and the Adviser (''Existing Management Agreements'').

3. Certain Portfolios of SunAmerica Series Trust, Anchor Series Trust, Seasons Series Trust, and Style Select Series, Inc. are subadvised by one or more investment advisers registered under the Advisers Act (each a ''Sub-Adviser'', collectively, the ''Sub-Advisers''). The Sub-Advisers serve pursuant to separate agreements (the ''Existing Sub-Advisory Agreements'').

4. On August 19, 1998, SunAmerica and AIG entered into an agreement pursuant to which SunAmerica will merge with and into AIG, with AIG as the surviving entity (''Transaction''). As a result of the consummation of the Transaction, the Adviser will become a wholly-owned subsidiary of AIG. The Transaction is expected to be consummated on or about December 15, 1998 (''Closing Date''). Applicants state that the Transaction will result in an assignment, and thus automatic termination, of the Existing Advisory Agreements and the Existing Sub-Advisory Agreements.

5. Applicant's request an exemption to permit (a) the implementation during the Interim Period, prior to obtaining shareholder approval, of the New Agreements between the Funds and the Adviser and Sub-Advisers, and (b) the Adviser and Sub-Advisers to receive

[1] Three of the SunAmerica Series Trust Portfolios, the Equity Income Portfolio, the Equity Index Portfolio, and the Small Company Value Portfolio are newly organized and have not yet commenced offering shares to the public. Applicants do not seek relief with respect to these Portfolios.

[2] One Portfolio of Anchor Series Trust, the Target '98 Portfolio, was liquidated as of November 15, 1998. Applicants do not seek relief with respect to this Portfolio.

from each Fund, upon approval of the applicable Portfolio's shareholders, any and all fees payable under the New Agreements during the Interim Period. The requested exemption would cover the Interim Period of not more than 120 days beginning on the later of the Closing Date or the date the requested order is issued and continuing, with respect to each Portfolio, through the date the New Agreements are approved or disapproved by the shareholders of the Portfolio (but in no event later than April 30, 1999).[3] The New Agreements will contain terms and conditions identical to those of the Existing Advisory Agreements and Existing Sub-Advisory Agreements, except for the effective and termination dates and escrow provisions described below.

6. On October 15, 1998 and October 20, 1998 the boards of directors or trustees of the Funds (the ''Boards''), including a majority of the directors who are not ''interested persons'' within the meaning of section 2(a)(19) of the Act (the ''Independent Board Members''), voted in accordance with section 15(c) of the Act to approve the New Agreements and to submit them to the Funds' shareholders. The shareholders meetings are scheduled to be held on or about December 30, 1998.

7. Applicants propose to enter into an escrow arrangement with an unaffiliated escrow agent. The fees earned by the Adviser and Sub-Advisers during the Interim Period under the New Agreements would be paid into an interest-bearing escrow account. The amounts in the escrow account with respect to a Portfolio (including any interest earned) will be paid (a) to the Adviser and Sub-Advisers, if any, only if shareholders of the Portfolio approve the applicable New Agreements or (b) to the Portfolio if the Interim Period has ended and shareholders have not approved the applicable New Agreements. Before any such payment is made, the Board of the relevant Fund will be notified.

[3] Applicants state that if the Closing Date precedes the issuance of the requested order, the Adviser, and if applicable the Subadvisers, will serve after the Closing Date and prior to the issuance of the order in a manner consistent with their fiduciary duty to provide investment advisory services to the Portfolios even though approval of the New Agreements has not been secured from the Portfolios' respective shareholders. Applicants also state that the Adviser, and if applicable the Subadviser, will be entitled to receive from each Portfolio with respect to the period from the Closing Date until the issuance of the order no more than the actual out-of-pocket cost to the Adviser, and if applicable the Subadvisers, for providing investment advisory services to the Portfolios.

Applicant's Legal Analysis

1. Section 15(a) of the Act provides, in pertinent part, that it shall be unlawful for any person to serve or act as investment adviser of a registered investment company, except pursuant to a written contract that has been approved by the vote of a majority of the outstanding voting securities of the investment company. Section 15(a) further requires that the written contract provide for automatic termination in the event of its assignment. Section 2(a)(4) of the Act defines ''assignment'' to include any direct or indirect transfer of a controlling block of the assignor's outstanding voting securities by a security holder of the assignor. Applicants state that the Transaction will result in an ''assignment'' of the Existing Advisory Agreements and Existing Sub-Advisory Agreements, and that the Agreements will terminate by their terms and in accordance with the Act.

2. Rule 15a–4 under the Act provides, in pertinent part, that if an investment advisory contract with an investment company is terminated, the adviser may continue to serve for up to 120 days under a written contract that has not been approved by the investment company's shareholders, provided that: (a) the new contract is approved by the board of directors (including a majority of the non-interested directors); (b) the compensation to be paid under the new contract does not exceed the compensation which would have been paid under the contract most recently approved by shareholders of the investment company; and (c) neither the adviser nor any controlling person of the adviser ''directly or indirectly receives money or other benefit'' in connection with the transaction. Applicants state that they may not rely on rule 15a–4 because of the benefits arising to SunAmerica, the Adviser's parent, in connection with the Transaction.

3. Section 6(c) provides that the SEC may exempt any person, security, or transaction from any provision of the Act, if and to the extent that the exemption is necessary or appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policies and provisions of the Act.

4. Applicants state that the requested relief satisfies this standard. Applicants assert that the structure and timing of the Transaction were determined by AIG and SunAmerica in response to a number of factors beyond the scope of the Act and substantially unrelated to the Funds. Applicants further assert that the requested relief would permit continuity of investment management for the Funds following the Transaction. Applicants state that the Funds should receive, during the Interim Period, the same advisory services, provided in the same manner, at the same fee level, by substantially the same personnel, as they received prior to the Transaction. Applicants state that if the personnel providing material services pursuant to the New Agreements materially change, the Adviser will apprise and consult with the applicable Board to ensure that the Directors (including a majority of the Independent Board Members) are satisfied that the services provided by the Adviser and Sub-Advisers, if any, will not be diminished in scope or quality.

5. Applicants submit that to deprive the Adviser and Sub-Advisers of fees earned during the Interim Period would be an unduly harsh result and unreasonable penalty. Applicants also state that such fees will be released to the Adviser and Sub-Advisers only after shareholder approval of the New Agreements.

Applicants' Conditions

Applicants agree that any order of the SEC granting the requested relief will be subject to the following conditions:

1. Each New Agreement that is in effect during the Interim Period will have substantially the same terms and conditions as the corresponding Existing Management Agreement and Existing Sub-Advisory Agreement, except for their respective effective and termination dates and escrow provisions.

2. Fees earned by the Advisers and the Sub-Advisers in respect of the New Agreements during the Interim Period will be maintained in an interest-bearing escrow account, and amounts in the account (including interest earned on such paid fees) will be paid (a) to the Adviser and Sub-Advisers in accordance with the New Agreements, only after the requisite shareholder approvals are obtained, or (b) to the respective Portfolio, in the absence of such approvals with respect to such Portfolio.

3. Each Fund will convene a meeting of the shareholders to vote on approval of the applicable New Agreement on or before the 120th day following the termination of the Existing Management Agreements and Existing Sub-Advisory Agreements (but in no event later than April 30, 1999).

4. Either AIG or the Adviser will bear the costs of preparing and filing this application and the costs relating to the solicitation of shareholder approval of

the Portfolios necessitated by the Transaction.

5. The Adviser will, and will cause the Sub-Advisers to, take all appropriate steps so that the scope and quality of the advisory and other services provided to the Portfolios during the Interim Period will be at least equivalent, in the judgment of each Board, including a majority of the Independent Board Members, to the scope and quality of service previously provided. If personnel providing material services during the Interim Period change materially, the Adviser will apprise and consult with the appropriate Board to assure that the Board, including a majority of the Independent Board Members, are satisfied that the services provided will not be diminished in scope or quality.

For the SEC, by the Division of Investment Management, under delegated authority.

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 98–31442 Filed 11–24–98; 8:45 am]

BILLING CODE 8010–01–M

SOCIAL SECURITY ADMINISTRATION

Agency Information Collection Activities: Proposed Collection Requests

This notice lists information collection packages that will require submission to the Office of Management and Budget (OMB), in compliance with P.L. 104–13 effective October 1, 1995, The Paperwork Reduction Act of 1995. The information collection listed below is a proposed new collection requiring OMB approval:

Authorization to Obtain Earnings Data from the Social Security Administration—0960–NEW. SSA collects this information when a wage earner or a third party requests detailed earnings information pertaining to the wage earner from the Social Security Administration. The information provided on form SSA–581 is used by SSA to verify the authorization to access earnings record data and to produce an itemized statement for release to the third party named on the form. The information is provided by the wage earner and/or the third party.

Number of Respondents: 60,000.

Frequency of Response: 1.

Average Burden Per Response: 2 minutes.

Estimated Annual Burden: 2,000 hours.

Written comments and recommendations regarding the information collection(s) should be sent within 60 days from the date of this publication, directly to the SSA Reports Clearance Officer at the following address: Social Security Administration, DCFAM, Attn: Frederick W. Brickenkamp, 6401 Security Blvd., 1–A–21 Operations Bldg., Baltimore, MD 21235.

In addition to your comments on the accuracy of the agency's burden estimate, we are soliciting comments on the need for the information; its practical utility; ways to enhance its quality, utility and clarity; and on ways to minimize burden on respondents, including the use of automated collection techniques or other forms of information technology.

To receive a copy of any of the forms, call the SSA Reports Clearance Officer on (410) 965–4145 or write to him at the address listed above.

Dated: November 18, 1998.

Frederick W. Brickenkamp,

Reports Clearance Officer, Social Security Administration.

[FR Doc. 98–31429 Filed 11–24–98; 8:45 am]

BILLING CODE 4190–29–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

RTCA, Inc.; Government/Industry Free Flight Steering Committee

Pursuant to section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92–463, 5 U.S.C., Appendix 2), notice is hereby given for an RTCA Government/Industry Free Flight Steering Committee meeting to be held December 10, 1998, starting at 1:00 p.m. The meeting will be held at the Federal Aviation Administration, 800 Independence Avenue, SW., Washington, DC, 20591, in the Bessie Coleman Conference Center, Room 2AB.

The agenda will include: (1) Welcome and Opening Remarks; (2) Review Summary of the Previous Meeting; (3) FAA Report on (a) Controller Pilot Data Link Communications Human Factors Roadmap and (b) Safe Flight 21; (4) Report and Recommendations from the Free Flight Select Committee; (5) Progress Report on the GPS/WAAS Sole Means Risk Assessment; (6) Other Business; (7) Date and Location of Next Meeting; (8) Closing Remarks.

Attendance is open to the interested public but limited to space availability. With the approval of the co-chairmen, members of the public may present oral statements at the meeting. Persons wishing to present statements or obtain information should contact the RTCA, Inc., at (202) 833–9339 (phone), (202) 833–9434 (facsimile), or dclarke@rtca.org (e-mail). Members of the public may present a written statement at any time.

Issued in Washington, DC, on November 17, 1998.

Janice L. Peters,

Designated Official.

[FR Doc. 98–31533 Filed 11–24–98; 8:45 am]

BILLING CODE 4910–13–M

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Public Hearing To Receive Public Comments Concerning the Implementation of the Noise Abatement Measures at the Indianapolis International Airport

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of Public Hearing.

SUMMARY: The Federal Aviation Administration (FAA) is issuing this notice to advise the public that a Public Hearing will be held concerning the environmental impact of implementing the Noise Abatement Measures described in the Draft Supplemental Environmental Impact Statement (DSEIS) for Indianapolis International Airport. This hearing is being held pursuant to the requirements of the National Environmental Policy Act of 1969 (Pub. L. 91–190) and other laws as applicable.

DATES: January 5, 1999, 5:00 p.m.–8:00 p.m.

ADDRESSES: Holiday Inn Select—Airport, 2501 S. High School Road, Indianapolis, IN.

POINT OF CONTACT: Mr. Wally Welter, Environmental Specialist, FAA Great Lakes Region, Air Traffic Division, AGL–520.V, 2300 East Devon Avenue, Des Plaines, IL 60018.

SUPPLEMENTARY INFORMATION: A Draft Supplemental Environmental Impact Statement (DSEIS) has been prepared and will be available for public review and comment. This document will be available 30 days prior to the hearing at the following locations:

(1) Federal Aviation Administration, Air Traffic Division Office, 2300 East Devon Avenue, Des Plaines, IL 60018,

(2) Indianapolis Airport Authority, South High School Road, Indianapolis International Airport, Indianapolis, IN,

(3) Decatur Township Branch Library, 5301 Kentucky Avenue, Indianapolis, IN 46241,

(4) Marion County Public Library, 40 East St. Clair, Indianapolis, IN 46204,

(5) Mooresville Public Library, 220 W. Harrison Street, Mooresville, IN 46158,

(6) Plainfield Public Library, 1120 Stafford Road, Plainfield, IN 46208,

(7) Wayne Township Branch Library, 198 South Girls School Road, Indianapolis, IN 46214.

The purpose of the hearing is to consider the social, economic, and environmental effects of the proposed actions. During the hearing the public will be given an opportunity to present oral and/or written comments for the public record. Additionally, prior to January 8, 1999, written comments may be addressed to Mr. Wally Welter, Environmental Specialist, FAA Great Lakes Region, Air Traffic Division, AGL–520.V, Des Plaines, IL 60018.

Issued in Des Plaines, Illinois, on November 18, 1998.

David B. Johnson,

Assistant Manager, Air Traffic Division.

[FR Doc. 98–31532 Filed 11–24–98; 8:45 am]

BILLING CODE 4910–13–M

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

[Docket No. NHTSA–98–4774]

Decision That Nonconforming 1994–1996 Volkswagen Jetta Passenger Cars are Eligible for Importation

AGENCY: National Highway Traffic Safety Administration (NHTSA), DOT.

ACTION: Notice of decision by NHTSA that nonconforming 1994–1996 Volkswagen Jetta passenger cars are eligible for importation.

SUMMARY: This notice announces the decision by NHTSA that 1994–1996 Volkswagen Jetta passenger cars not originally manufactured to comply with all applicable Federal motor vehicle safety standards are eligible for importation into the United States because they are substantially similar to vehicles originally manufactured for importation into and sale in the United States and certified by their manufacturer as complying with the safety standards (the U.S. certified version of the 1994–1996 Volkswagen Jetta), and they are capable of being readily altered to conform to the standards.

DATES: This decision is effective as of November 25, 1998.

FOR FURTHER INFORMATION CONTACT: George Entwistle, Office of Vehicle Safety Compliance, NHTSA (202–366–5306).

SUPPLEMENTARY INFORMATION:

Background

Under 49 U.S.C. 30141(a)(1)(A), a motor vehicle that was not originally manufactured to conform to all applicable Federal motor vehicle safety standards shall be refused admission into the United States unless NHTSA has decided that the motor vehicle is substantially similar to a motor vehicle originally manufactured for importation into and sale in the United States, certified under 49 U.S.C. 30115, and of the same model year as the model of the motor vehicle to be compared, and is capable of being readily altered to conform to all applicable Federal motor vehicle safety standards.

Petitions for eligibility decisions may be submitted by either manufacturers or importers who have registered with NHTSA pursuant to 49 CFR Part 592. As specified in 49 CFR 593.7, NHTSA publishes notice in the **Federal Register** of each petition that it receives, and affords interested persons an opportunity to comment on the petition. At the close of the comment period, NHTSA decides, on the basis of the petition and any comments that it has received, whether the vehicle is eligible for importation. The agency then publishes this decision in the **Federal Register**.

G&K Automotive Conversion, Inc. of Santa Ana, California (''G.K.'') (Registered Importer 90–007) petitioned NHTSA to decide whether 1993–1997 Volkswagen Jetta passenger cars manufactured in Mexico for the Mexican market are eligible for importation into the United States. NHTSA published notice of the petition under Docket No. NHTSA 97–3290 on January 12, 1998 (63 FR 1880) to afford an opportunity for public comment. The reader is referred to that notice for a thorough description of the petition.

One comment was received in response to the notice of the petition, from Volkswagen of America, Inc. (''Volkswagen''), the United States representative of Volkswagenwerke, A.G., the vehicle's manufacturer. In this comment, Volkswagen contended that G&K's description of the modifications that would be necessary to conform the vehicle to applicable standards is incomplete in a number of significant respects.

Specifically, with respect to Standard No. 109, *New Pneumatic Tires,* Volkswagen contended that non-U.S. certified 1993–1997 Volkswagen Jettas may be equipped with tires that have insufficient load ratings once the vehicle is modified through the addition of air bag systems, side impact protection, and other required safety related components.

With respect to Standard Nos. 203 *Impact Protection for the Driver from the Steering Control System* and 208 *Occupant Crash Protection,* Volkswagen noted that the 1993 model U.S. certified Jetta is equipped with automatic seat belts and that all 1994 and later model year versions of the vehicle are equipped with driver's and passenger's side air bags. Volkswagen contended that it is not possible to install air bag systems in non-U.S. certified 1993 Jettas, and that automatic seat belts must therefore be installed in those vehicles using anchorages that conform to all of the requirements of Standard No. 210, *Seat Belt Assembly Anchorages.* Additionally, Volkswagen observed that in order to comply with the unbelted test requirement of Standard Nos. 208, all U.S. certified 1994–1997 Jettas are equipped with knee bar restraints in the instrument panel which are not present on non-U.S. certified versions of the vehicle. Volkswagen noted that the petitioner did not cite the need for the installation of this equipment. Volkswagen also noted that it began to use pretensioners in the seat belts for the front seating positions of U.S. certified Jettas during the 1994 model year, and that the petitioner failed to identify the need to install pretensioner equipped seat belts to conform non-U.S. certified versions of the vehicle to Standard No. 208. Additionally, Volkswagen observed that the seat belts on U.S. certified 1996 Volkswagen Jettas are equipped with convertible locking retractors in order to meet the child restraint lockability requirements of S7.1.1.5 of Standard No. 208. The company asserted that the seat belts in the front and rear outboard seating positions of non-U.S. certified 1996 Jettas would have to be changed if they are not equipped with the same retractors.

Volkswagen disputed the petitioner's contention that non-U.S. certified 1993–1997 Jettas meet Standard No. 214 *Side Impact Protection* in the same manner as their U.S. certified counterparts. The company asserted that beginning with the 1995 model year, it installed additional padding and structural reinforcements in U.S. certified versions of the vehicle to comply with the dynamic side impact requirements of the standard.

Volkswagen further observed that beginning with the 1994 model year, the Jetta was classified as a high theft line vehicle under the Theft Prevention Standard at 49 CFR Part 541. The company noted that in order to obtain an exemption from the parts marking

requirements of the standard, it installed a standard alarm system with a central locking feature that mechanically locks all doors when the key in the front door is turned. Volkswagen observed that non-U.S. certified 1994 Jettas may not have this central locking system, as a result of which those vehicles would not be exempt from the parts marking requirement of the standard, rendering them, in the Company's view, ineligible for importation.

Aside from these specific observations, Volkswagen made two general comments with respect to the petition. In the first of these, the Company questioned whether modifications such as the addition of air bags, safety belts, and side impact protection components can be performed on a used vehicle outside of a production line setting at a level of quality necessary to assure compliance of each vehicle with the Federal motor vehicle safety standards. In addition, the company expressed the belief that NHTSA cannot decide that all model year 1993 through 1997 Jettas are eligible for importation due to significant differences between vehicles within these model years with regard to their compliance with Standard Nos. 208 and 214. Because the modifications necessary to achieve compliance with those standards may differ by model year, Volkswagen contends that NHTSA may not make a single eligibility decision that encompasses all vehicles within the model years specified in the petition.

NHTSA accorded G&K an opportunity to respond to Volkswagen's comments. In its response, G&K notified the agency that it wished to amend its petition to cover only model years 1994–1996. G&K stated with respect to the Standard No. 109 compliance issues raised by Volkswagen that all vehicles imported will be inspected to confirm that they are equipped with tires of the same size and load rating as those furnished on the U.S. certified model, and that the tires will be replaced if necessary to comply with the standard. Addressing the Standard Nos. 203 and 208 compliance issues raised by Volkswagen with regard to 1994 through 1996 model year Jettas, G&K stated that all parts of the automatic restraint system in the U.S. certified version of these vehicles will be installed on existing mounts in non-U.S. certified models. As enumerated by G&K, those components include the dash braces, knee bolsters, wiring harnesses, warning lights, dash pads, air bag assemblies, seat belts in both front outboard seating positions, and control boxes for the seat belts and air bags. In addition, G&K stated that new door panels that will accommodate the electric window motors and central locking systems will be installed.

With regard to the Standard No. 214 compliance issues raised by Volkswagen, G&K stated that doorbars would be installed on non-U.S. certified models and dash braces and door panels will be replaced with U.S. model components to meet the requirements of the standard. After a further communication from Volkswagen identifying additional parts that were necessary to achieve compliance, G&K provided the agency with a complete parts list identifying all components to be installed.

Addressing the Theft Prevention Standard issues raised by Volkswagen, G&K stated that U.S. model central locking and alarm systems will be installed on non-U.S. certified Jettas.

NHTSA believes that G&K's response adequately addresses the comments that Volkswagen has made regarding the petition. NHTSA further notes that the modifications described by G&K, which have been performed with relative ease on thousands of motor vehicles imported over the years, would not preclude non-U.S. certified 1994–1996 Volkswagen Jettas from being found ''capable of being readily altered to comply with applicable motor vehicle safety standards.'' Additionally, NHTSA finds no merit to Volkswagen's contention that the agency lacks authority to make an import eligibility decision covering vehicles within a range of model years when different modifications may have to be made to vehicles within those model years to achieve compliance with certain of the standards. Accordingly, NHTSA has decided to grant the petition.

Vehicle Eligibility Number for Subject Vehicles

The importer of a vehicle admissible under any final decision must indicate on the form HS–7 accompanying entry the appropriate vehicle eligibility number indicating that the vehicle is eligible for entry. VSP–274 is the vehicle eligibility number assigned to vehicles admissible under this notice of final decision.

Final Decision

Accordingly, on the basis of the foregoing, NHTSA hereby decides that 1994–1996 Volkswagen Jetta passenger cars not originally manufactured to comply with all applicable Federal motor vehicle safety standards are substantially similar to 1994–1996 Volkswagen Jetta passenger cars originally manufactured for importation into and sale in the United States and certified under 49 U.S.C. 30115, and are capable of being readily altered to conform to all applicable Federal motor vehicle safety standards.

Authority: 49 U.S.C. 30141(a)(1)(A) and (b)(1); 49 CFR 593.8; delegations of authority at 49 CFR 1.50 and 501.8.

Issued on: November 19, 1998.

Marilynne Jacobs,

Director, Office of Vehicle Safety Compliance.

[FR Doc. 98–31534 Filed 11–24–98; 8:45 am]

BILLING CODE 4910–59–P

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

[Docket No. NHTSA 98–4275; Notice 2]

American Honda Motor Company, Inc.; Grant of Renewal of Temporary Exemption From Federal Motor Vehicle Safety Standard No. 122

This notice grants the application of American Honda Motor Co., Inc., of Torrance, California (''Honda''), for a one-year renewal of its temporary exemption from the fade and water recovery requirements of Federal Motor Vehicle Safety Standard No. 122, *Motorcycle Brake Systems.* The basis of the application for renewal was that an exemption would make easier the development or field evaluation of a new motor vehicle safety feature providing a safety level at least equal to the safety level of the standard.

Notice of receipt of an application was published on August 10, 1998, and an opportunity afforded for comment (63 FR 42661).

The agency previously granted Honda NHTSA Temporary Exemption No. 97–1, expiring September 1, 1998, from the following requirements of 49 CFR 571.122 Standard No. 122 *Motorcycle Brake Systems*: S5.4.1 Baseline check—minimum and maximum pedal forces, S5.4.2 Fade, S5.4.3 Fade recovery, S5.7.2 Water recovery test, and S6.10 Brake actuation forces (62 FR 52372, October 7, 1997). This exemption covered Honda's 1998 CBR1100XX motorcycle. Honda has applied for an extension of its exemption to September 1, 1999, to cover the 1999 model CBR1100XX motorcycle, and ''all unsold 1998 model year'' CBR1100XX vehicles. However, it was unnecessary for Honda to have included unsold vehicles in its request. NHTSA's temporary exemptions apply as of the date of manufacture and certification of an exempted vehicle, and continue to cover that vehicle even if it is sold after the expiration date of the exemption.

Honda's original and renewed request concerned exemption ''from the requirement of the minimum hand-lever force of five pounds in the base line check for the fade and water recovery tests.'' It is evaluating the marketability of an ''improved'' motorcycle brake system setting which is currently applied to the model sold in Europe. The difference in setting is limited to a softer master cylinder return spring in the European version. Using the softer spring results in a ''more predictable (linear) feeling during initial brake lever application.'' Although ''the change allows a more predictable rise in brake gain, the on-set of braking occurs at lever forces slightly below the five pound minimum'' specified in Standard No. 122. Honda considers that motorcycle brake systems have continued to evolve and improve since Standard No. 122 was adopted in 1972, and that one area of improvement is brake lever force which has gradually been reduced. However, the five-pound minimum specification ''is preventing further development and improvement'' of brake system characteristics. This limit, when applied to the CBR1100XX ''results in an imprecise feeling when the rider applies low-level front brake lever inputs.'' On November 5, 1997, Honda submitted a petition for rulemaking to amend Standard No. 122 to eliminate the minimum brake actuation force requirement. As of June 19, 1998, when Honda applied for a renewal of its application, NHTSA had not yet decided whether to grant the petition. The agency notes that it anticipates granting the petition and commencing a rulemaking proceeding this fall.

The 1999 model of the CBR1100XX ''will be nearly identical'' to the 1998 model ''with two notable exceptions: the engine air/fuel delivery system will change from carburetors to electronic fuel injection, and the brake system will also have a minor change.'' This brake system change involves characteristics of the pressure control valve, but is ''limited to high input force range, and it will not affect the baseline check result nor other test results in FMVSS 122.''

The CBR1100XX is equipped with Honda's Linked Brake System (LBS) which is designed to engage both front and rear brakes when either the front brake lever or the rear brake pedal is used. The LBS differs from other integrated systems in that it allows the rider to choose which wheel gets the majority of braking force, depending on which brake control the rider uses.

According to Honda, the overall braking performance remains unchanged from a conforming motorcycle. Exempted CBR1100XX vehicles meet ''the stopping distance requirement but at lever forces slightly below the minimum.''

Honda argued in 1997 that granting an exemption would be in the public interest and consistent with objectives of traffic safety because it

> * * * should improve a rider's ability to precisely modulate the brake force at low-level brake lever input forces. Improving the predictability, even at very low-level brake lever input, increases the rider's confidence in the motorcycle's brake system.

This year Honda repeats those arguments and submits that a renewal allows further refinement and development of the LBS. It believes that the LBS has ''many desirable characteristics—especially during emergency braking—that could reduce the number of rear brake lock-up crashes.'' Honda has produced about 1200 motorcycles under Exemption 97–1, and anticipates that it will produce about 1,500 vehicles under a renewal.

No comments were received on the application.

The changes that Honda intends to make to the braking system of its 1999 model do not affect the reasoning upon which the agency's findings were based in granting the original exemption for its 1998 motorcycle, and the agency's rationale is hereby incorporated by reference (62 FR 52372, October 7, 1997). A renewal should allow further refinement and development of the LBS.

In consideration of the foregoing, it is hereby found that an exemption would make easier the development or field evaluation of a new motor vehicle safety feature providing a safety level at least equal to the safety level of Standard No. 122. It is also hereby found that the renewal of the temporary exemption is in the public interest and consistent with the objectives of motor vehicle safety. Accordingly, NHTSA Temporary Exemption No. 97–1 is extended to, and will expire on, September 1, 1999.

(49 U.S.C. 30113; delegation of authority at 49 CFR 1.50.)

Issued on November 18, 1998.

Ricardo Martinez,

Administrator.

[FR Doc. 98–31523 Filed 11–24–98; 8:45 am]

BILLING CODE 4910–59–U

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

Annual List of Defect and Noncompliance Decisions Affecting Nonconforming Imported Vehicles

AGENCY: National Highway Traffic Safety Administration (NHTSA), DOT.

ACTION: Annual list of defect and noncompliance decisions affecting nonconforming imported vehicles.

SUMMARY: This document contains a list of vehicles recalled by their manufacturers during Fiscal Year 1998 (October 1, 1997 through September 30, 1998) to correct a safety-related defect or a noncompliance with an applicable Federal motor vehicle safety standard (FMVSS). The listed vehicles are those that have been decided by NHTSA to be substantially similar to vehicles imported into the United States that were not originally manufactured to conform to all applicable FMVSS. The registered importers of those nonconforming vehicles are obligated to provide their owners with notification of, and a remedy for, the defects or noncompliances for which the listed vehicles were recalled.

FOR FURTHER INFORMATION CONTACT: George Entwistle, Office of Vehicle Safety Compliance, NHTSA (202–366–5306).

SUPPLEMENTARY INFORMATION: Under 49 U.S.C. 30141(a)(1)(A), a motor vehicle that was not originally manufactured to conform to all applicable Federal motor vehicle safety standards (FMVSS) shall be refused admission into the United States unless NHTSA has decided that the motor vehicle is substantially similar to a motor vehicle of the same model year that was originally manufactured for importation into and sale in the United States and certified under 49 U.S.C. 30115. Once NHTSA decides that a nonconforming vehicle is eligible for importation, it may be imported by a person who is registered with the agency pursuant to 49 U.S.C. 30141(c) (''registered importer''), who will undertake to bring the vehicle into conformity, or by a person who has a contract with a registered importer to perform this work. Before releasing the vehicle for use on public streets, roads, or highways, the registered importer must certify to NHTSA, pursuant to 49 U.S.C. 30146(a), that the vehicle has been brought into conformity with all applicable FMVSS.

If a vehicle originally manufactured and certified for importation into and sale in the United States is decided to

contain a defect related to motor vehicle safety, or not to comply with an applicable FMVSS, 49 U.S.C. 30147(a)(1)(A) provides that the same defect or noncompliance is deemed to exist in any nonconforming vehicle that NHTSA has decided to be substantially similar and for which a registered importer has submitted a certificate of conformity to the agency. Under 49 U.S.C. 30147(a)(1)(B), the registered importer is deemed to be the nonconforming vehicle's manufacturer for the purpose of providing notification of, and a remedy for, the defect or noncompliance.

To apprise registered importers of the vehicles for which they must conduct a notification and remedy (i.e., ''recall'') campaign, and to apprise the owners of those vehicles of the need for such action, 49 U.S.C. 30147(a)(2) requires NHTSA to publish in the **Federal Register** notice of any defect or noncompliance decision that is made with respect to substantially similar U.S. certified vehicles. Annex A contains a list of all such decisions that were made during Fiscal Year 1998, which ran from October 1, 1997 through September 30, 1998. The list identifies the Recall Number that was assigned to the recall by NHTSA after the agency received the manufacturer's notification of the defect or noncompliance under 49 CFR Part 573. After September 30, 1999, NHTSA will publish a comparable list of all defect and noncompliance decisions affecting nonconforming imported vehicles that are made during the current fiscal year.

Authority: 49 U.S.C. 30147(a)(2); 49 CFR 593.8; delegations of authority at 49 CFR 1.50 and 501.8.

Issued on: November 20, 1998.

Marilynne Jacobs,

Director, Office of Vehicle Safety Compliance.

ANNEX A—FISCAL YEAR 98 RECALLS AFFECTING VEHICLES IMPORTED BY REGISTERED IMPORTERS

Make	Model	Year	Recall No.
AUDI	A4	1996	97V175000.
BENTLEY	AZURE	1996	97V182000.
BLUE BIRD	TC2000	1990	97V197000.
BLUE BIRD	TC2000	1990	97V197002.
BMW	325I	1992	98V178000.
BMW	325IS	1994	98V178000.
BMW	525I	1989	98V178000.
BMW	525I	1990	98V178000.
BMW	525I	1991	98V178000.
BMW	525I	1994	98V178000.
BMW	540I	1994	98V178000.
BMW	540I	1995	98V178000.
BMW	850I	1991	98V178000.
BUICK	CENTURY	1998	98V102000.
BUICK	REGAL	1997	97V223000.
BUICK	REGAL	1997	98V102000.
BUICK	REGAL	1998	98V102000.
BUICK	ROADMASTER	1992	97V217000.
CADILLAC	DEVILLE	1995	98V115000.
CADILLAC	DEVILLE	1998	97V232000.
CADILLAC	DEVILLE	1998	97V183000.
CADILLAC	ELDORADO	1995	98V115000.
CADILLAC	SEVILLE	1995	98V115000.
CHEVROLET	CAPRICE	1992	97V217000.
CHEVROLET	CAVALIER	1996	98V027000.
CHEVROLET	CAVALIER	1996	98V146000.
CHEVROLET	CAVALIER	1997	98V032000.
CHEVROLET	CAVALIER	1997	98V146000.
CHEVROLET	CAVALIER	1998	97V219000.
CHRYSLER	CIRRUS	1995	97V201000.
CHRYSLER	CIRRUS	1995	98V063000.
CHRYSLER	CIRRUS	1995	98V183000.
CHRYSLER	CIRRUS	1996	97V201000.
CHRYSLER	CIRRUS	1996	98V183000.
CHRYSLER	CIRRUS	1997	97V201000.
CHRYSLER	CIRRUS	1997	98V183000.
CHRYSLER	CONCORDE	1993	98V130000.
CHRYSLER	CONCORDE	1993	98V184000.
CHRYSLER	CONCORDE	1994	98V184000.
CHRYSLER	CONCORDE	1995	98V184000.
CHRYSLER	CONCORDE	1996	98V184000.
CHRYSLER	CONCORDE	1997	98V184000.
CHRYSLER	LHS	1994	98V184000.
CHRYSLER	LHS	1995	98V184000.
CHRYSLER	LHS	1996	98V184000.
CHRYSLER	LHS	1997	98V184000.
CHRYSLER	SEBRING	1995	97V201000.
CHRYSLER	SEBRING	1996	97V201000.
CHRYSLER	SEBRING	1996	98V183000.
CHRYSLER	SEBRING	1997	97V201000.
CHRYSLER	SEBRING	1997	98V183000.
DODGE	INTREPID	1995	98V184000.
DODGE	INTREPID	1996	98V184000.
DODGE	INTREPID	1997	98V184000.

ANNEX A—FISCAL YEAR 98 RECALLS AFFECTING VEHICLES IMPORTED BY REGISTERED IMPORTERS—Continued

Make	Model	Year	Recall No.
DODGE	INTREPID	1998	98V049000.
DODGE	NEON	1995	97V169000.
DODGE	STRATUS	1995	97V201000.
DODGE	STRATUS	1995	98V183000.
DODGE	STRATUS	1996	97V201000.
DODGE	STRATUS	1996	98V183000.
DODGE	STRATUS	1997	97V201000.
DODGE	STRATUS	1997	98V183000.
DODGE	STRATUS	1998	98V183000.
EAGLE	TALON	1994	98V069000.
EAGLE	TALON	1994	98V069002.
EAGLE	VISION	1993	98V130000.
EAGLE	VISION	1993	98V184000.
EAGLE	VISION	1994	98V184000.
EAGLE	VISION	1995	98V184000.
EAGLE	VISION	1996	98V184000.
EAGLE	VISION	1997	98V184000.
FORD	CONTOUR	1995	97V225000.
FORD	CONTOUR	1995	98V233000.
FORD	CONTOUR	1996	97V233000.
FORD	CONTOUR	1996	97V225000.
FORD	CONTOUR	1996	98V233000.
FORD	CONTOUR	1997	97V203000.
FORD	CONTOUR	1997	98V233000.
FORD	CONTOUR	1998	98V028000.
FORD	CONTOUR	1998	98V028001.
FORD	CONTOUR	1998	98V233000.
FORD	MUSTANG	1994	97V180000.
FORD	MUSTANG	1995	97V180000.
FORD	MUSTANG	1996	97V180000.
FORD	MUSTANG	1998	97V216000.
FORD	TAURUS	1993	98V009000.
FORD	TAURUS	1993	98V094000.
FORD	TAURUS	1994	98V009000.
FORD	TAURUS	1997	98V028002.
FORD	TAURUS	1998	98V028002.
FREIGHTLINER	FREIGHTLINER	1997	98V003000.
GMC	JIMMY	1998	98V053000.
GMC	JIMMY	1998	98V097000.
GMC	S15	1995	98V150000.
GMC	S15	1996	98V150000.
GMC	SAFARI	1998	98V165000.
GMC	SONOMA	1998	98V097000.
GMC	SUBURBAN	1998	98V033000.
GMC	YUKON	1998	98V033000.
HARLEY DAVIDSON	FLHT	1998	98V158000.
HARLEY DAVIDSON	FLHTC	1995	98V158000.
HARLEY DAVIDSON	FLHTC	1996	98V158000.
HARLEY DAVIDSON	FLHTC	1997	98V158000.
HARLEY DAVIDSON	FLHTC	1998	98V158000.
HARLEY DAVIDSON	FLHTCI	1996	98V158000.
HARLEY DAVIDSON	FLHTCI	1997	98V158000.
HARLEY DAVIDSON	FLHTCI	1998	98V158000.
HARLEY DAVIDSON	FLHTCU	1996	98V158000.
HARLEY DAVIDSON	FLHTCU	1997	98V158000.
HARLEY DAVIDSON	FLHTCU	1998	98V158000.
HARLEY DAVIDSON	FLHTCUI	1997	98V158000.
HARLEY DAVIDSON	FLHTCUI	1998	98V158000.
HONDA	ACCORD	1995	98V231000.
HONDA	ACCORD	1996	98V231000.
HONDA	ACCORD	1997	98V231000.
HONDA	ACCORD	1998	98V018000.
HONDA	CIVIC	1998	97V193000.
JEEP	CHEROKEE	1990	98V005000.
JEEP	CHEROKEE	1991	98V005000.
JEEP	CHEROKEE	1997	97V194000.
JEEP	CHEROKEE	1997	97V194001.
JEEP	CHEROKEE	1998	98V023000.
JEEP	CHEROKEE	1997	97V194002.
JEEP	GRAND CHEROKEE	1993	98V005000.
JEEP	GRAND CHEROKEE	1996	98V006000.
JEEP	GRAND CHEROKEE	1997	98V194000.

ANNEX A—FISCAL YEAR 98 RECALLS AFFECTING VEHICLES IMPORTED BY REGISTERED IMPORTERS—Continued

Make	Model	Year	Recall No.
JEEP	GRAND CHEROKEE	1997	97V194001.
JEEP	GRAND CHEROKEE	1997	97V194002.
JEEP	GRAND CHEROKEE	1998	98V023000.
JEEP	WRANGLER	1990	98V005000.
JEEP	WRANGLER	1991	98V005000.
JEEP	WRANGLER	1997	97V194003.
JEEP	WRANGLER	1997	98V046000.
KENWORTH	T2000	1996	98V129000.
KENWORTH	T2000	1997	98V129000.
KENWORTH	T800	1996	97V196003.
KENWORTH	T800	1997	97V196003.
KENWORTH	W900	1997	97V196003.
LEXUS	LS400	1996	98V016000.
LINCOLN	CONTINENTAL	1990	97I003000.
LINCOLN	CONTINENTAL	1990	97V174000.
LINCOLN	CONTINENTAL	1994	98V009000.
LINCOLN	MARK VIII	1993	98V009000.
MAZDA	626	1997	98V206000.
MAZDA	626	1998	97V228000.
MAZDA	MX6	1997	98V206000.
MERCURY	MYSTIQUE	1995	97V225000.
MERCURY	MYSTIQUE	1995	98V233000.
MERCURY	MYSTIQUE	1996	97V225000.
MERCURY	MYSTIQUE	1996	98V233000.
MERCURY	MYSTIQUE	1997	98V233000.
MERCURY	MYSTIQUE	1998	98V028000.
MERCURY	MYSTIQUE	1998	98V233000.
MERCURY	SABLE	1989	97I003000.
MERCURY	SABLE	1993	98V009000.
MERCURY	SABLE	1993	98V094000.
MERCURY	SABLE	1994	98V009000.
MERCURY	SABLE	1997	98V028002.
MERCURY	SABLE	1998	98V028002.
NAVISTAR	4700	1995	98V119002.
NAVISTAR	4900	1993	98V171000.
OLDSMOBILE	ACHIEVA	1996	98V027000.
PLYMOUTH	BREEZE	1995	97V201000.
PLYMOUTH	BREEZE	1996	97V201000.
PLYMOUTH	BREEZE	1996	98V183000.
PLYMOUTH	BREEZE	1997	97V201000.
PLYMOUTH	BREEZE	1997	98V183000.
PLYMOUTH	BREEZE	1998	98V183000.
PLYMOUTH	NEON	1995	97V169000.
PLYMOUTH	PROWLER	1997	98V047000.
PLYMOUTH	PROWLER	1999	98V104000.
PONTIAC	GRAND AM	1996	98V027000.
PONTIAC	SUNFIRE	1996	98V027000.
PONTIAC	SUNFIRE	1996	98V146000.
PONTIAC	SUNFIRE	1997	98V032000.
PONTIAC	SUNFIRE	1997	98V146000.
PONTIAC	SUNFIRE	1998	97V219000.
PORSCHE	BOXSTER	1997	98V112000.
SAAB	900	1995	98V038000.
TOYOTA	CAMRY	1994	98V155000.
TOYOTA	CAMRY	1997	97V213000.
TOYOTA	SIENNA	1998	97V188000.
VOLKSWAGEN	GTI	1995	98V160000.
VOLKSWAGEN	GTI	1995	98V195000.
VOLKSWAGEN	JETTA	1996	98V160000.
VOLKSWAGEN	NEW BEETLE	1998	98V100000.

[FR Doc. 98–31535 Filed 11–24–98; 8:45 am]
BILLING CODE 4910–59–P

DEPARTMENT OF TRANSPORTATION

Research and Special Programs Administration

[Notice No. 98–10]

Information Collection Activities

AGENCY: Research and Special Programs Administration (RSPA), DOT.

ACTION: Notice and request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, RSPA invites comments on certain information collections pertaining to hazardous materials transportation for which RSPA intends to request renewal from the Office of Management and Budget (OMB).

DATES: Interested persons are invited to submit comments on or before January 25, 1999.

ADDRESSES: Address written comments to the Dockets Unit, Room PL 401, Research and Special Programs Administration, U.S. Department of Transportation, 400 Seventh St., SW, Washington, DC 20590–0001. Comments may also be submitted by e-mail to: rules @ rspa.dot.gov, or faxed to (202) 366–3753. Comments should identify the Notice number (98–10) and the appropriate Office of Management and Budget (OMB) Control Number(s). Mailed written comments should be submitted in two copies. Persons wishing to receive confirmation of receipt of their mailed written comments should include a self-addressed, stamped postcard showing the Notice number. The Dockets Unit is located on the Plaza Level of the Nassif Building at the U.S. Department of Transportation at the above address. Public information may be reviewed between the hours of 9:00 a.m. and 5:00 p.m., Monday through Friday, except Federal holidays. Internet users may access all comments received by the U.S. Department of Transportation by using the Universal Resource Locator (URL) at http://dms.dot.gov. An electronic copy of the document may be downloaded using a modem and suitable communications software from the Government Printing Office's Electronic Bulletin Board Service at (202) 512–1661.

Requests for a copy of an information collection should be directed to Deborah Boothe, Office of Hazardous Materials Standards (DHM–10), Research and Special Programs Administration, Room 8102, 400 Seventh Street, SW, Washington, DC 20590–0001, Telephone (202) 366–8553.

FOR FURTHER INFORMATION CONTACT: Deborah Boothe, Office of Hazardous Materials Standards (DHM–10), Research and Special Programs Administration, Room 8102, 400 Seventh Street, SW, Washington, DC 20590–0001, Telephone (202) 366–8553.

SUPPLEMENTARY INFORMATION: Section 1320.8(d), Title 5, Code of Federal Regulations requires that RSPA provide interested members of the public and affected agencies an opportunity to comment on information collection and recordkeeping requests. This notice identifies information collections that RSPA is submitting to OMB for renewal and extension. These collections are contained in 49 CFR part 110, part 130, and parts 171–180. RSPA has revised burden estimates, where appropriate, to reflect current reporting levels or adjustments based on changes in proposed or final rules published since the information collections were last approved. The following information is provided for each information collection: (1) Title of the information collection, including former title if a change is being made; (2) OMB control number; (3) summary of the information collection activity; (4) description of affected public; (5) estimate of total annual reporting and recordkeeping burden; and (6) frequency of collection. RSPA will request a three-year term of approval for each information collection activity and, when approved by OMB, publish notice of the approval in the **Federal Register**.

RSPA requests comments on the following information collections:

Title: Inspection and Testing of Portable Tanks and Intermediate Bulk Containers.

OMB Control Number: 2137–0018.

Summary: This information collection consolidates provisions for documenting qualifications, inspections, tests and approvals pertaining to the manufacture and use of portable tanks and intermediate bulk containers under various provisions of the Hazardous Materials Regulations (49 CFR Parts 171–180). It is necessary to ascertain whether portable tanks and intermediate bulk containers have been qualified, inspected and retested in accordance with the HMR. The information is used to verify that certain portable tanks and intermediate bulk containers meet required performance standards prior to their being authorized for use and to document periodic requalification and testing to ensure the packagings have not deteriorated due to age or physical abuse to a degree that would render them unsafe for the transportation of hazardous materials. Applicable sections are as follows: § 173.32—retest, retest marking, and record retention for portable tanks; § 173.32a—approval of IM portable tanks; § 173.32b—periodic inspections and testing for IM portable tanks; § 178.245–6—certification markings for DOT–51 portable tanks; § 178.245–7—manufacturer's data report for DOT–51 portable tanks; § 178.255–14—certification markings for DOT–60 portable tanks; § 178.255–15—manufacturer's data report for DOT–60 portable tanks; § 178.270–14—certification marking of IM portable tanks; § 178.801—testing, retesting and recordkeeping for intermediate bulk containers; and § 180.352—periodic retests and inspections for intermediate bulk containers.

Affected Public: Manufacturers and owners of portable tanks and intermediate bulk containers.

Recordkeeping:

Number of Respondents: 314.

Total Annual Responses: 51,220.

Total Annual Burden Hours: 51,340.

Frequency of collection: On occasion.

Title: Testing, Inspection and Marking Requirements for Cylinders.

OMB Control Number: 2137–0022.

Summary: Requirements in § 173.34 for qualification, maintenance and use of cylinders require that cylinders be periodically inspected and retested to ensure continuing compliance with packaging standards. Information collection requirements address registration of retesters and marking of cylinders by retesters with their identification number and retest date following conduct of tests. Records showing the results of inspections and retests must be kept by the cylinder owner or designated agent until expiration of the retest period or until the cylinder is reinspected or retested, whichever occurs first. These requirements are intended to ensure that retesters have the qualifications to perform tests and to identify to cylinder fillers and users that cylinders are qualified for continuing use. Information collection requirements in § 173.303 require that fillers of acetylene cylinders keep, for at least 30 days, a daily record of the representative pressure to which cylinders are filled.

Affected Public: Fillers, owners, users and retesters of reusable cylinders.

Annual Reporting Burden:

Number of Respondents: 139,352.

Total Annual Responses: 153,287.

Total Annual Burden Hours: 168,431.

Frequency: On occasion.

Title: Hazardous Materials Incident Reports.

OMB Control Number: 2137–0039.

Summary: This collection is applicable upon occurrence of incidents as prescribed in §§ 171.15 and 171.16. Basically, a Hazardous Materials Incident Report, DOT Form F5800.1, must be completed by a carrier of hazardous materials when a hazardous material transportation incident occurs, such as a release of materials, serious accident, evacuation or highway shutdown. Serious incidents meeting criteria in § 171.15 also require a telephonic report by the carrier. This information collection enhances the Department's ability to evaluate the effectiveness of its regulatory program, determine the need for regulatory changes, and address emerging hazardous materials transportation safety issues. The requirements apply to all interstate and intrastate carriers engaged in the transportation of hazardous materials by rail, air, water, and highway.

Affected Public: Carriers of hazardous materials.

Annual Reporting and Recordkeeping:

Number of Respondents: 803.

Total Annual Responses: 22,500.

Total Annual Burden Hours: 33,811.

Frequency of collection: On occasion.

Title: Flammable Cryogenic Liquids.

OMB Control Number: 2137–0542.

Summary: Provisions in § 177.818 require the carriage on a motor vehicle of written procedures for venting flammable cryogenic liquids and for responding to emergencies. Paragraph (h) of § 177.840 specifies certain safety procedures and documentation requirements for drivers of these motor vehicles. These requirements are intended to ensure a high level of safety when transporting flammable cryogenics due to their extreme flammability and high compression ratio when in a liquid state.

Affected Public: Carriers of cryogenic materials.

Annual Reporting and Recordkeeping:

Total Respondents: 65.

Total Annual Responses: 18,200.

Total Annual Burden Hours: 1,213.

Frequency of collection: On occasion.

Title: Approvals for Hazardous Materials.

OMB Control Number: 2137–0557.

Summary: Without these requirements there is no means to: (1) determine whether applicants who apply to become designated approval agencies are qualified to evaluate package design, test packages, classify hazardous materials, etc.; (2) verify that various containers and special loading requirements for vessels meet the requirements of the HMR; and (3) assure that regulated hazardous materials pose no danger to life and property during transportation.

Affected Public: Businesses and other entities who must meet the approval requirements in the HMR.

Annual Reporting and Recordkeeping:

Total Respondents: 3,503.

Total Annual Responses: 3,853.

Total Annual Burden Hours: 18,302.

Frequency of collection: On occasion.

Title: Testing Requirements for Non-bulk Packaging (Formerly entitled Testing Requirements for Packaging).

OMB Control Number: 2137–0572.

Summary: Detailed packaging manufacturing specifications have been replaced by a series of performance tests that a non-bulk packaging must be capable of passing before it is authorized to be used for transporting hazardous materials. The HMR require proof that packagings meet these testing requirements. Manufacturers must retain records of design qualification tests and periodic retests. Manufacturers must notify, in writing, persons to whom packagings are transferred of any specification requirements that have not been met at the time of transfer. Subsequent distributors, as well as manufacturers must provide written notification. Performance-oriented packaging standards allow manufacturers and shippers much greater flexibility in selecting more economical packagings.

Affected Public: Each non-bulk packaging manufacturer that tests packagings to ensure compliance with the HMR.

Annual Reporting and Recordkeeping:

Annual Respondents: 5,000.

Annual Responses: 15,000.

Annual Burden Hours: 30,000.

Frequency of collection: On occasion.

Title: Container Certification Statement.

OMB Control Number: 2137–0582.

Summary: Shippers of explosives, in freight containers or transport vehicles by vessel, are required to certify on shipping documentation that the freight container or transport vehicle meets minimal structural serviceability requirements. This requirement is intended to ensure an adequate level of safety for transport of explosives aboard vessel and ensure consistency with similar requirements in international standards.

Affected Public: Shippers of explosives in freight containers or transport vehicles by vessel.

Annual Reporting and Recordkeeping:

Annual Respondents: 630.

Annual Responses: 835,000 HM Containers & 4400 Explosive Containers.

Annual Burden Hours: 13,989.

Frequency of collection: On occasion.

Title: Hazardous Materials Public Sector Training and Planning Grants.

OMB Control Number: 2137–0586.

Summary: Part 110 of 49 CFR sets for the procedures for reimbursable grants for public sector planning and training in support of the emergency planning and training efforts of States, Indian tribes and local communities to deal with hazardous materials emergencies, particularly those involving transportation. Sections in this part address information collection and recordkeeping with regard to applying for grants, monitoring expenditures, reporting and requesting modifications.

Affected Public: State and local governments, Indian tribes.

Annual Reporting and Recordkeeping:

Annual Respondents: 66.

Annual Responses: 1.

Annual Burden Hours: 4,082.

Frequency of collection: On occasion.

Title: Response Plans for Shipments of Oil.

OMB Control Number: 2137–0591.

Summary: In recent years several major oil discharges damaged the marine environment of the United States. Under authority of the Federal Water Pollution Control Act, as amended by the Oil Pollution Act of 1990, RSPA issued regulations in 49 CFR Part 130 that require preparation of written spill response plans.

Affected Public: Carriers that transport oil in bulk, by motor vehicle or rail.

Annual Reporting and Recordkeeping:

Annual Respondents: 8,000.

Annual Responses: 8,000.

Annual Burden Hours: 10,560.

Frequency of collection: On occasion.

Issued in Washington, DC on November 19, 1998.

Edward T. Mazzullo,

Director, Office of Hazardous Materials Standards.

[FR Doc. 98–31480 Filed 11–24–98; 8:45 am]

BILLING CODE 4910–60–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection; Comment Request for Form 5329

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice and request for comments.

SUMMARY: The Department of the Treasury, as part of its continuing effort

to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)). Currently, the IRS is soliciting comments concerning Form 5329, Additional Taxes Attributable to IRAs, Other Qualified Retirement Plans, Annuities, Modified Endowment Contracts, and MSAs.

DATES: Written comments should be received on or before January 25, 1999, to be assured of consideration.

ADDRESSES: Direct all written comments to Garrick R. Shear, Internal Revenue Service, room 5571, 1111 Constitution Avenue NW., Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the form and instructions should be directed to Martha R. Brinson, (202) 622–3869, Internal Revenue Service, room 5571, 1111 Constitution Avenue NW., Washington, DC 20224.

SUPPLEMENTARY INFORMATION:

Title: Additional Taxes Attributable to IRAs, Other Qualified Retirement Plans, Annuities, Modified Endowment Contracts, and MSAs.

OMB Number: 1545–0203.

Form Number: 5329.

Abstract: Form 5329 is used to compute and collect taxes related to: early distributions from individual retirement arrangements (IRAs) and other qualified retirement plans; distributions from education (ED) IRAs not used for educational expenses; excess contributions to traditional IRAs, Ed IRAs, and medical savings accounts (MSAs); and excess accumulations in qualified retirement plans.

Current Actions: There are no changes being made to the form at this time.

Type of Review: Extension of a currently approved collection.

Affected Public: Individuals or households.

Estimated Number of Respondents: 1,000,000.

Estimated Time Per Respondent: 1 hr., 3 min.

Estimated Total Annual Burden Hours: 1,042,400.

The following paragraph applies to all of the collections of information covered by this notice:

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 OMB control number. Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

REQUEST FOR COMMENTS: Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (a) Whether the 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 collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (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; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: November 19, 1998.

Garrick R. Shear,

IRS Reports Clearance Officer.

[FR Doc. 98–31526 Filed 11–24–98; 8:45 am]

BILLING CODE 4830–01–U

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection; Comment Request for Form 8839

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice and request for comments.

SUMMARY: The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)). Currently, the IRS is soliciting comments concerning Form 8839, Qualified Adoption Expenses.

DATES: Written comments should be received on or before January 25, 1999, to be assured of consideration.

ADDRESSES: Direct all written comments to Garrick R. Shear, Internal Revenue Service, room 5571, 1111 Constitution Avenue NW., Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the form and instructions should be directed to Martha R. Brinson, (202) 622–3869, Internal Revenue Service, room 5571, 1111 Constitution Avenue NW., Washington, DC 20224.

SUPPLEMENTARY INFORMATION:

Title: Qualified Adoption Expenses.

OMB Number: 1545–1552.

Form Number: 8839.

Abstract: Section 23 of the Internal Revenue Code allows taxpayers to claim a nonrefundable tax credit for qualified adoption expenses paid or incurred by the taxpayer. Code section 137 allows taxpayers to exclude amounts paid or expenses incurred by an employer for the qualified adoption expenses of the employee which are paid under an adoption assistance program. Form 8839 is used to figure the credit and/or exclusion.

Current Actions: There are no changes being made to the form at this time.

Type of Review: Extension of a currently approved collection.

Affected Public: Individuals or households.

Estimated Number of Respondents: 50,000.

Estimated Time Per Respondent: 3 hr., 11 min.

Estimated Total Annual Burden Hours: 159,500.

The following paragraph applies to all of the collections of information covered by this notice:

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 OMB control number. Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

REQUEST FOR COMMENTS: Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (a) Whether the 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 collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (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; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: November 18, 1998.

Garrick R. Shear,

IRS Reports Clearance Officer.

[FR Doc. 98–31527 Filed 11–24–98; 8:45 am]

BILLING CODE 4830–01–U

Corrections

Federal Register

Vol. 63, No. 227

Wednesday, November 25, 1998

This section of the FEDERAL REGISTER contains editorial corrections of previously published Presidential, Rule, Proposed Rule, and Notice documents. These corrections are prepared by the Office of the Federal Register. Agency prepared corrections are issued as signed documents and appear in the appropriate document categories elsewhere in the issue.

FEDERAL RESERVE SYSTEM

12 CFR Part 225

[Regulations H, K, O, and Y; Docket No. R-1021]

Membership of State Banking Institutions in the Federal Reserve System; International Banking Operations; Loans to Executive Officers, Directors, and Principal Shareholders of Member Banks; Bank Holding Companies and Change in Bank Control; Rules of Practice for Hearings; and Rules Regarding Delegation of Authority

Correction

In rule document 98–29097, beginning on page 58620, in the issue of Monday, November 2, 1998, make the following correction:

§ 225.4 [Corrected]

On page 58621, in the second column, under **§ 225.4 [Amended]**, in amendatory instruction 2, in the sixth line, ''§ 208.8(0)-'' should read ''§ 208.8(f)-''.

BILLING CODE 1505-01-D

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[CO–930–4214–010; COC–61627]

Proposed Withdrawal: Opportunity for Public Meeting; Colorado

Correction

In notice document 98–30526, appearing on page 63745, in the issue of Monday, November 16, 1998, make the following correction:

On page 63745, in the third column, in the eighth line, ''W½NW¼NE¼SE¼'' should read ''W½NW¼NE¼NE¼SE¼''.

BILLING CODE 1505-01-D

Federal Register

Wednesday
November 25, 1998

Part II

Department of Labor

Office of Workers' Compensation Programs

20 CFR Parts 10 and 25

Claims for Compensation Under the Federal Employees' Compensation Act; Compensation for Disability and Death of Noncitizen Federal Employees Outside the United States; Final Rule

DEPARTMENT OF LABOR

Office of Workers' Compensation Programs

20 CFR Parts 10 and 25

RIN 1215–AB07

Claims for Compensation Under the Federal Employees' Compensation Act; Compensation for Disability and Death of Noncitizen Federal Employees Outside the United States

AGENCY: Office of Workers' Compensation Programs, Labor.

ACTION: Final rule.

SUMMARY: On December 23, 1997, the Department of Labor proposed revisions to the regulations governing the administration of the Federal Employees' Compensation Act (FECA) (62 FR 67120). The FECA provides benefits to all civilian Federal employees and certain other groups of employees and individuals who are injured or killed while performing their jobs.

The proposed changes were summarized in that publication. They contain a major revision of the medical fee schedule to include pharmacy and inpatient hospital bills. Other significant new provisions address suspension of benefits during incarceration and termination of benefits for conviction of fraud against the program; changes to the continuation of pay (COP) provisions; paying for an attendant as a medical expense; inclusion of OWCP nurse services in the definition of vocational rehabilitation services; clarifying the reconsideration process; restricting entitlement to postpone oral hearings; clarification of subpoena authority; streamlining the standards for review of representatives' fees; provision of more detailed guidance for claims involving the liability of a third party; and clarification of procedures for claims filed by non-Federal law enforcement officers.

Finally, in light of comments received, the proposal to remove all references to leave repurchase has been abandoned in favor of including a brief mention of this practice.

EFFECTIVE DATE: January 4, 1999.

FOR FURTHER INFORMATION CONTACT: Thomas M. Markey, Director for Federal Employees' Compensation, Employment Standards Administration, U.S. Department of Labor, Room S–3229, 200 Constitution Avenue N.W., Washington, DC 20210; Telephone (202) 693–0040.

SUPPLEMENTARY INFORMATION: Proposed regulations were published in the **Federal Register** on December 23, 1997 (62 FR 67120). They allowed a 60-day period for comment, during which the Department of Labor received timely comments from 24 parties. Thirteen were submitted by Federal employing agencies, seven by labor organizations which represent Federal employees, two by attorneys, one by a physician, and one by a Department of Labor employee. Four untimely comments from Federal employing agencies were also received; many of the points they made were also made by other commenters.

The comments centered on time frames for use of continuation of pay (COP), time frames for submittal of forms by agencies, and postponement of hearing requests. None of the comments represented a profound challenge to the proposed rules.

This final rule applies to cases where the injury or death occurred before the effective date, but only when an initial decision on a particular issue is made on or after the effective date. This final rule does not apply, however, to issues decided for the first time in one of these cases before the effective date, even when such decision is being reviewed after a hearing before an OWCP representative, on reconsideration before OWCP, or on appeal to the Employees' Compensation Appeals Board (ECAB).

Several changes were made which did not result from the comments. One is the addition of nine new OMB clearance numbers to § 10.3 since publication of the Notice of Proposed Rulemaking. Another is that § 10.500 has been subdivided for clarity into four different subsections, and the contents have been rearranged slightly. Also, the title of subpart F has been changed to ''Continuing Benefits'', and the title of subpart G has been changed to ''Appeals Process'' for clarity. Several of the questions have been modified slightly for clarity, or so that they will be understandable on their own, without reference to the section where they appear.

Finally, after reviewing the decision of the United States District Court for the District of Massachusetts in *Jones-Booker* v. *United States* (C.A. No. 97cv10616–PBS, May 20, 1998), a provision is being added as new § 10.607(c). This provision will toll the running of the one-year time limitation for requesting reconsideration during any period for which the claimant can establish through the submission of probative medical evidence that he or she was unable to communicate in any way, and that his or her testimony was necessary to obtain modification of the prior decision. Any such period is not counted as part of the year in which a claimant has to timely request reconsideration. To establish eligibility for such tolling, the claimant will have the burden of proving both that he or she was unable to communicate in any way and that his or her testimony was necessary to establish factual matters that could not be established in any other way.

Overall, the parties who commented on the organization of the proposed regulations, the new question-and-answer format, and the ''plain English'' approach approved of these changes. However, one agency stated that the question-and-answer format might well be problematical, and that subject headings would be easier to follow.

The Department's analysis of the comments received is set forth below. Unless otherwise stated, section numbers refer to the revised regulations. No comments were received with respect to part 25.

Section 10.0

One labor organization asked that OWCP clarify the introduction to the regulations at § 10.0 by adding ''including an officer or employee of an instrumentality wholly owned by the United States'' to the first sentence. However, this same phrase already appears in the definition of ''Employee'' at § 10.5(h)(1), and it is not felt that repeating it in § 10.0 would provide any further clarification. Therefore, this change is not being made.

Section 10.5(a)

Two labor organizations noted OWCP's efforts to streamline its regulations and suggested dropping the term ''Compensation'' from the first line of § 10.5(a) since ''Compensation'' is defined at section 8101(12) of the FECA. While it is true that the FECA contains a general definition of ''Compensation,'' § 10.5(a) provides a more precise definition of this term (which is used interchangeably with ''Benefits'' throughout these regulations) that takes into account the construction given to this particular section since the FECA was first amended to include it in 1924. Therefore, dropping the term ''Compensation'' from § 10.5(a) would not be consistent with OWCP's streamlining effort, and the suggestion is not adopted.

Two labor organizations also argued that § 10.5(a) should not include ''medical treatment'' paid for out of the Employees'' Compensation Fund since beneficiaries are entitled to medical treatment for employment-related injuries and illnesses regardless of whether or not they sustain any

disability. However, this argument ignores the fact that, as one of the ''benefits paid for from the Employees'' Compensation Fund,'' medical treatment clearly falls within the statutory definition of ''Compensation'' set out at section 8101(12). Also, the regulatory definition of ''Benefits or Compensation'' in use since 1987 (20 CFR 10.5(a)(6)) includes ''medical treatment'' and, as there was no intent to change this aspect of the definition in these regulations, the suggestion is not accepted.

Section 10.5(f)

One commenter disagreed with the dual economic and medical nature of the definition of ''Disability'' in § 10.5(f) and argued that the definition of this word should focus solely on clinical findings. However, such a change would be contrary to settled precedent of the ECAB that has emphasized both the economic and medical aspects of disability for work under the FECA. Also, the regulatory definition of ''Disability'' in use since 1987 (20 CFR 10.5(a)(17)) was essentially identical to § 10.5(f), and as there was no intent to change this definition in these regulations, the suggestion is not adopted.

Section 10.5(g)

While one labor organization commended OWCP for providing further helpful explanation of the term ''Earnings from employment or self-employment'' in the definition at § 10.5(g), another labor organization asserted that ''reimbursed expenses'' are ''commonly not considered to be income'' and asked that they be deleted from the list of examples contained in § 10.5(g)(1) because they are not paid for ''services'' as that word is used in section 8114(e) of the FECA. There is nothing in the language referenced in section 8114(e) that would necessarily take precedence over the general requirement in section 8106(b) of the FECA that an employee must include any ''other advantages which are part of his earnings in employment or self-employment and which can be estimated in money'' in his reports to OWCP. The regulatory definition of ''Earnings from employment or self-employment'' in use since 1987 (20 CFR 10.125(c)) has included ''reimbursed expenses'', and as there was no intent to change this definition in these regulations, the request to delete this specific example from the list in § 10.5(g)(1) is not adopted.

Section 10.5(q)

One labor organization requested that the word ''by'' in the definition of ''Occupational disease or illness'' at § 10.5(q) be changed to ''in'' as it appeared in the prior regulatory definition in use since 1987. However, using the word ''in'' would not adequately convey the requirement in section 8101(5) of the FECA that occupational diseases or illnesses be ''proximately caused by the employment'' (emphasis added) rather than merely occurring during or ''in'' a period of employment in order to be compensable. Therefore, while there was no intent in these regulations to change the prior definition of ''Occupational disease or illness'' in any significant way, the requested change would not clarify § 10.5(q) in a manner consistent with the FECA, and it is therefore not adopted.

Section 10.5(x)

One Federal agency and two labor organizations expressed concern about the intended effect of the word ''material'' in the definition of ''Recurrence of disability'' and requested further clarification from OWCP. After considering the practical impact of the word ''material'' on the definition of this term, it does not appear that this particular word adds any further precision to § 10.5(x), and therefore it is deleted.

One labor organization suggested that confusion might result from the use of the term ''intervening injury'' in § 10.5(x) given the precise meaning of this term in the adjudication of claims for consequential injuries. However, since the context of § 10.5(x) makes it clear that the term ''intervening injury'' merely refers to a type of work stoppage that is not due to a ''spontaneous change in a medical condition,'' and there was no intent to limit this term to the meaning it has with respect to consequential injuries, modification of this particular term is not warranted.

The same labor organization also suggested that the reductions-in-force referred to § 10.5(x) as not resulting in recurrences of disability be limited to ''officially mandated'' actions. As the agency responsible for adjudicating FECA claims for the entire Federal workforce, OWCP must be able to rely upon employers (and claimants) to advise it of any relevant and pertinent personnel actions that might have some bearing on the outcome of a FECA claim. OWCP has neither the resources nor the expertise to ascertain whether reductions-in-force are ''officially mandated'' (presumably, this phrase is equivalent to ''duly authorized''), and must leave disputes about individual reductions-in-force to be resolved in the proper forum. Moreover, the words ''general'' or ''officially mandated'' add nothing to the sense of this section or its legal force. Under these circumstances, the requested modification of ''reductions-in-force'' would not be workable and is therefore not adopted.

Finally, two Federal agencies suggested that language be added to § 10.5(x) to highlight that a ''Recurrence of disability'' does not occur after an employee recuperates from surgery for an employment-related condition or injury if he or she has no entitlement to monetary benefits for refusing an offer of suitable work. Another commenter disagreed with the concept of recurrences altogether. This group of comments about the effect of changes in an employee's accepted medical condition indicates that it would be helpful to add another definition to answer the concerns raised. Therefore, § 10.5 is revised to add a new § 10.5(y), ''Recurrence of medical condition'', and subsequent paragraphs are renumbered accordingly.

Section 10.5(dd)

One labor organization suggested that a portion of the definition of ''Temporary aggravation'' in § 10.5(cc) (renumbered § 10.5(dd) in accordance with the revision noted above) be changed from ''caused that condition'' to ''caused that preexisting condition.'' This same organization also suggested that the second part of this section be changed from ''no greater impairment than existed prior to the employment injury'' to ''no greater impairment or disability than existed prior to the aggravation.'' The first wording change is redundant, given the context, and the second wording change would modify the sense of the definition in use since 1987 (20 CFR 10.5(a)(18)), which the program had no intent to change. For these reasons, the suggested changes are not adopted.

Section 10.5(ee)

One Federal agency assumed that the proposed definition of ''Traumatic injury'' in § 10.5(dd) (renumbered § 10.5(ee) in accordance with the revision noted above) differed from the prior regulatory definition of this term in that it now included the phrase ''external force,'' and requested further clarification regarding the meaning of this phrase. However, the definition of ''Traumatic injury'' has included the phrase ''external force'' since 1975 and no further definition of this phrase is required since it does not represent an

attempt to change the existing definition.

Section 10.6

One Federal agency felt that the statement that ''certain other benefits are payable'' in § 10.6(b) was not consistent with the language of section 8148(b)(3) of the FECA, which provides OWCP with discretionary authority in this area, and should be changed to ''certain other benefits may be payable * * *.'' We agree that the statute does give OWCP discretion in this matter, and § 10.6(b) is therefore revised consistent with the suggestion.

The same agency also felt that § 10.6(c) should refer only to persons who live in the beneficiary's household ''and are'' dependent on the beneficiary for support. Adoption of this idea would eliminate compensation payable for dependents living in another household through no fault of their own, e.g., minor children whose non-custodial parent is a beneficiary. In any event, this interpretation of the term ''dependent'' does not conform to the statutory test for dependency contained in section 8110(a) of the FECA, and the suggested revision is not adopted.

Finally, this agency suggested addition of a means test for dependents to this section and to § 10.405. The FECA contains no basis for such a measure.

Section 10.7

Three agencies commented on the use of Form CA–3, two stating that they would like to see continued use of the form, and one stating that there should be some way to report return to duty in its place. If the form is not to be required, one agency said that it should be removed from the list. On balance, OWCP does not believe that use of the form should be required, since agencies routinely notify the district offices when employees return to work. Form CA–3 is therefore being removed from the list. However, OWCP is looking into alternative means of collecting the information requested on this form.

One agency inquired about the purpose of Form CA–12, and another suggested that it simply be deleted from the list. A labor organization suggested that its purpose be clarified. OWCP uses this form to obtain reports of dependents in death cases. As the form is used exclusively by OWCP, and employers have no need to stock it, it is being removed from the list.

Two employee organizations suggested that this section include a statement that employers may not modify forms prescribed by OWCP, or use substitute forms. A statement to that effect is being added to paragraph (a).

Forms CA–7a and CA–7b have been added to the list (see the comments concerning leave buy-back at the end of this analysis).

Sections 10.10, 10.11, and 10.12

Two agencies commented on the statement that all records related to claims filed under the FECA are covered by the Government-wide system of records established by the Department of Labor. More specifically, they stated that an employer generates and maintains a variety of records systems in connection with claims filed under the FECA. The agencies suggested that § 10.10 be revised to provide that DOL/GOVT–1 covers only those records whose primary purpose is to generate, record or report data required by OWCP in its adjudication of claims. All other records an agency may generate as a result of a claim, such as those needed for personnel actions, payroll actions, safety records and investigative reports, should be subject only to the agency's Privacy Act regulations.

Similar comments were submitted to OWCP in connection with its proposal to amend former § 10.12 of the FECA regulations. In the final rule promulgated in the **Federal Register** on October 22, 1998, OWCP concluded that all records collected because a claim was filed seeking benefits under the FECA, including copies of records maintained by the employing agency, were official records of OWCP and, with one limited exception, covered by DOL/GOVT–1.

OWCP recognized, however, that a record may be created to satisfy two or more purposes, and therefore may be covered by other systems of records even though the subject matter of the document relates to an on-the-job injury sustained by a Federal employee. Thus, for example, records collected by an agency as part of a safety, personnel, or criminal investigation conducted pursuant to statutory or regulatory authority other than the FECA would not be covered by DOL/GOVT–1, unless they are submitted by the employee or the agency to OWCP for consideration in connection with the FEC claim. Readers are directed to the comments set forth at 63 FR 56752.

As noted above, the Department's proposed amendments to former § 10.12 have been adopted as a final rule. To ensure consistency, the provisions of that rule are being included in this publication.

With respect to § 10.12, a commenter alleged that he had experienced difficulty obtaining copies of case records from OWCP and recommended that this provision be revised to include a time limitation. The Department of Labor's regulations at 29 CFR part 71 contain the pertinent time limitations applicable to Privacy Act requests, and repeating them in these regulations would serve no useful purpose.

The same commenter also suggested that § 10.12 be revised to require OWCP to suspend the adjudication process until it complies with a request for copies under this section, and also to provide claimants with an opportunity to ''review and respond to the final decision after being provided with the requested documents.'' However, there is no reason given to support the recommendation that case adjudication should be interrupted until OWCP responds to a request under this provision, and the time periods within which claimants can exercise their appeal rights are set out in either the FECA itself or the ECAB's regulations and cannot be altered in these regulations. Accordingly, this second group of suggested revisions to § 10.12 have also not been made.

Section 10.16

One Federal agency requested the addition of a sentence at the end of § 10.16(a) to ''clarify'' that OWCP both cooperates with and supports the Department of Justice's efforts to enforce the criminal provisions that apply to claims under the FECA. However, OWCP already cooperates with and supports these efforts to vigorously enforce the criminal provisions referred to in § 10.16(a). Therefore, since the addition of an essentially hortatory sentence will not ''clarify'' OWCP's policy any further, the suggestion is not adopted.

One labor organization suggested deleting the phrase ''for making a false report'' from the question asked by § 10.16 to clarify that one of the criminal provisions referenced in this section, 18 U.S.C. 1922, applies to employer actions that wrongfully impede a claim. Since the question asked by proposed § 10.16 refers only to penalties that arise from filing a false report, it is revised consistent with the suggestion.

The same labor organization also suggested that a new subsection (c) be added to § 10.16 to further clarify that criminal penalties apply to actions by employers that wrongfully impede a claim. However, § 10.16(a) already lists 18 U.S.C. 1922 as one of the criminal provisions that can apply in connection with a claim under the FECA, so the addition of a new subsection to address this one provision is not seen as necessary. Instead, this subsection is

revised to clarify that criminal penalties also apply to actions of employers that wrongfully impede a claim.

Section 10.17

One Federal agency inquired whether the forfeiture of benefits provided for in § 10.17 applied to both Federal and State crimes and requested clarification if that was indeed the case. In light of the fact that section 8148(a) of the FECA refers to any ''Federal or State criminal statute,'' § 10.17 is revised consistent with the suggestion. The same agency also requested that a reporting requirement be added to this section so beneficiaries would have to inform OWCP of their convictions, and such a requirement will in fact be added to Form CA–1032.

Section 10.18

One Federal agency asked whether benefits inadvertently paid to an incarcerated beneficiary would be considered an overpayment of compensation, and also asked whether the forfeiture described in § 10.18(a) would apply to a period of time already served prior to conviction that is later included in the sentence of a convicted felon. As for the overpayment inquiry, an incarcerated felon is not entitled to compensation during the period of his or her incarceration, and therefore any compensation paid to such an individual would clearly constitute an overpayment of compensation under section 8129 and would be recoverable as such.

With respect to the possible retroactive application of any such forfeiture, section 8148(b)(1) specifies the potential range of these forfeitures by providing that ''no benefits * * * shall be paid or provided to any individual during any period'' of incarceration, not for any period of incarceration. This temporal limitation means that the forfeiture provided for by section 8148(b)(1) of the FECA will result only in a cessation of current payments that would otherwise have been made ''during'' a period of incarceration based on a felony conviction, and will not also result in a retroactive forfeiture for a period of time already served prior to conviction if subsequently included in the sentence.

Four Federal agencies objected to OWCP's blanket decision in § 10.18(b) to exercise the discretion granted it by section 8148(b)(3) of the FECA in such a way as to require the payment of benefits to eligible dependents of all incarcerated beneficiaries, since this is a ''benefit'' that was not available to family members of uninjured Federal employees incarcerated for felony convictions. One of these agencies wanted OWCP to restrict payments of this sort to dependents of felons who are incarcerated for periods of up to six months only, while two of the four agencies complained that there would be ''no reduction in compensation benefits'' in certain situations under § 10.18(b).

OWCP's policy is consistent with both the remedial aspect of the FECA and Congress's decision in section 8148(b)(3) to provide OWCP with the discretion necessary to make these types of payments. Also, these comments include no recognition that OWCP has exercised this discretion in such a way that these payments to dependents will never exceed 75% of the incarcerated felon's gross current entitlement (which is less than their monthly pay), and will therefore always result in a reduction of compensation benefits. To clarify matters, § 10.18(b) is revised to point out that dependents under this paragraph will not be paid the same amount of compensation as other dependents.

One of these four Federal agencies also requested that a reporting requirement be added to this section so incarcerated felons would have to inform OWCP when they were incarcerated, and such a requirement will be added to Form CA–1032.

Section 10.100

With respect to paragraph (b)(1), one agency requested some examples of verbal notifications of injury, asking specifically what would happen if an employee claimed to have told a supervisor that an injury occurred, but the supervisor died before the facts could be determined. In practice, verbal notification very seldom forms the basis for a claim. In problematic situations such as the one cited, OWCP would need to explore the surrounding circumstances and make a finding consistent with all of the evidence. Since such situations are so individual in nature, as well as quite rare in occurrence, OWCP does not believe that a fuller discussion of this matter in the regulations is warranted.

A commenter objected to the three-year time limit, which is set by law. A modification to it would require a change to the FECA itself.

Sections 10.101 Through 10.106

An employer stated that proposed § 10.103 is redundant, since it essentially repeats the contents of proposed § 10.101. This point is well taken. The positions of proposed § 10.102 and § 10.101 have been reversed, the title of proposed § 10.101 (now § 10.102) has been reworded, and proposed § 10.104 through § 10.106 have been renumbered § 10.103 through § 10.105. (The suggestion from a labor organization that the heading in § 10.103 be rephrased to include only compensable injuries therefore becomes moot). The following comments refer to the provisions as renumbered.

Sections 10.100(b)(3), 10.101(a), and 10.105(a)

Three labor organizations objected to the provision allowing for withdrawal of claims on the grounds that employers may pressure employees to drop claims. While the program continues to believe that there are valid reasons for retaining this provision, the text of § 10.117(b) has been modified to prohibit employers from compelling or inducing employees to withdraw claims.

Two agencies suggested that language be added to § 10.100(b)(3) to indicate that any COP granted to an employee after a claim is withdrawn must be charged to sick leave, annual leave or leave without pay as chosen by the employee. This suggestion has been adopted with respect to annual or sick leave, and the last part of the sentence has been reworded in accordance with § 10.223, which says that COP paid in error may be considered an overpayment of pay consistent with 5 U.S.C. 5584.

One agency asked about the implications of withdrawal of cases which were closed ''short form'', on the basis that OWCP does not formally ''determine eligibility for benefits'' in these cases. While no case-specific determination is made in these cases, eligibility has been established using pre-determined criteria, and the program does not believe that the proposed language compromises the ability to withdraw a case which is closed ''short form''. Should this happen, any monies paid for medical care would be declared an overpayment, which would be handled according to the usual procedures.

Section 10.101 (b) and (c)

A labor organization stated that, because latent conditions may result from traumatic injuries, the discussion of timeliness with respect to latent conditions should not appear solely in the paragraph dealing with occupational disease. The point is well taken, and the language of paragraph (c) is being added to § 10.100 as new paragraph (c). The organization also favors removing the word ''injurious'' from the first sentence of paragraph (b). As the concept of ''injury'' is integral to workers'

compensation claims, OWCP believes that the use of this word is appropriate.

Section 10.102

A labor organization suggested that the heading be rephrased to include only compensable injuries. When a Form CA–7 is filed, OWCP has not necessarily determined the compensability of the claim. The suggested change would therefore be unnecessarily restrictive and confusing.

Section 10.102(a)

One agency suggested that this section be amended to include a statement that Form CA–7 is not needed during the initial period of disability, which is covered by COP. The first sentence is being modified to clarify this point.

A labor organization states that the requirement to submit Form CA–7 no more than 14 days after pay stops suggests a legal time limit which a reader might confuse with the time limits specified by the FECA for making claim for compensation, which are described in § 10.100(b). Section 10.101(a) is exclusively concerned with the mechanics of filing a particular form, and makes no reference to time limitations under the FECA. OWCP does not believe that readers will be misled by the wording of this section when it is read in context.

Section 10.102(b)(3)

One agency asked for clarification as to whether the medical evidence should be submitted to the employer or to OWCP. As OWCP is the proper recipient, this paragraph has been changed to so state. The agency also stated that the employee should be required to provide the medical evidence to the employer. OWCP strenuously disagrees, as it is the adjudicator of claims for compensation and employers do not have a global need for medical reports supporting such payments. The agency may, however, obtain copies of such medical evidence directly from OWCP. Therefore, this change has not been made.

Section 10.103

One agency proposed that Form CA–7 always be required to file claims for schedule awards, as they are tracked for timely processing and letters are not, and a request for a schedule award conveyed in a letter might be overlooked. While this suggestion has merit, it does not take into account that schedule awards are initiated by claims personnel as well as by claimants, or that a schedule award may be claimed whether or not the employee is receiving compensation for disability. Given the variety of ways in which a claim for a schedule award may originate, OWCP does not think it is prudent to restrict the method of filing the claim to Form CA–7.

One employee organization noted that the phrase ''compensated according to the schedule'' is redundant. The phrase is being removed and the word ''such'' is being added before ''impairment'' to ensure that the meaning of the paragraph is clear.

Section 10.104

A commenter objected to the concept of recurrences. Removal of this concept would require a change to the FECA itself.

Section 10.104(a)

An agency desired clarification of whether an employee must both lose time from work and incur a wage loss for the submittal of a Form CA–2a to be necessary. This in fact is the case, and no change is made to this paragraph.

Another agency noted that this section addresses only recurrences of disability, and does not consider recurrences of medical conditions (although Form CA–2a is designed to claim both). This agency proposed adding a phrase to the end of the first sentence to address recurrences of medical conditions, and this change has been made.

Three agencies and a labor organization noted a contradiction between a statement in this section and a statement in § 10.207(a), with respect to whether a Form CA–2a, Notice of Recurrence, must be filed during the COP period. One agency noted that submittal of the form is a workload item both for the employer and for OWCP, while another agency noted OWCP's comment in the Preamble to the Proposed Rule that it is difficult for OWCP to intervene in cases when it does not know that time loss is occurring. The statement in § 10.207(a) is correct, and the second sentence of proposed § 10.105(a) (now § 10.104(a)) has been removed.

A labor organization suggested rewording the sentence addressing situations where a Form CA–2a need not be filed. From the suggested text it is clear that three situations (new traumatic injuries, new occupational diseases, and new events contributing to already-existing occupational diseases), rather than the two specified in the proposed rule, need to be addressed in this regard, and the paragraph has been reworded accordingly.

Section 10.104(b)

An agency asked whether the statement accompanying Form CA–2a is to be submitted as a separate narrative, since the information listed in this paragraph is also listed on Form CA–2a. The paragraph is being reworded so that it refers to the specific requirements stated on Form CA–2a, just as § 10.104(b)(2) refers to specific requirements stated on Form CA–2a with reference to the submittal of a medical report.

Section 10.105(a)

A labor organization suggested that this section be reworded to refer to the claimant as the ''survivor claimant'' throughout. As the referent changes from ''survivor'' to ''claimant'' in the middle of the paragraph, different wording would clearly be desirable. Therefore, ''claimant'' has been changed to ''survivor'' both in this paragraph and in paragraph (c). The point that SSNs are to be provided for all survivors on whose behalf benefits are being claimed has been clarified, though this issue was not raised by the labor organization.

Section 10.105(d)

A labor organization suggested that the first sentence of this paragraph, which parallels the language of section 8122(c), be expanded to include occupational diseases, and this change has been made. However, the meaning of the statutory text has not been expanded as suggested, by changing ''the same injury'' to ''the same compensable condition''.

The organization also proposed that this section address the entitlement of a survivor to the remainder of a schedule award after an employee dies. That is not the subject of this section, however, and its inclusion here would not be germane.

The organization also asked what provision of the FECA bars a claim for disability which is not filed while the employee is alive. In *Anna Palestro (Vincent Palestro),* 15 ECAB 241 (1964), the Employees' Compensation Appeals Board established that an individual must be alive to claim benefits for disability. The only provision for payments to carry over from a disability claim after death is found in section 8109.

Section 10.110 (a) and (b)

Nine employing agencies, one employee organization, and one other commenter objected to the reduction of time for submitting Forms CA–1 and CA–2 from 10 to five days. Many reasons were cited for this objection.

Practical concerns included observations that decentralized operations make it difficult to meet current time standards, much less tightened ones, and that delivery by the Postal Service can take five days. Also, injuries occurring on a night shift or weekend cannot always receive administrative attention until the next day, when the employee and/or witnesses may not be available; a five-day time frame may result in incomplete and/or inaccurate submittals of information; the quality of claims review by employers might suffer; and the proposed standards would be difficult to enforce.

With respect to traumatic injury cases, it was stated that a five-day period for submittal would be at variance with the 10-day period allowed employees to produce prima facie evidence of disability. It was further stated that, given that OWCP closes most traumatic injury cases ''short form'', and OWCP nurses are not assigned unless and until a Form CA–7 is submitted, the advantage of a five-day period over a 10-day period was not evident.

With respect to occupational disease cases, it was stated that 15 days should be allowed for submittal of Forms CA–2 for former employees, on the basis that it takes more than 10 days to compile even minimal information for these people. This longer time period would be consistent with the longer time frames OWCP allows for developing and adjudicating claims for occupational disease.

Concerns about the effect on employer morale included the observations that while a reduced time period is a worthy goal, less than half of claims submitted Government-wide meet the 10-day goal now; that employers trying to improve their performance in this area would be subject to criticism for inability to comply with this time limit; and that reducing the time limit would change employers' focus from the needs of injured employees to the need to meet the regulatory requirements.

As a related matter, an employer predicted with respect to § 10.117 that a five-day submittal requirement would result in more erroneous controversions, or more controversions after the initial submittal. This employer juxtaposed the five-day period to the 30-day period allowed for controversion, but this juxtaposition differs little from that presented by the current requirement to submit notices of injury within 10 days. Also, there is a difference between controverting the case, which can be done quickly, and providing supporting evidence, which may in fact take more time.

Finally, § 10.110(b) indicates that the employing agency will ''transmit'' the completed form to OWCP (as does § 10.113(c)). The word ''transmit'' is used specifically to allow for electronic transmission of forms. It was suggested that a five-day time frame would be more appropriate when electronic transmission is a reality. It is this argument which seemed most salient, and given the evolutionary nature of the program's electronic data processing efforts, the proposal to reduce the number of days allowed for submittal from 10 working days to five calendar days will be set aside until OWCP has the capacity to receive the notices in electronic format from all agencies. At that time OWCP will revisit this issue from the regulatory standpoint. The 10-day submittal period is very much within the norm by comparison with workers' compensation programs in the States and the District of Columbia. Nineteen states also set a 10-day submittal period, while 19 states set a shorter period and 13 states set a longer one.

A commenter stated that the employer cannot know if ''the need for more than two appointments'' as stated in § 10.110(b)(3) will develop, and suggests a more general rewording. The program has followed this practice for a number of years, and it has proven to be quite serviceable. Therefore, OWCP does not believe that a change is warranted.

Two labor organizations suggested that the employer be required to furnish the employee with a copy of both sides of Form CA–1 or CA–2 when the employer completes its portion of the form. A phrase to this effect is being added.

Section 10.111

Concerning paragraph (a), a labor organization suggested that language be added to explicitly require the employer to advise the employee of his or her rights under the FECA, as the current regulations provide at § 10.106(a). Employers are required at various places in these regulations to provide specific information and forms to injured workers, and inclusion of a general statement is superfluous.

Concerning paragraph (b), an agency suggested that the time frame for submitting Form CA–7 to OWCP remain as stated in current § 10.106(b), which allows for submittal by the tenth calendar day of wage loss rather than during the COP period. The proposed regulation represents long-standing policy in accordance with guidance first issued by FPM Letter 810–6 in May 1985. OWCP does not believe that this policy needs to be changed.

Concerning paragraph (c), three agencies objected to the five-day time frame for submitting Form CA–7. However, this time frame is the same as that found in the current regulations, and the program is striving to shorten the time frames for submittal of notices of injury and claims for compensation. Therefore, OWCP believes that it would be counterproductive to specify a period greater than the five days currently allowed for submittal of claim forms.

One employee organization suggested that the time frame be expressed as calendar days, rather than working days, to be consistent with § 10.110(a). As the latter section will be changed to read ''10 working days'' (see comments above), the wording in § 10.111(c) will remain ''working days'' as well.

Section 10.112

Two agencies objected to the five-day time frame for submitting Form CA–8. As noted in the comments about § 10.111(c) above, however, this time frame is the same as the one found in the current regulations, and the program is striving to shorten the time frames for submittal of claims for compensation. Here, too, the program believes that it would be counterproductive to specify a period greater than the five days currently allowed for submittal of claim forms.

As with § 10.111(c), one employee organization suggested that the time frame be expressed as calendar days, rather than working days, to be consistent with § 10.110(a). As the latter section will be changed to read ''10 working days'' (see comments above), the wording in § 10.112(b) will remain ''working days'' as well.

Section 10.115

Current § 10.104 requires the employee to submit medical evidence in all cases. One agency stated that this requirement is not clearly enunciated in the proposed regulations, in spite of specific references in proposed §§ 10.210, 10.101, and 10.105, and suggested a change to proposed § 10.115. The program concurs, and a sentence is being added to clarify this point.

A commenter recommended that Forms CA–1, CA–2, and CA–2c (perhaps CA–2a was intended) be combined, and that Forms CA–5 and CA–5b be combined, and that Forms CA–7, CA–8, and CA–12 be combined. Each of these forms serves a specific purpose and is accompanied by specific instructions. Any of the combinations suggested would result in much longer forms which would be more difficult to

use and understand, both for employees and employers.

A labor organization objected to the removal of the language found at current § 10.110(a) concerning the employee's burden of proof, and suggested that it be restored. Most of the material in the current rule is covered in proposed § 10.115, but the sentences pertaining to the belief of the claimant and emergence of a condition during a period of Federal employment with respect to causal relationship have been added to proposed § 10.115(e), and the latter part of that paragraph as proposed has been relettered (f). Also, a statement that the claimant must establish the five basic requirements of the claim to meet his or her burden of proof has been added to the introductory paragraph of this section.

Section 10.117

One agency read this section as applying only to occupational disease claims, as this is the subject of the section immediately preceding it, and proposed that § 10.117 be retitled to make clear that it applies to both traumatic injuries and occupational diseases. OWCP concurs, and this change has been made.

The same agency proposed a new paragraph providing that ''OWCP will promptly respond'' to an agency's objection to acceptance of a claim, and also that the agency and the claimant may review each other's responses to the agency's objections. Section 10.119 already addresses OWCP's responsibility to advise all of the parties to the claim when a claim is contested, and the remainder of this suggestion would add another layer of review by claimants and agencies. For these reasons OWCP has not adopted this suggestion.

One labor organization suggested that the last sentence of paragraph (b) be modified to include withdrawal of a claim. OWCP concurs with this suggestion and believes that it will address the issues raised with respect to §§ 10.100(b)(3), 10.101(a), and 10.105(a) (see the comments above with respect to these sections).

Section 10.118

One employee organization suggested that the language which appears in current § 10.140 with respect to the non-adversarial nature of proceedings under the FECA be added to this section. OWCP agrees that it should appear, but as this language applies to many aspects of claims processing, it is being added to § 10.0.

Section 10.119

An agency made two comments about delayed controversion which apparently flowed from the proposal to reduce the number of days allowed for filing notices of injury and occupational disease from 10 to five days. It asked whether OWCP would provide written explanation of an acceptance if the agency contested the claim within 30 days of receiving the notice from the claimant, even if the claim was not contested on the notice itself. OWCP will in fact provide such written explanation, and this section has been modified accordingly.

Section 10.121

Two employee organizations suggested that the phrase ''up to'' be removed, so that employees will always have 30 days to respond to a request for information. OWCP concurs, and the language of the current § 10.110(b) regulation is being retained in this regard.

Section 10.127

One employee organization suggested that the word ''should'' in the second sentence be changed to ''will'', both to ensure that the employee's representative is properly notified and to be consistent with the language in the last sentence. This change has been made.

Section 10.200

One agency requested amplification of when an agency can make preliminary determinations on an employee's entitlement to COP other than in the situations described in § 10.220 and § 10.221. Another agency suggested that the proposed language did not make it clear enough that the employing agency must pay COP, even while controverting it, except for certain delineated reasons. A labor organization also suggested clarifying language in this regard.

The policy behind the proposed rule was and remains that there are no circumstances under which an agency can refuse to pay COP, except for those listed in § 10.220 and § 10.221. The confusion and doubt expressed in the comments, however, pointed to a need for clarification. OWCP found language suggested by an employing agency to be helpful in this regard and changed § 10.200(b) accordingly.

Moreover, in paragraph (a), the phrase ''workers'' compensation benefits'' has been changed to ''wage loss benefits'' to make the meaning more clear. Finally, paragraph (e) lacks the words ''employing agency's'' before the word ''premises''. This oversight has been corrected.

Sections 10.205 and 10.207

These sections elicited the most comments with respect to COP (six and seven, respectively). These sections propose that, to use COP: Disability must either (1) begin within 30 days after the date of injury (§ 10.205(a)(3)); or (2) recur within 30 days after the first return to work (§ 10.207(c)).

One agency objected to shortening the time frame for commencing COP after suffering a recurrence of disability, and noted that since a Form CA–2a was required, OWCP would be put on notice of the recurrence. That agency also pointed out that neither the current nor the proposed rules address the situation where an employee returns to work but takes intermittent COP for medical appointments only, and it suggested that a new section be added to specifically allow for this. COP is appropriately used for medical appointments, and while OWCP does not believe a separate section is needed, a phrase to this effect has been added to § 10.205(a)(1).

Finally, that agency also suggested that employees should document these medical visits. Since bills will be submitted to OWCP for any medical treatment and the dates of treatment will be specified on these bills, no additional documentation will be required.

Six labor organizations addressed the reduction in the time period for commencing COP in both § 10.205 and § 10.207. One organization noted that disability may not begin right away because, for example, of difficulty in scheduling surgery, and that the restriction in both sections was contrary to the remedial purpose of COP. Another noted that complete healing following surgery may take longer than the 30-day time frame would allow, and suggested that a special extension to 180 days be allowed where COP is used for medical appointments only. A third organization challenged OWCP's stated rationale, noting that agencies do not uniformly submit claim forms in a timely manner. This organization stated further that early intervention is valuable in cases involving extensive disability, not where disability is infrequent, and suggested that the intention was really to save agencies COP payments.

A fourth organization felt that the change would deprive the employee of one of the Act's benefits and instead allow agencies to return employees to work before they were physically able to do so. A fifth organization expressed deep concern with the proposal, stating that it failed to recognize that some conditions result in delayed disability,

and while it applauded efforts to minimize lost time, it asked that other methods be used. The fifth organization suggested that the period be reduced to 60 rather than 30 days. A sixth organization also registered grave concerns with this change, stating that it ran counter to the remedial intent of COP and noting that medical treatment may be delayed beyond 30 days from the date of the injury.

COP is intended to prevent an interruption of income in traumatic injury cases during the time period it takes for an employee to submit a claim and for OWCP to adjudicate the claim. While the legislative history does not specify why a 45-day maximum was chosen, the history, supported by the plain language of the statute, makes it clear that Congress was concerned about interruption of an employee's salary while a claim was filed and adjudicated, but had no intention of providing an entitlement to the entire 45-day period if wage-loss benefits could be paid instead. Section 8118(b)(3) further provides that COP is to be paid ''under accounting procedures and such other regulations as the Secretary may require,'' giving the Secretary broad authority to establish the ground rules under which COP will be paid.

However, to mitigate any problems which a 30-day maximum time frame for beginning to use COP might cause, the time frame in the final rule has been changed to 45 days. Despite this change, OWCP believes that it will still be able to fulfill its goal of returning employees to work at the earliest possible time. As noted in the Preamble to the Proposed Rule, it is best if OWCP learns of lost-time cases as soon as possible so that early intervention can facilitate an early return to work. Continued disability-related absences, even intermittent absences, can prevent OWCP from intervening during this crucial time. OWCP recognizes that this need must be balanced against the need to ensure an income stream. The two are not mutually exclusive, however, and the efforts of the agencies and OWCP to shorten the time period required to process claims and pay benefits will prevent interruptions to the income stream.

One example put forth in favor of retaining the existing period for payment of COP when disability does not begin right after the date of injury is that of a claimant whose surgery cannot be scheduled within 30 days. If the claimant continues to work, lost time does not begin until the date of surgery, and if this date is more than 30 days past the date of injury, the individual will have no entitlement to COP and no income.

In this scenario, however, the income stream would not be interrupted. OWCP would note that surgery is pending, and the anticipated lost time would allow the agency and OWCP to process claim forms for wage-loss benefits so that the income stream would not be interrupted. Indeed, this is the very kind of scenario in which COP would not be appropriate, since such lost time is anticipated well in advance and the agency and OWCP have time to process the claim to provide the wage-loss benefits under the Act.

Finally, several commenters noted that employees in some cases lose time intermittently just to attend medical appointments, and cited this kind of time loss as a reason for not reducing the period for commenting use of COP. OWCP does not disagree with this argument, but after careful consideration, it concluded that administration of a provision with different time frames with respect to disability and medical care would be too complicated, both for employing agencies and for OWCP itself. Therefore, the time frame for beginning to use COP will be 45 days in all circumstances.

Three agencies and a labor organization noted a contradiction between a statement in this section and a statement in § 10.105(a), with respect to whether a Form CA–2a, Notice of Recurrence, must be filed during the COP period. As noted in the comments about § 10.105, the statement in § 10.207(a) is correct.

Section 10.205(a)(2)

An employing agency inquired as to what would constitute ''another form'' acceptable to OWCP, and whether a letter would suffice. This language is included so that the regulations reflect OWCP's position that a Form CA–2, CA–7 or CA–8 (all of which contain words of claim) fulfills the requirement that notice be given ''in writing'' under the appropriate circumstances. The word ''form'' does in fact denote an OWCP-approved claim form, and a letter would not serve the purpose described herein.

Section 10.206

One agency expressed concern with the retroactive election of COP in those cases OWCP terms ''short form closure'' cases, that is, cases where there is no wage loss claim and the medical bills do not exceed a certain dollar amount. In these cases, no formal acceptance is issued. The agency points out that in such cases, the wording in § 10.206(a) should be revised to reflect this by adding the parenthetical clause ''(if written approval is issued).'' This suggestion is accepted and the language has been changed accordingly.

Section 10.210

An employing agency argued that employees should submit medical reports to employing agencies as well as to OWCP. This issue is addressed in the comments about § 10.331(b). Several commenters pointed out a typographical error (''employer'' instead of ''employee''), which is corrected in the final rule.

A labor organization objected to changing the period within which medical evidence supporting disability must be submitted to the employer from 10 working days to 10 calendar days. This change was made because it is important to obtain this evidence as soon as possible. Using working days, which do not include Saturdays, Sundays and Federal government holidays, can easily result in a period of 15 or more calendar days elapsing before a medical report is received, a period during which the employee continues to be absent from work. OWCP has discussed the importance of early intervention, and the earlier the submittal, the better. This section is entitled ''Employee's Responsibilities'' to emphasize that return-to-work efforts are required by employees as well as employers and OWCP. Certainly the employee, who has chosen his or her physician, has the most leverage over the physician at this crucial time and can best ensure that such medical evidence is submitted. The new language requiring the report to contain a statement as to when the employee can return to work is consistent with and essential to this goal.

Section 10.211

One labor organization suggested wording changes to subsection (c) that would have the effect of eliminating the distinction between controverting a claim for COP and other objections an employer might raise to a claim under the FECA. Unlike a general objection that would have no immediate consequences for a claimant pending action by OWCP, controverting a claim for COP is a preliminary determination by an employer that stops a claimant's regular pay. Therefore, OWCP wants to retain the distinctive nature of this particular type of objection, and the suggested changes have not been adopted.

In subsection (d), several commenters asked what the phrase ''other forms approved by the Secretary'' meant. This phrase was added to ensure that the

regulations reflected OWCP's position that a Form CA–2, CA–7 or CA–8 (all of which contain words of claim) will fulfill the requirement that notice be given ''in writing'' under the appropriate circumstances. In addition, one labor organization suggested changing ''return'' to ''transmit'', and this change has been made. Finally, three agencies objected to the requirement that Form CA–1 be submitted to OWCP within five calendar days. For the reasons stated in the response to the comments received to § 10.110, OWCP has decided to keep the time frame of 10 working days, and the language of paragraph (d) has been changed accordingly.

Section 10.215

One agency noted with respect to paragraph (d) that there appeared to be a change in how COP days are calculated in this section as proposed. The section states that days off are counted toward COP if COP was used in the days immediately before and after the days off. The comment pointed to an inadvertent modification in how days are calculated and the final version has been changed to read that if COP is used on the day before or the day after days off and disability is supported by medical evidence, the days off are counted toward COP.

The same agency suggested language on calculating COP days for part-time or intermittent employees, and that language has been adopted. However, this agency's suggestion that OWCP add a new paragraph to § 10.215 to address the circumstances under which COP may be used for obtaining medical treatment would both limit the scope of paragraph (c) and unnecessarily restrict OWCP's ability to monitor the provision of medical treatment, and therefore the requested addition has not been made.

Sections 10.216 and 10.217

Two Federal agencies noted that the inclusion of differential and/or Sunday premium pay in the pay rate for COP was contrary to provisions in two appropriation bills passed by Congress, Pub. L. 104–208, section 630, 110 Stat. 3009, 3362 (1996) and Pub. L. 105–61, section 636, 111 Stat. 1272, 1316 (1997), which prohibited Federal agencies funded by those bills from paying differential and/or Sunday premium pay to their employees unless they actually performed work during the time period relevant to such pay. These agencies therefore suggested that both §§ 10.216(a)(1) and 10.217 be changed to reflect that these particular increments of pay are not to be included in the pay rate for COP.

Ever since Congress amended the FECA in 1974 to provide for COP, OWCP has directed agencies to include premium, night or shift differential, Sunday or holiday pay, and other extra pay in their calculations of the pay rate for COP. However, in several recent appropriation bills, Congress has included language similar to the prohibitions cited by the two Federal agencies, without actually amending the underlying statutory authority for such increments of pay or overturning court decisions construing such statutory authority.

Therefore, while it is clear in the absence of such appropriations language that it would still be proper for OWCP to require the inclusion of these two increments of pay in the pay rate for COP, it is also clear that the statutory authority for the payment of such increments is not derived from the FECA itself, nor are these increments currently being paid in a consistent manner throughout the entire Federal workforce due to the varied scope of agency legal authority to spend appropriated funds. In addition, the agencies funded by the appropriation bills in question would again be required to include these increments of pay in the pay rate for COP should the prohibition on their payment not be included in future appropriation bills.

From an administrative standpoint, there is little justification for OWCP involvement in payroll functions among the various agencies, only some of which are affected by the appropriation bills noted above, since COP constitutes a continuation of an employee's ''pay'' that is calculated and paid by his or her agency rather than a form of ''compensation'' that is calculated and paid by OWCP. Accordingly, §§ 10.216(a)(1) and 10.217 are revised to reflect these circumstances.

One of the same two Federal agencies also suggested adding language to § 10.216(a) to emphasize that ''weekly pay'' is based on an average of the employee's weekly pay over the prior 52 weeks. However, § 10.216(a) already explains this very point, and thus the suggested addition is not made. One labor organization urged that § 10.216 include a reference to paid leave in determining how COP is calculated, for fear that agencies would exclude it from their calculations. Certainly, paid leave must be included in the calculation of COP. While neither OWCP's regulations issued since 1975 nor the Federal (FECA) Procedure Manual make reference to paid leave, there is no indication that this absence has caused the feared exclusions to occur. Therefore, OWCP sees no need to add the requested reference.

Sections 10.220, 10.221 and 10.222

One labor organization recommended changes to § 10.221 regarding the requirement that an agency controvert a claim for COP before it stops an employee's pay. However, the suggested changes, which involve retention of language in current § 10.203(b), would not maintain the desired distinction between controverting and otherwise objecting to a claim, and they have therefore not been incorporated.

A number of labor organizations noted that the existing rules direct agencies to retroactively reinstate COP which it had stopped because medical evidence showing disability had not been received within 10 days, when that medical report is received. The language has been added to § 10.222(a)(1).

One agency asked about the type of medical evidence necessary to support the continued payment of COP and requested further guidance from OWCP. The evaluation of medical evidence by the employing agency is limited to a determination of whether, on its face, the medical report supports disability. Agencies do not properly consider medical rationale. Given this limited involvement, further guidance of the type requested is seen as unnecessary.

One labor organization objected to the provision in § 10.222(a)(1) that would allow an agency to stop paying COP if the claimant fails to submit the required medical evidence within 10 calendar days and requested that the time frame of 10 working days be retained. However, as noted previously in the response to this labor organization's objection to the equivalent language in § 10.210(b), the change to calendar days from working days was made because it is important to obtain this evidence as soon as possible. Therefore, for the same reasons that supported maintaining the equivalent change in § 10.210(b), the requested change in § 10.222(a)(1) has not been made.

Another labor organization objected to the change allowing the termination of COP when a personnel action—initiated before the injury and including a removal action—becomes final following the injury and during the COP period. No reason was offered for the objection, however, and the program believes that this clarification is necessary to ensure that employees who would otherwise not have received salary do not receive it merely because of the COP provisions. This change was supported by one agency.

Yet another labor organization, along with an agency, suggested that the

proposed rules clarify the employing agencies' authority to terminate COP. An agency noted that § 10.222(a)(3), regarding refusal of a written offer of suitable work, appears to change the current authority for an agency to stop COP. Such a change was not intended, and so new language has been added to this section which makes it clear that an agency can stop COP when an employee refuses a written offer of suitable work, but that OWCP has final authority to determine whether the termination was appropriate and can order retroactive restoration of COP benefits improperly terminated.

The labor organization noted that the language preventing an agency from terminating COP except under the circumstances listed in existing § 10.203 and § 10.204 does not appear in the proposed rules. The reasons for termination have remained essentially the same (except for termination for personnel actions initiated before the injury which become final after the injury). While the language in § 10.220 and § 10.222 is phrased to limit authority of the agency not to pay (§ 10.220) or to stop paying (§ 10.222) in those circumstances listed, the comments show that the program's intent was not clear. Therefore, additional language has been added to § 10.220 and § 10.222(c), clarifying that the agency cannot stop COP to which the employee is otherwise entitled except for the reasons set out in these two sections, or unless OWCP directs COP to stop, or unless the individual has returned to work.

Sections 10.223

Two agencies noted that this section failed to address disruptions by the employee's representative. That language has been added. A labor organization noted that the ''required medical examination'' is one required by OWCP and the regulations should so state, and this change has been made. The organization also suggested making clear that the suspension is subject to all appeal and review rights. This language is unnecessary, since all adverse decisions by OWCP are subject to the review and appeal processes set forth under the Act.

Section 10.300(b)

While agreeing with the proposed language that Form CA–16 need not be issued more than a week after the injury occurs, one agency suggested that this section be changed to state that the form need not be issued if the employee reports the injury more than one week after its occurrence. The current language covers this situation as well as the situation where an employee reports an injury right away but does not appear to need medical care for up to a week afterwards. Therefore, OWCP does not believe that the suggested change is necessary.

Another agency suggested that the time for issuing Form CA–16 be increased from four to 24 hours, citing distances among supervisors, injured employees, medical treatment facilities, and those authorized to sign Forms CA–16. The four-hour time frame is the same as currently provided, and as noted in the second sentence of this paragraph, verbal authorization may be given if necessary. In view of the excellent telephone and facsimile communications generally available in the United States, OWCP sees no reason to increase this time frame.

A commenter also objected to the time frame stated, claiming that reaching OWCP may take a week, that care cannot be authorized unless the specific procedures are known ahead of time, and that employees injured at night and on weekends are denied equal access to care. These arguments are not persuasive, especially as the proposed rule is unchanged from the existing rule, and the commenter's suggestion that the employer authorize one visit for medical care until OWCP can approve further care is impractical.

Three labor organizations argued that the proposed rule limiting issuance of Form CA–16 to one week following the injury is inconsistent with the statutory 30-day requirement for claiming COP. Still another labor organization stated that changing to a one-week limit from what it considered to be the current time frame of six months from the date of injury to be ''radical and inappropriate''. OWCP does not agree. The purpose of Form CA–16 is to authorize urgently-needed medical care in connection with a work-related traumatic injury, not to provide blanket medical coverage. An employee whose need for medical care develops so gradually that it is not apparent until a week after the injury occurred cannot accurately be said to require urgent medical care. The time requirements for claiming COP have no relation to those governing issuance of Form CA–16.

Section 10.300(d)

Three employee organizations suggested that the employer be specifically instructed to ''advise the employee of the right to initial choice of physician'', parallel to the language of proposed § 10.211(b) with respect to the employee's right to COP. This change has been made.

Another employee organization suggested that this paragraph allow for initial choice of medical facility as well as physician. Inasmuch as a report from a physician is needed to support a claim for compensation, the inclusion of the term ''medical facility'' is irrelevant at best, and might prove misleading as well.

A commenter stated that this section does not indicate how OWCP will notify physicians that they have been excluded. This information is provided in subpart I, which is referenced in this paragraph.

Section 10.303

Two agencies expressed their appreciation for the clear statement with respect to issuing Forms CA–16 for simple workplace exposures to hazardous substances when injuries have not occurred.

Section 10.310

Two agencies stated their support for the changes in this section with respect to appliances, supplies, and generic equivalents for prescribed medications, indicating their belief that these measures would assist in cost containment (and, in the view of one of them, sound fiscal management). Another agency stated its approval of the program's cost containment efforts in general. Another commenter, on the other hand, questioned how OWCP would apply the test of cost-effectiveness.

A commenter also questioned the statement that OWCP ''will not approve an elaborate appliance or service where a more basic one is suitable'', positing that OWCP will oppose use of higher-cost diagnostic tests (for instance MRIs, in comparison with x-rays) in a misguided attempt to cut costs. This conclusion is incorrect. The statement is intended to address requests for special equipment, such as exercise bicycles, and special services, such as health club memberships, when prescribed to treat the effects of an injury. OWCP will not pay for a top-of-the-line appliance or service where a less expensive equivalent exists. However, in matters of diagnosis and treatment, OWCP does not and will not attempt to second-guess physicians.

Section 10.310(b)

The last sentence in this paragraph gives OWCP the authority to require the use of generic equivalents where available. An agency suggested that OWCP require the use of generic equivalents where available for all prescribed medications, unless the employee shows good cause for not

doing so. Another commenter, on the other hand, stated that OWCP should not be allowed to require the use of generic equivalents if they do not represent the ''SOC'' (presumably ''standard of care''), since doing so ''sets MDs up for malpractice''.

As the purpose of adding this provision to the regulations is to provide OWCP with the flexibility to implement such a policy in the future, the first comment is not adopted. With respect to the second comment, use of generic equivalents is a commonly accepted practice in many health plans and medical benefit programs, and the program has no intent to subvert generally accepted standards of care. The statement will therefore remain unchanged.

Section 10.311

With respect to § 10.311(a), two agencies stated their disagreement with what they considered the expansion of chiropractic services and suggested that the first sentence be reworded to more closely follow the statutory language. However, the proposed change is virtually identical to the last sentence of section 8101(2), and as there is no intent to expand the meaning of the statute, and the costs involved are consistent with the statute and with OWCP's past practice, OWCP does not believe that the language of this section needs to be modified.

Another commenter objected to §§ 10.311(a) and (b) on the basis that chiropractors cannot treat subluxations. Such treatment is authorized at section 8101(2).

Section 10.313

An agency asked that this section more clearly define when preventive treatment may be authorized and when it may not, particularly in the context that a work-related injury must be present before treatment may be authorized. Paragraphs (b) and (d) already refer to specific injuries, and paragraph (a) addresses complications of agency-sponsored preventive measures, which are considered to be injuries. Paragraph (c) refers to conversion of tuberculin reaction after exposure to tuberculosis in the performance of duty. Since tuberculosis is transmitted invisibly, through the air, a specific injury is inferred from the conversion. For these reasons, OWCP does not believe that changes to this paragraph are necessary.

Section 10.314

Two employee organizations objected to the change in method of payment to attendants as represented by this section, given the language of section 8111(a). The Preamble to the Proposed Rule (62 FR 67123–67124) sets forth in detail OWCP's reasons for making this change, and OWCP continues to believe that this exercise of the Director's discretion will be beneficial in several ways. As noted in the Preamble, employees currently receiving an attendant's allowance under section 8111(a) will not be affected by this change.

Two agencies stated that they support the changes noted in this section, one indicating its belief that this provision will help OWCP to monitor and control medical costs in the future. The other suggested that this section address the desired billing method, either specifically or by cross-reference to subpart I. OWCP concurs, and a cross-reference to § 10.801 has been added.

The second agency also suggested that the new provision apply to all cases, and that attendants' allowances currently being paid under section 8111(a) be discontinued. In this agency's view, such a change would reduce workload and avoid any confusion which might result from having two methods of payment. Given the relatively small number of cases affected by this provision, OWCP does not believe that the benefits which would result from changing the method of payment to claimants now receiving augmented compensation for attendants would outweigh the disruption which might result.

Section 10.320

An agency questioned whether an employee's spouse may attend a second opinion examination, and if not, asked that this be stated in the regulation (and in the letters notifying claimants of appointments). The proposed paragraph states that ''the employee is not entitled to have anyone else present at the examination * * *.'' OWCP believes that the word ''anyone'' is inclusive enough to convey the intended meaning of this sentence, and that clarification is unnecessary.

A labor organization commented that it is unlikely that personal physicians will participate in second opinion examinations, due to other commitments, and that is unfair for an employee to be ''be denied an opportunity to have a second person present during the examination.'' Another organization expressed similar concerns and stated that the language of § 10.323 is sufficient to address any improper behavior.

Section 8123(a) provides that ''The employee may have a physician designated and paid by him present to participate in the examination.'' The FECA says nothing about other individuals participating in the examination. Of course, it is perfectly permissible for any individual to accompany the employee to the examination and remain nearby, in the waiting room, if the employee so desires.

On another subject covered by this section, an employee organization argued that the provision for sending a case file for second opinion evaluation without actual examination of the claimant is counter to the clear language of section 8123, and should therefore be removed. Evaluation of the case file without examination of the claimant can assist claims staff in resolving such issues as causal relationship in occupational disease cases, or making retroactive determination of whether surgery should be authorized. Furthermore, in *Melvina Jackson*, 38 ECAB 443 (1987), the ECAB authoritatively held that this section of the FECA is not limited to *physical examinations* of a claimant and specifically construed section 8123(a) as providing for evaluations of the evidence in a claimant's record without an actual physical examination. Therefore, the suggested deletion is not made.

Section 10.321

One agency asked that a statement be added to this section clarifying that not every difference in medical opinion results in a referee examination. The requested clarification is consistent with decisions of both the ECAB (Andrea Kay Roberts, Docket No. 95–1839 (October 22, 1997)) and federal courts that have addressed this point (*McDougal-Saddler* v. *Herman*, No.Civ.A. 97–1908 (E.D.Pa. December 24, 1997), and *Chaklos* v. *Reich*, et al., No. Civ.A. 95–1763 (W.D.Pa. August 25, 1997)). OWCP agrees that clarifying this section would be useful and therefore a new paragraph (a) has been added. Also, the current text has been relettered paragraph (b), and the title of this section has been slightly revised to more accurately reflect its subject matter.

One labor organization argued that the provision for sending a case file for referee evaluation without actual examination of the claimant is counter to the clear language of section 8123, and should therefore be removed. However, in *Melvina Jackson*, 38 ECAB 443 (1987), the ECAB noted that it had never held that an actual physical examination of a claimant was necessary to resolve disagreements using the medical referee provisions of

section 8123(a). Therefore, the suggested deletion is not made.

In paragraph (b), the reference to section 8123(a) has been replaced with a reference to § 10.502.

Section 10.322

An agency asked that a statement be added to this paragraph noting that the costs of second opinion and referee examinations are eventually charged back to employers. However, the costs associated with medical examinations are no different from other benefits under the FECA, as all expenses are charged back to employers. The mechanism for doing so is described in the FECA at section 8147. In line with OWCP's attempt to avoid repeating statutory provisions in the regulations wherever possible, the program does not believe that addition of language about chargeback of costs associated with medical examinations is necessary or desirable.

Section 10.323

An agency suggested that the title of this section be revised to include the word ''penalties'', and this change has been made.

Section 10.324

A labor organization argued for inclusion of language which would bar the results of medical examinations requested by the employer from being used to reduce or terminate OWCP benefits, unless those results were corroborated by medical examinations directed by OWCP. The program's procedures have stated for some time that such examinations will not be used in this way, and OWCP is not aware of any problems which have arisen with respect to this policy. Therefore, the program does not believe that it is necessary to address it by regulation.

Section 10.330

See the discussion above concerning § 10.115. This section is being modified to make clear that in all cases the employee is responsible for submitting medical evidence, or arranging for its submittal.

A commenter suggested that medical reports require the disclosure of previous claims for the same condition, pre-existing conditions of the same part of the body, and hobbies or other occupations which may contribute to the condition claimed. OWCP already has the capacity to identify previous Federal workers' compensation claims for injuries to the same part of the body. Where necessary, OWCP requests information about pre-existing conditions, hobbies and other jobs as part of evaluating claims for disability.

The same commenter stated that examining physicians should be required to state whether the condition found is causally related to employment. In fact, such a requirement already exists. The commenter also suggested that OWCP physicians review all claims to ensure that causal relationship is properly established. OWCP will shortly begin using automated decision tables, which will compare the condition claimed on the bill with the condition accepted in order to identify problematical acceptances.

Section 10.331(b)

An agency suggested that the employee or treating physician submit copies of medical reports to the employer, stating that while Form CA–17 is useful, physicians do not always complete it. The agency also suggested that OWCP should be required to submit to the employer a copy of any medical report showing that the employee can return to work in some capacity.

Another agency characterized the requirement that reports be sent directly to OWCP as ''directing employees and medical providers to circumvent the employing agencies'' and claimed that this represents a detrimental change, although current § 10.410(b) also requires submittal of reports to OWCP. This agency also stated that this policy will hinder agencies from helping claimants with requests for surgery and claims for wage loss and from becoming aware of new medical conditions which need to be considered in making offers of reemployment.

A third agency stated that it has difficulty managing cases without immediate access to medical reports, which it cannot always obtain right away from OWCP. Another commenter makes this argument as well.

This set of comments speaks to the need for careful information-gathering and for close coordination among employers, employees and OWCP. They also speak to the rights and responsibilities of all parties in the claims process. In its proposed regulations, OWCP has tried to strike a balance among these sometimes competing interests. Employers usually need copies of medical reports primarily to identify jobs to which their injured employees may return, and Form CA–17 is designed explicitly for this purpose. That medical providers do not always complete forms and reports as requested is an experience shared by OWCP, and the program does not believe that adding another requirement for information submittal will truly address this issue, particularly when the medical reports may not accurately describe work limitations.

With respect to managing claims and the need for up-to-date information when offering reemployment, one of the reasons that OWCP uses the services of registered nurses is to facilitate coordination and exchange of medical information among claimants, employers, and medical providers. When a claimant can return to work, whether to full or light duty, full or part time, it has been OWCP's experience that the nurses are able to provide information quickly and accurately so that reemployment can take place as soon as possible.

For all of these reasons the program does not believe that a change in this section is warranted. The agency may, however, obtain copies of such medical evidence directly from OWCP.

Another issue raised by several employing agencies is whether Form CA–17 may be used only for traumatic injuries. One agency notes that it might well be used to determine work limitations in certain kinds of occupational illness cases. OWCP concurs, and the word ''traumatic'' has been removed from this paragraph.

Section 10.333

One employee organization suggested that this section state that medical reports in support of claims for schedule awards must be based on the American Medical Administration's (actually, American Medical Association's) *Guides to the Evaluation of Permanent Impairment.* OWCP concurs, and this reference has been added to this section.

Section 10.336

A commenter stated that the time frames for submittal of bills are too long and suggested that OWCP require submittal within 30 days of the service date. However, the time frames set forth in the regulations are consistent with the practice of the insurance industry in general, and OWCP sees no reason to change them. The commenter also suggested that OWCP be required to process bills within 60 days of receipt. OWCP adheres to internal standards which require that 90 percent of medical payments be made within 28 days of receipt and that 95 percent be made within 60 days of receipt. For this reason, OWCP does not see the benefit of including specific time periods in the regulations. Requiring an ''attached medical report'', as is also suggested, is impractical in an automated bill processing environment.

Section 10.337

An employer and another commenter objected to the provision for reimbursement on the basis that it is unfair to both the agency, which will have to pay the chargeback bill, and to providers who adhere to the fee schedule. While OWCP does not consistently and/or routinely reimburse employees for these excess charges, paragraphs (b) and (c) have been revised so that the employee will be responsible for contacting the provider to obtain refund or credit. If the provider does not comply with this request, the claimant will need to submit documentation of the attempt to OWCP. OWCP may in its discretion make up the difference to the claimant, after reviewing the facts and circumstances of the case. Once such a payment is made, the employee would be aware of the monetary costs of continuing to seek treatment with such a provider, and OWCP might consider not reimbursing the employee for any subsequent excess charges, thereby minimizing the impact of § 10.337 on an agency's chargeback costs. (Section 10.802 has been modified consistent with these changes.)

Two labor organizations suggested that the language of § 10.813 be repeated for claimants in this section. Sections 10.337 and 10.813 are intended to be parallel in structure, and OWCP does not believe that repeating § 10.813 would serve any useful purpose.

Section 10.401

With respect to the period of disability which must elapse before the claimant may be compensated for the first three days of wage loss, an agency asked that the method of counting the days be clarified. The word ''calendar'' is being inserted to make the meaning clear. The agency also inquired as to whether the 14 days may be intermittent, and in fact they may.

One agency suggested a cross-reference to § 10.6. A specific reference to section 8110(a) would probably be more useful, and one is therefore being added.

Section 10.403(a)

One agency commented, apparently with respect to this section, that determinations of wage-earning capacity should be tied to the minimum wage rate. However, the FECA has no provision for establishing such a link.

Two labor organizations argued that, consistent with ECAB decisions in this area, any position selected as representing an employee's wage-earning capacity must be actually available to the employee within his or her commuting area. However, this is an incorrect interpretation of the ECAB's rulings, which have consistently held that OWCP only needs to find that a position is being performed in sufficient numbers in the area in which the employee lives so as to be considered reasonably available before it can determine that the job represents the employee's wage-earning capacity [*e.g., Kenneth H. Cummings, Sr.,* 28 ECAB 284 (1977); *James B. Stewart,* 32 ECAB 36 (1980)]. Accordingly, since there is no requirement that the selected position actually be available to the employee, the suggested change is not made.

Section 10.404

Two agencies objected to the inclusion of pre-existing impairments in payments made under the schedule award provisions of the FECA. These agencies argued that employees who are compensated for the full extent of their impairments actually receive benefits for non-occupational impairment.

It is a well-settled principle of workers' compensation law that each employee is hired ''as is''. The employee is a whole person, with various strengths and weaknesses, some of which pre-exist employment and some which develop concurrently with it. Apart from the practical difficulties which the commenting agencies admit would result from any attempt to differentiate work-related from non-work-related impairment to a schedule member, such an attempt would violate the remedial nature and spirit of the FECA.

One agency suggested re-writing this section to reflect a means test for dependency. The FECA contains no provision for such a test (see the comments about § 10.6).

A labor organization suggested restoring text concerning payment for schedule impairment which appears in current § 10.304(c). This material already appears in section 8107(a), and OWCP sees no reason to repeat it here.

Another commenter objected to the program's use of the AMA's *Guides to the Evaluation of Permanent Impairment* for determining schedule awards under the FECA, indicating that it focuses on the extent of the initial injury or illness, not the degree of recovery. This, however, is not true. The AMA states on page 1/1 of the fourth edition that ''The *Guides* defines 'permanent impairment' as one that has become static or stabilized during a period of time sufficient to allow optimal tissue repair, and one that is unlikely to change in spite of further medical or surgical therapy.'' OWCP does not agree with the commenter's suggestion that the program use another publication for determining schedule awards.

The commenter also questioned whether medical benefits are payable in cases where the claimant has reached maximum medical improvement. Such expenses are in fact payable as long as treatment is found to be necessary and reasonable.

Section 10.405

An agency suggested addition of a means test for dependents to this section and to § 10.6. The FECA contains no basis for such a measure.

Section 10.406

A commenter suggested use of different percentages than those provided by law for payment of compensation for disability. Such modifications would require a change to the FECA itself.

Section 10.410

One labor organization requested that OWCP restore the partial description of the compensation payable in death cases that was set out at § 10.306 of the 1987 regulations (the organization was apparently unaware that the FECA was amended in 1990 to change the age of remarriage noted in section 8133(b)(1) to 55). Since the proposed rule was published in the **Federal Register** on December 23, 1997, the ECAB issued a decision construing section 8133(a)(5) of the FECA for the first time. That decision is *Clyde Stevenson (Donna R. Stevenson),* Docket No. 95–3016 (issued February 4, 1998). In light of the authoritative construction of this section of the FECA provided by the ECAB in *Stevenson,* and to address the concerns of the labor organization, the heading and text of § 10.410 are revised consistent with the request.

Section 10.417

A commenter suggested that this section should state whether a handicapped child continues to be entitled to benefits if the employee dies. If this happens, payments end unless death benefits are awarded. No change is necessary as a result of this comment.

Section 10.420

In all four subsections, the statutory reference has been changed to section 8146a, not 8146(a).

Section 10.421

Two Federal agencies recommended that the election provision in § 10.421(a) be modified to make it either partially or fully irrevocable, citing the Office of

Personnel Management's (OPM's) rule that elections of benefits in death cases are irrevocable, while another commenter recommended that the provision be removed entirely. OPM and OWCP have adopted their respective policies for particular reasons, and neither agency is unaware of the other's position.

While it is understandable that agencies would desire that OPM and OWCP policy be the same, the changes proposed by these commenters would not be consistent with the settled construction given to section 8116 of the FECA by the ECAB in such leading cases as *Adeline N. Etzel (Bernard E. Etzel),* 21 ECAB 151 (1969); *Charles W. Akers,* 24 ECAB 316 (1973); *Louis Teplitsky,* 29 ECAB 826 (1978); and *Gary J. Bartolucci,* 34 ECAB 1569 (1983). Therefore, the suggested modifications are not adopted.

The latter commenter recommended that both subsections (a) and (d) of § 10.421 be modified to automatically end compensation payments at retirement age (except for permanently totally disabled individuals), at which time such beneficiaries would ''revert'' to their respective retirement systems. The commenter also recommended that the dual benefit restrictions set out in § 10.421(a) also apply to the military payments described in § 10.421(b). Absent an act of Congress amending section 8116, however, such changes cannot be made, and OWCP is therefore not adopting them.

Finally, the same commenter recommended that the first sentence of § 10.421(e) be modified to add the requirement that beneficiaries provide ''information on any other compensation or injury.'' However, such information would have no effect on a beneficiary's entitlement to compensation under the provisions of section 8116, and the requested modification is therefore considered unwarranted.

Section 10.430(a)

One labor organization suggested that the word ''clear'' be added before ''indication of the period * * *'', and OWCP is making this change. The organization also suggested that the section specify that periodic checks are to show any deductions or adjustments affecting the amount of the payment. OWCP is working on automated enhancements which will allow this information to be shown, but the capacity to do so is not yet available.

Sections 10.433, 10.436, and 10.437

Three agencies objected to being held financially accountable, through the chargeback process, for waivers of overpayments which resulted from errors made by OWCP. They suggested that when OWCP waives such an overpayment, the agency should receive a credit to its chargeback bill in the amount of the overpayment. For two reasons, OWCP does not concur with this suggestion.

First, the FECA is remedial in nature, and OWCP considers requests for waiver according to carefully defined procedures which are intended to protect the interests of both the claimant and the Government. The granting or withholding of a waiver is not intended to be a punishment or a reward, but rather the result of an administrative process as provided by law. Secondly, the FECA contains no provision for crediting the chargeback with monies reflecting either the commission of errors or the waiver of overpayments by OWCP.

Section 10.441

A commenter objected to inclusion of overpayment amounts in agencies' chargeback bills when the claimant is not at fault and the employer controverted the claim or detected the overpayment. The FECA contains no provision for crediting the chargeback because of such actions by the employer. In paragraph (b), the reference to the Debt Collection Act of 1982 has been replaced with the Federal Claims Collection Act of 1966 (as amended).

Section 10.500

As noted above, the proposed section has been subdivided into four new sections (§ 10.500 through 10.503) for clarity, and the contents have been slightly rearranged.

One agency objected to what it believed to be a new criterion for defining suitable work, namely that it be ''appropriate to the nature of the employee's usual employment''. This phrase represents a misreading of the actual text, which is taken from section 8115, as follows: ''appropriate to the nature of the injury; the degree of physical impairment; the employee's usual work; * * *'' The regulatory language contains nothing novel.

Four labor organizations argued that any position found to constitute suitable work should be available within the employee's commuting area. The availability of suitable work within the employee's ''commuting area'', a term which has been extensively addressed by the ECAB, is required. *See Arquelio Pacheco,* 40 ECAB 277 (1988); *Fred L. Nelly,* 46 ECAB 142 (1994). OWCP is modifying this section accordingly.

Section 10.501

One labor organization suggested rewording paragraph (a) to state that OWCP's requests for medical evidence in long-term disability cases will ordinarily occur not less than once a year. OWCP is making this change, as the suggested wording reflects long-term OWCP policy with respect to certain severely disabled employees.

One agency and another commenter noted that, while the Preamble to the Proposed Rule states that benefits may be suspended for failure to undergo non-invasive testing directed by OWCP, the text of paragraph (b) itself does not so state. A sentence is being added to this section to correct this oversight.

Section 10.505

One agency stated that this section combines two subsections of section 8151(b) in error, and a labor organization made the same point by suggesting that this section be rephrased. The word ''within'' is being replaced by the word ''after'' to correct this oversight.

The same agency noted that, because of the importance of making job offers in writing, § 10.505(c) is better placed in § 10.507, ''How should the employer make an offer of suitable work?'' OWCP concurs, and the language has been moved accordingly.

Section 10.505(a)

One labor organization suggested that this section require the employer to advise the employee in writing of the specific duties involved. This change has been made.

Section 10.506

An employer suggested that agencies not be limited to the use of Form CA–17 in gathering medical information from physicians. The form is usually adequate for this purpose, and this section has been revised to so state. Another agency wanted to remove the words ''in writing'' from this section, on the basis that return to work might be delayed or improper job placements might result from unclear descriptions of restrictions from physicians. The need for clarity in such descriptions is one of the two main reasons for requiring such offers to be made in writing, the other being the need for diligent attention to due process requirements. The suggested change has not been made.

A labor organization asked whether it is appropriate to use Form CA–17 for occupational diseases as well as traumatic injuries. OWCP has revised § 10.331(b) to allow its use in both kinds of situations.

This organization, along with one other, also suggested that employers be allowed to contact employees only in writing. Also, two labor organizations stated that employers should be explicitly prohibited from contacting physicians through phone calls or personal visits. OWCP concurs with both of these ideas, and the suggested changes have been added to this section.

Another labor organization objected to the provision allowing employers to contact employees at reasonable intervals to obtain medical evidence, due to a perceived possibility of harassment. While reasonable people may interpret the phrase ''at reasonable intervals'' differently, the phrase clearly does not provide license for harassment. OWCP does not believe that there is merit to the suggestion that this provision be removed.

Section 10.507

Two labor organizations stated that employers should be required to advise employees in writing of the information specified in paragraphs (a) and (b). This change has been made. (Also, ''should'' in (a) has been changed to ''shall'' for consistency with (b).)

Section 10.507(c)

An agency asked whether a job offer can be made verbally and followed up in writing. As discussed with respect to § 10.331(b), OWCP has tried to strike a balance among the sometimes competing interests of employers, employees, and OWCP itself.

In this case, the time gained by allowing verbal job offers must be balanced against the need to protect the employee's due process rights. The FECA provides a severe and permanent penalty for refusing an offered job, and the ECAB has remanded cases where OWCP has not scrupulously followed various procedural requirements. Job duties must be defined with great precision so that both employer and employee correctly understand them, and the potential for miscommunication is always higher in verbal than in written exchanges. However, as a practical matter, verbal job offers can expedite the process of reemployment, which benefits both the employer and the employee.

To both allow this flexibility and provide due process rights, this section has been modified to state that a job offer may be made verbally as long as the employing agency follows it up with a detailed written job offer within two business days of the verbal offer. This amount of time should be sufficient for the claimant to consider the job duties and assess whether he or she can perform them. The second half of this section has also been relettered ''(d)''.

Section 10.508

A labor organization stated that, since relocation expenses may be paid only to individuals who have been separated from the employer's rolls, the title of this section should be modified. However, the program believes that the question should continue to be phrased more generally, since it will arise with respect to employees still on the employer's rolls as well as to separated employees.

The same organization, and two others as well, proposed that the regulations require OWCP to notify employees that relocation expenses are payable when the job is offered. OWCP concurs that such notification should be provided in any case where a finding is made that the job is suitable, and text has been added to this effect.

Section 10.509

Three labor organizations suggested that the term ''reduction-in-force'' in § 10.509(a) be further modified by adding language that would limit its application to ''general'' or ''officially mandated'' actions. Using these modifiers, however, would not be consistent with ECAB decisions finding that employees do not sustain compensable recurrences of disability when they lose their light-duty positions pursuant to many different types of reductions-in-force.

Moreover, OWCP must be able to rely upon employers (and claimants) to advise it of any personnel actions that might affect the outcome of a FECA claim. OWCP has neither the resources nor the expertise to determine whether reductions-in-force are ''officially mandated'' (presumably, this phrase is equivalent to ''duly authorized''), and must leave disputes about individual reductions-in-force to be resolved in the proper forum. The suggested change would therefore not be workable, nor would it enhance either the sense of this section or its legal force.

Two of the same organizations suggested that OWCP simply assume that eliminated light-duty positions have been abolished because of employment-related disability. It is not OWCP's practice to make assumptions where the facts can be determined, and OWCP sees no merit in this idea.

Another labor organization objected to the underlying premise in § 10.509(a) that a reduction-in-force will not lead to a compensable recurrence of disability. However, as noted above, the ECAB has consistently ruled that employees who lose their light-duty positions in a reduction-in-force do not sustain compensable recurrences of disability.

A labor organization suggested that this section be modified so that employers would be prohibited from eliminating only light-duty positions. This is a personnel matter, and one which is outside the scope of these regulations.

One labor organization argued that a partially disabled employee who loses his or her Federal job will not be able to find another job in private industry and should therefore be entitled to receive compensation. Because this statement is hypothetical, OWCP cannot address it. An employee whose light-duty job is withdrawn, except in reduction-in-force situations, will in fact be entitled to claim compensation for a recurrence of disability.

An agency noted that employees may be performing light-duty work in classified positions while they are still receiving ''retained pay'' based on their date-of-injury positions and questioned whether OWCP should use their actual earnings in such circumstances to determine their wage-earning capacities consistent with the language found in § 10.509(a). However, using an employee's actual earnings while he or she is receiving ''retained pay'' has been approved by the ECAB in cases such as *Domenick Pezzetti,* 45 ECAB 787, *petition for recon. denied,* Docket No. 92–2037 (issued November 2, 1994), which held that the use of actual earnings under these circumstances to determine an employee's wage-earning capacity was consistent with section 8115(a) of the FECA.

The same agency also suggested that § 10.509(b) specifically note that an injured employee must ''encumber'' a classified light-duty position before OWCP will use the actual earnings in such a position to determine the wage-earning capacity under § 10.509(a). This suggestion reflects OWCP's existing policy in this area, and § 10.509(b) is revised accordingly.

A labor organization raised a concern that pursuant to § 10.509(b), OWCP might be tempted to use an ''odd-lot'' or ''sheltered'' position created specifically for a particular injured employee to determine that employee's wage-earning capacity. However, the ECAB has long rejected use of such a position, and nothing in this subsection is meant to thwart this legal prohibition, which is widely recognized in the field of workers' compensation law. If a job is withdrawn after OWCP has determined the employee's loss of wage-earning capacity, and the job was in fact an odd-lot or sheltered job, the employee may file a claim for a recurrence of disability.

Finally, one commenter disagreed with the use of the term ''light-duty'' in this section and argued that it should be replaced with a term such as ''modified'' or ''restricted duty'' that would be based solely on medical restrictions. However, the term ''light-duty'' has a very specific meaning in § 10.509(b) that is obviously based on a number of medical and factual circumstances, and for these reasons OWCP does not accept the argument that it be replaced with a purely medical term.

Section 10.515(a)

A labor organization suggested that the word ''total'' be replaced by ''his or her compensable'' disability. In fact, neither the original phrase nor the proposed revision adds value to this paragraph, and the phrase ''because total disability has ceased'' is therefore being removed.

Section 10.515(b)

An agency suggested that this section be reworded to require claimants to seek suitable employment, as well as to accept it. This change, which is consistent with section 8106(c), has been made.

A labor organization suggested that this paragraph be expanded to include the effects of an ''other acceptable medical condition'' as well as the effects of the work-related injury. The suggested wording both obscures the meaning of the paragraph and introduces extraneous concerns, and no change is being made to it.

Section 10.515(c) and (d)

An agency noted that employees do not always advise attending physicians that work may be available for them, and asks whether the agency can contact the physician when there is a written job offer or the employee's work limitations can be accommodated. Section 10.331(b) allows employers to contact physicians to obtain descriptions of work limitations on Form CA–17.

Section 10.516

Two agencies argued that the 30-day period provided by OWCP for an employee to accept or decline an offered position is too long. One suggested that this period be shortened to five days, while the other suggested that it be shortened to 15 days.

Where a job is to be accepted or declined, and termination of benefits may be at issue, OWCP does not consider a period of less than 30 days sufficient, across the board, for response from employees. For instance, if the employee objects to the position offered for medical reasons and thus needs to obtain a medical report, it is unreasonable to expect that the physician will conform to a five or even a 15-day deadline to prepare and submit a medical report.

Although the circumstances in a particular case may not in fact warrant a 30-day period for response, clear and consistent procedures are especially important in this area of the program's operations, given the need to provide due process at every step. For these reasons, OWCP does not believe a change to this paragraph is warranted.

Sections 10.518 and 10.519

While one Federal agency strongly supported the inclusion of nursing services as one of the many vocational rehabilitation services that OWCP may provide to injured employees, one labor organization noted that such inclusion would change nursing services from a voluntary choice to an obligatory course that OWCP could ''direct'' an employee to undergo, and argued that OWCP should not make this change. It stated that such an approach would be ''deeply unproductive'' without giving any reason for this belief. The organization also posited that the mandatory aspect was proposed so that the costs associated with OWCP nurses would be shifted to the employing agencies, but in fact, the costs are already charged back to the agencies.

In addition, the organization argued that since section 8104(a) of the FECA only allows OWCP to direct ''permanently disabled'' employees to undergo vocational rehabilitation, OWCP could not impose the sanctions described in § 10.519 (which are derived from section 8113(b) against employees who refuse to cooperate with OWCP nurses unless they were ''permanently disabled.''

Pursuant to section 8104(a), OWCP has the discretionary authority to ''direct a permanently disabled individual whose disability is compensable'' to undergo vocational rehabilitation. The ECAB has repeatedly held that a ''permanently disabled individual'' refers to an employee with a loss of wage-earning capacity, since the intent of Congress in enacting section 8104(a) was to provide disabled employees with the services necessary to overcome or lessen their disability. *See, e.g., Wayne E. Vincent, 6 ECAB 1024 (1954); Joseph C. Reuter,* 11 ECAB 296 (1960); *Gary L. Loser,* 38 ECAB 673 (1987).

Consistent with these rulings, OWCP's policy is to presume that an injured employee who has a loss of wage-earning capacity is ''permanently disabled,'' for purposes of § 10.519 only, unless and until the employee proves that the disability is not permanent, and to intervene in the early stages of disability cases to help employees return to some type of work as soon as possible. Since nursing services have been shown to be one of the most effective vocational rehabilitation services that can be provided to employees in the weeks immediately following their injuries, § 10.519 allows OWCP to impose sanctions against employees who refuse to cooperate with its nurses. However, in light of the apparent confusion regarding the scope of this regulation, § 10.519 is revised to better describe OWCP's policy.

Section 10.520

A labor organization asked that this section be reworded to state that positions must be available within the employee's commuting area. OWCP believes that this point is sufficiently addressed in the response to the comments to § 10.403 set out above.

Section 10.525(a)

Two agencies asked that this section include the authority for OWCP to request copies of employees' tax returns, though neither agency includes a reason for this request. The program occasionally finds it necessary to request tax returns, for instance to verify self-employment or to ensure that an employee has not earned income for a lengthy period for which retroactive compensation is claimed. When asked, employees have submitted the copies without protest. OWCP does not believe that an addition of regulatory authority is necessary.

Section 10.526

One agency asked OWCP to clarify the language of this section regarding the applicability and frequency of the intended reporting requirement, while another agency noted the similarity of this section to § 10.525 and suggested simply combining the two sections. To clarify § 10.526 consistent with the first suggestion, the text of this section has been modified to specifically state that this is a periodic reporting requirement which applies to both partially and totally disabled employees. However, the suggestion to combine §§ 10.525 and 10.526 is not adopted since the text of § 10.526 is intended to focus on volunteer activities, and keeping these sections separate will further highlight this intentional distinction.

The second agency also suggested that this section include OWCP's expectation that employees will report

any information which might reasonably affect their benefit levels. The program believes that this last point is better left to procedural guidance.

One labor organization argued that employees should not be required to report volunteer activities because such activities may help them cope with their disabilities. While agreeing that these activities may be beneficial to an employee's self-esteem, OWCP is of the opinion that they are also a useful indicator of an employee's ability to perform some form of work and therefore should be reported.

Section 10.527

One agency suggested strengthening the wording of this section by removing the words ''attempt to'' with respect to verifying employees earnings. Those two words have been removed. Another agency stated that this section should be reworded so as not to limit the kinds of computer matches which may be performed with records of State agencies. This suggestion is being adopted as well.

Section 10.540(b)

One labor organization suggested that the second sentence of § 10.540(b) be changed from ''a claim has been made for a specific period of time'' to ''a claim has been approved for a specific period of time * * *'' However, the recommended change would change the focus of this portion of § 10.540(b) from the reasonable expectation of the beneficiary to a determination of OWCP, and would therefore be inconsistent with the remainder of this subsection, which states that OWCP will not provide written notice before it terminates compensation ''when the beneficiary has no reasonable basis to expect that payment of compensation will continue.'' Therefore, the suggested change is not made. However, two minor wording changes have been made to clarify the meaning of two clauses in the third sentence.

Section 10.540(c)

A labor organization suggested wording changes that would, in essence, provide employees who refuse to accept or perform suitable work additional procedural safeguards that exceeded those described in § 10.516. However, the procedures in § 10.516 are based on the ECAB's decision in *Maggie L. Moore*, 42 ECAB 484 (1991), *reaffirmed on recon.*, 43 ECAB 818 (1992). OWCP sees no basis to add further procedures in this area.

One agency was under the impression that this section, which states (among other things) that OWCP will not provide written notice before it terminates compensation based on a ''failure or refusal to either continue performing suitable work or to accept an offer of suitable work,'' was inconsistent with the notice provided in these situations pursuant to § 10.516. However, the two regulations are not inconsistent since the notice provided under § 10.516 informs the employee of OWCP's determination that a particular position is suitable, whereas the notice contemplated by § 10.540 informs the employee of the impending cessation of his or her compensation rather than a finding on a preliminary issue such as suitability.

Therefore, for example, once an employee has received the notice required by § 10.516 and has refused an offer of suitable work, OWCP will issue a decision terminating the employee's monetary benefits without any prior written notice to that effect. The first sentence of § 10.540(c) is being amended to include the word ''terminated'' before ''suspended or forfeited'' to account for all of the possible ways in which OWCP may end compensation payments.

Section 10.541(b)

An agency suggested that the word ''Substantial'' be inserted before the word ''Evidence'' at the beginning of this section, which addresses the kinds of evidence which will affect OWCP's proposed action to reduce or terminate benefits. In practice, evaluations of evidence received when pre-termination notice has been issued always require judgment and discretion on the part of OWCP staff. This wording change would have no effect of any significance on the meaning of this subsection.

A labor organization suggested substituting ''finding and award under 5 U.S.C. 8124'' for ''decision'', but here again, such a wording change would have no apparent effect of any significance on the meaning of this subsection.

Section 10.600

One agency proposed giving agencies the right to seek review of decisions. Since proceedings under the FECA are non-adversarial, there is no statutory basis for providing the agencies with the right to seek review of benefit determinations.

Two employing agencies suggested that the phrase ''initial final decision'' in the first sentence is confusing. OWCP concurs, and the phrase has been changed to ''formal decision''.

Section 10.607

The existing rule, unchanged in the proposal, is that the claimant has a right to reconsideration of any decision if requested within one year of the date of the last merit decision. Three labor organizations noted that the proposal does not reflect OWCP's practice of including ECAB decisions among the ''merit decisions'' the date from which the one year begins to run.

Any suggestion that OWCP should review or reconsider an ECAB decision is inappropriate. OWCP and ECAB are separate and distinct entities. The ECAB is the highest appellate authority under the FECA and its decisions are binding on OWCP. Since OWCP has no authority to review decisions of the ECAB, OWCP has interpreted its limitation provision as liberally as possible, such that a merit decision of the ECAB will renew the one-year time period within which a claimant may request reconsideration before OWCP, with the date of the ECAB's merit decision serving as the new starting point from which the one-year period will run. OWCP will continue to do so, but because ECAB decisions cannot be reviewed by anyone, including OWCP, the language in this section has not been changed.

Section 10.609

One commenter suggested that the amount of time allowed for employers to comment on the application for reconsideration be expanded from 15 to 30 days, due to time constraints on the part of agency staff. While such a change would lengthen a process which is already time-consuming, OWCP recognizes that the 15-day period has been problematical. Therefore, the period for commenting on the application for reconsideration has been changed to 20 days in the final rule. This commenter also advocated allowing employers to ''question'' claims (presumably by requesting reconsideration). The FECA makes no provision for appeal rights for employers.

Section 10.610

One employing agency suggested that this section include appeal rights for employers. The FECA contains no provision for granting such rights.

Section 10.615

One agency objected to the proposal that a hearing representative may direct that the hearing be conducted by telephone or teleconference. A labor organization said that this should be a recommendation but not done at the hearing representative's option. Neither

the agency nor the labor organization gives a basis for its objection. OWCP believes that this option will allow it to better control an ever-increasing workload and to provide hearings at an earlier time than it otherwise could, without limiting claimants' rights in any way.

Sections 10.616 and 10.619

Several labor organizations objected to recognizing forms of date marking other than postmarks. Since requests are being submitted through carriers other than the Postal Service, and electronic transmission is likely to become routine in the future, the text has not been changed.

With respect to § 10.616, one commenter noted that the claimant could ask for a change to an oral hearing after the case was far along in the written review process, thus undercutting efficiency and allowing for purposeful delays. The point is well taken, and the time frame for such requests has been shortened to 30 days after the Branch of Hearings and Review acknowledges the request.

Sections 10.617 and 10.618

Several comments about time frames were received. One commenter noted that the time frames set forth in § 10.617(f) for submitting evidence were confusing and potentially never-ending, because they would allow new evidence to be submitted up to the date of the decision, which in turn would require comments by the agency or the employee, and so forth. The final rules have been changed to clarify that evidence in cases where oral hearings are held is to be submitted up to 30 days after the date on which the hearing is held (unless the hearing representative specifically grants an extension of time). Similarly, § 10.618(a) has been changed to provide that OWCP will designate a date by which evidence is to be submitted in reviews of the written record.

Another commenter noted that the service provisions in § 10.618(b) represent a change from the current practice of having the agency serve their comments directly on the claimant (or the claimant's representative, if any) and provide OWCP with a certification of service. That section has been slightly modified to reflect this practice.

With respect to the agencies' comments that 15 days is not enough time to adequately review and analyze the transcript (§ 10.617(e)), OWCP recognizes that this time frame has been problematical and has therefore extended the period for response to 20 days. For consistency, the time frame for claimants to respond to agency comments has also been changed to 20 days.

A labor organization suggested that the notice of hearing be mailed 60 days, rather than 30 days, before the date of the scheduled hearing. The argument offered is that seven to 10 days can elapse between the hearing representative's determination of the date of the hearing and the employee's receipt of the notice. However, any increase in the period of notice adds an increment of delay to a process which OWCP is attempting to streamline. The program does not believe that this change is necessary, and it has not been adopted.

Finally, one labor organization noted that language from the statute (section 8124(b)(2)) which appears in the current rules (at existing § 10.133) should be included in § 10.617. The phrase ''but may conduct the hearing in such a manner as to best ascertain the rights of the claimant'' has been added to § 10.617(c).

Section 10.621

One employing agency noted that the agency's role in teleconferenced hearings and the number of representatives an agency may send to the hearing needed to be clarified (another agency made the latter point as well). Section 10.621 has been changed to allow more than one representative, where appropriate. The comments also stated that the agency and the claimant should each be given copies of the other's comments, and both should have the same amount of time to review and respond to transcripts and comments. The current practice of sending agency comments to the claimant reflects the non-adversarial nature of the FECA claims process, and the fact that the agency is not a party to the claim. Because the agency is a source of information, however, it is allowed limited participation, but expansion of that role would not be appropriate.

Section 10.621(a)

One labor organization objected to the statement allowing hearing representatives to ask employing agency representatives to testify, on the basis that the employee cannot easily anticipate what issues the hearing representative will raise and that employing agency representatives, who are often compensation specialists, may confuse employees with sophisticated arguments. The organization also argues that active participation by the agency will compromise the non-adversarial nature of the hearing process and hinder the ability of claimants to present evidence. These arguments do not take into consideration the role of the hearing representative, which is to uphold the non-adversarial nature of the process and adjudicate the issues based on the evidence. OWCP does not find these arguments persuasive, and the language of this section has not been modified.

Section 10.622

The provision prohibiting cancellations of hearings drew considerable criticism from four labor organizations and three commenters, and support from one Federal agency. Most of the comments suggested that the blanket prohibition against postponements was too harsh and suggested that postponements be allowed under ''exceptional circumstances.''

OWCP is concerned about providing any opportunity to further delay the hearing process or to add yet another issue for potential review. Nevertheless, it is recognized that very narrow circumstances exist which are truly out of the control of the claimant and would justify a postponement. Accordingly, § 10.622(b) has been changed to allow a postponement for exceptional circumstances, defined in § 10.622(c) as medically documented non-elective hospitalization of the claimant, or death of the claimant's parent, spouse or child.

One labor organization commented on the period for rescheduling a hearing. However, nothing in this section of the regulations refers to time periods.

The first sentence in § 10.622(b) has been slightly reworded and divided into two sentences for clarity.

Section 10.701

A labor organization questioned whether representational activity undertaken in connection with a claim under the FECA is exempt from the prohibitions set forth at 18 U.S.C. 205. The organization asserted that ''the adjudication of a claim under the FECA is an administrative proceeding and thereby such representation meets the exceptions noted in the applicable law''. OWCP believes that the organization was referring to section 205(d), which permits a Federal employee to represent another employee in ''disciplinary, loyalty, or other personnel administration proceedings'' so long as the person acts without compensation. Based on OWCP's reading of Informal Advisory Letter 85 x 1, issued January 7, 1995, by the Office of Government Ethics (OGE) (representation of persons seeking to establish entitlement to benefits under laws administered by the

Veterans Administration is not covered by section 205(d)), the program is of the opinion that proceedings under the FECA do not come within the exception. For these reasons, no change will be made to § 10.701.

Section 10.701(b)

A labor organization noted that the phrase ''conflict with any other provision of law'' is redundant, given that it appears in the first paragraph of this section. Therefore, the phrase has been removed from paragraph (b).

Section 10.703

One commenter objected to assigning the task of approving fee petitions to the body before which the services for which fees are charged were performed. However, the office before which the work was performed is in the best position to evaluate the usefulness of services, the nature and complexity of the claim and the other criteria set out in this section. Thus, the text remains unchanged in this regard.

Section 10.705

One Federal agency asked whether claims examiners exercise any discretion in requiring an employee to prosecute an action against a third party in regard to minor injury claims, noting that § 10.709 references the procedures under which a FECA beneficiary who has been directed to pursue an action against a third party can be released from that obligation. Section 10.705(a) provides that an injured claimant ''can be required to take action'' against a third party responsible for an injury covered under the FECA. It does, however, allow OWCP to exercise discretion in determining whether to require a FECA beneficiary to take action against a third party.

Section 10.711

One Federal agency pointed out that ''Subtotal B'' in the example should be ''72,000'' and not ''-72,000'', and that ''Disbursement'' in line 4 of the example should be ''Disbursements.'' These observations are correct, and § 10.711 is revised accordingly.

Section 10.714

One commenter objected to the inclusion of costs for both second opinion medical examinations and referee medical examinations within the refundable disbursements used to calculate any required refund or any credit against future benefits. The objection is based upon the fact that the damages requested from a third party in any litigation are not based upon those expenditures. Inclusion of such costs within the refundable disbursements used to calculate both required refund and credit against future benefits is a longstanding practice based upon the fact that such costs are paid from the Employees' Compensation Fund and contribute to the ability of OWCP to ''furnish to an employee who is injured while in the performance of duty, the services, appliances, and supplies prescribed or recommended by a qualified physician, which the Secretary of Labor considers likely to cure, give relief, reduce the degree or the period of disability, or aid in lessening the amount of the monthly compensation'' as set forth in section 8103(a) of the FECA.

Furthermore, the Supreme Court in *United States* v. *Lorrenzetti,* 467 U.S. 167 (1984), has specifically rejected any attempt to limit the calculation of either the refund required to be paid by FECA beneficiaries or any credit against future benefits based upon whether or not the expenditures at issue were within the elements of damages for which recovery was sought against a third party in the litigation that resulted in a recovery subject to section 8132. Accordingly, the requested change to this section is not made.

Section 10.717

One commenter disagreed with the statement that ''an injury caused by medical malpractice in treating an injury covered by the FECA is also an injury covered under the FECA,'' and argued that such coverage should not result from the medical malpractice of a private physician. However, since the statement in question is based on ECAB cases where coverage has been found under these circumstances, such as in *Bonnie D. Jefferson,* 34 ECAB 1426 (1983), the suggested modification of § 10.717 would be directly contrary to the ECAB's interpretation of the FECA, and it is therefore considered unwarranted.

Sections 10.730 and 10.731

An agency objected to the elimination of a number of redundant provisions that involved the Peace Corps and stated that without their inclusion in these regulations, it would not be able to effectively administer the workers' compensation claims of its personnel. However, the retention of the provisions in question would not be consistent with OWCP's efforts to streamline its regulations and would not provide any significant assistance with respect to this class of claims since the eliminated provisions merely repeat statutory language without adding anything. The suggested changes to this section are therefore not adopted.

Section 10.800

One agency recommended that OWCP expand the list of issues addressed by medical records to include ''disability.'' The recommended change would be consistent with § 10.330(j), which states that a medical report from an attending physician must address ''the extent of disability,'' and therefore § 10.800 is revised to reflect this suggestion.

Section 10.801

One agency supported the changes to OWCP's fee schedule, but asked how the requirement to use the specific billing forms listed in § 10.801 would be communicated to providers and employees. These regulations themselves are the primary vehicle for informing providers and employees of OWCP's billing requirements, which will also be communicated via the Internet (from which copies of the forms can be downloaded) and through routine contacts with OWCP claims staff and bill processing units in the various district offices across the country.

Section 10.802

One agency asked if there were any consequences for providers who consistently refused to reimburse employees for amounts charged in excess of the fee schedule. Since the inception of the fee schedule in 1986, OWCP has specified such consequences, and § 10.815(e) of these regulations states that providers may be excluded from participating in the FECA program if they knowingly fail to reimburse employees for amounts charged in excess of the fee schedule. Another agency thought that allowing OWCP to consider reimbursing an employee for the amount in excess of the fee schedule in § 10.802(g) contravened the fee schedule and would lead to an undesirable increase in agency chargeback costs. As noted above in response to similar comments regarding § 10.337, subsections (e), (f), and (g) of § 10.802 have been modified consistent with the changes to § 10.337.

Section 10.805

One agency asked if some providers might be exempt from the OWCP fee schedule. In § 10.805(b) and (c), OWCP notes that its fee schedule does not currently cover services provided in nursing homes, nor does it cover appliances, supplies, services or treatment furnished by medical facilities of the U.S. Public Health Service or the Departments of the Army, Navy, Air Force and Veterans Affairs.

Another agency disagreed with the fact that the fee schedule did not apply to Government medical facilities, since this meant that agencies would pay more if they encouraged their employees to seek treatment for employment-related injuries or illnesses at such facilities. However, this agency did not seem to be aware that pursuant to section 8103(a), employees have the right to make an initial selection of a physician to provide medical treatment, and would presumably not choose to be treated in a Government medical facility if other sources were available. Furthermore, there seems to be little rationale for applying OWCP's fee schedule to these facilities since they are, to a large extent, designed to provide specific types of medical services to rather limited groups of patients and are not currently operated under any recognizable billing system.

Finally, one commenter disagreed with the development and application of OWCP's fee schedule. Referencing a February 1994 article in the *Journal of Occupational Medicine*, this commenter alleged that using the schedule would cause providers to choose not to treat injured Federal employees, thus resulting in a diminished quality of care. OWCP's medical fee schedule has been in use since 1986 and is currently based on the relative value scale (RVS) used by the Health Care Financing Administration (HCFA), which includes geographic index factors. These data were developed by HCFA through studies and consultations with national physicians' groups and others. They are updated yearly through the regulatory process. While OWCP has incorporated the HCFA RVS in its medical fee schedule, the conversion factors that translate the RVS into maximum dollar amounts are based on OWCP program data, data from other Federal programs, reimbursements under State workers' compensation programs, and common billing data.

The article referenced by the commenter discusses the comparative cost savings of a corporate medical department versus outside services and therefore has no relevance to the program administered by OWCP given its national scope and the restrictions imposed by the physician selection provision of section 8103(a).

In the years since 1986, OWCP has not received any evidence that the fee schedule has jeopardized the quality of care provided injured employees, and the program only rarely receives a complaint about the maxima allowable that is not satisfactorily resolved. Therefore, no changes to § 10.805 will be made.

Section 10.809

One agency recommended that OWCP reimburse employees only for prescription drugs that they purchase for employment-related injuries and illnesses at the lower of either the fee schedule or the employee's individual health insurance plan charges. As already provided in § 10.809, OWCP will not reimburse an employee for an amount that exceeds the price he or she actually paid, nor will it reimburse an employee for an amount that exceeds the fee schedule. However, further limitations of the sort recommended would not be feasible due to the wide variation in health insurance plan charges and the fact that most plans do not cover prescription drugs needed for employment-related injuries and illnesses.

One labor organization noted that some small pharmacies lack the means to submit bills electronically to OWCP or to wait for the assignment of a claim number before submitting bills for payment by OWCP. However, there is no requirement that pharmacies bill OWCP electronically in these regulations, nor is there a likelihood that a problem involving claim numbers will occur since these numbers are currently being assigned in an expeditious manner.

The same labor organization asked that this section be amended to provide that pharmacies be notified of the requirement to refund any charges in excess of the fee schedule when employees are only partially reimbursed for prescription drugs. However, § 10.802(e) already provides for this notice to pharmacies and repeating this provision in § 10.809 is seen as unnecessary.

Another labor organization wanted OWCP to give employees notice of the fee schedule and an explanation of how it works, presumably in addition to the legal notice of these matters provided by the publication of the regulations in the **Federal Register**. However, additional notice of the sort requested would not be practical and is not seen as necessary, since current beneficiaries will be informed of these matters as part of the routine administration of their claims by OWCP. Therefore, the requested changes to § 10.809 will not be made.

Section 10.810

As with § 10.809, one labor organization wanted OWCP to notify employees of the fee schedule for inpatient medical services in § 10.810 and explain how it works, in addition to the legal notice of these matters provided by the publication of the regulations in the **Federal Register**. However, additional notice of the sort requested would not be practical and is not seen as necessary, since current beneficiaries will be informed of these matters as part of the routine administration of their claims by OWCP.

One commenter criticized the decision to use the HCFA Prospective Payment System (PPS) using Diagnostic Related Groups (DRGs) as the foundation of OWCP's own PPS in § 10.810. However, this decision was based on research that explored available options and a study of FECA inpatient bills which revealed that the HCFA PPS using DRGs is well-suited to OWCP's efforts to monitor and control its inpatient costs. Accordingly, the requested changes to § 10.810 have not been adopted.

Section 10.816

One commenter suggested that a new paragraph (c) be added to § 10.816 requiring that the ''partner or group'' of a physician automatically excluded from the FECA program under § 10.816(a) also be excluded from participating in the program. However, the situations that would lead OWCP to automatically exclude a physician under § 10.816(a) would be specific to that physician, and therefore they would not form a proper legal basis for automatically excluding that physician's ''partner or group'' under this regulation. Therefore, the suggested addition of a new subsection is not adopted.

Leave Buy-Back Provision

Two employing agencies and two labor organizations objected to the removal of the leave buy-back provision found at current § 10.310. Most important among the reasons for this removal, which are stated in the Preamble to the Proposed Rule, is that leave buy-back is neither authorized nor required by the FECA, nor is it controlled by OWCP.

The commenters argued that agencies would not have the authority to convert periods of leave to LWOP without the equivalent of the current § 10.310, and that in remaining silent about this issue, OWCP is abandoning its own procedures. It was also stated that compensation would have to be paid directly to employees, without reimbursement to agencies, and that employees would have to pay the entire cost of leave to agencies before leave restoration, instead of compensation due being paid to agencies. Finally, the two agencies stated that the current procedure, where OWCP pays the

agency directly, aids in debt collection, and that removal of the leave buy-back provision from OWCP's regulations would add work for agencies.

As an ancillary issue, several agencies asked that Forms CA–7a and CA–7b be added to the list in § 10.7(a).

The reasons for removal of the leave buy-back provision have not changed. However, since OWCP does in fact have a procedure for paying compensation when leave is restorable, a brief mention of this process in this rule is considered warranted, and it is being added as new § 10.425. For similar reasons, Forms CA–7a and CA–7b are being added to the list in § 10.7(a). Current practice is not altered.

Miscellaneous Comments

OWCP also received comments and suggestions which did not pertain directly to the proposed regulations. Many would require legislative amendments before they could be implemented, or concern procedural matters. Because they are not germane to this final rule, no further comments are appropriate.

One commenter addressed the section about Executive Order 12866, questioning whether compliance will be possible with existing personnel. To the extent that the comment refers to the staff needed by pharmacies to comply with the fee schedule, OWCP does not agree since similar fee schedules are already widely used. If the comment refers to federal personnel who administer the FECA, OWCP also disagrees but, in any event, the Executive Order does not concern the impact of regulations on federal agencies.

The commenter also stated that the proposed pharmacy fee schedule will adversely affect claimants since the most advanced drugs for musculoskeletal disorders are very expensive. However, the providers will be required to accept the amount offered under the fee schedule, and if they do not, the regulations contain a provision for reimbursement to the claimant of the difference between the amount charged and the amount allowed by the fee schedule (see the comments about § 10.337 above).

This commenter also addressed the section about the Unfunded Mandates Reform Act, referring to the above-noted proposal for establishing ''centers of excellence'' as well as to occupational health personnel matters. The first concern is misplaced (unfunded mandates apply to Federal requirements imposing a burden on States). The second concern is not germane to the regulations at hand.

Finally, with regard to the section about the Paperwork Reduction Act, this commenter made a general recommendation that existing forms be eliminated and consolidated. Since no specific forms are named or specific criticisms offered, OWCP is unable to address this comment.

Publication in Final Re Non-Substantive Changes

The Department of Labor has determined, pursuant to 5 U.S.C. 553(b)(B), that good cause exists for waiving the public comment on this rule with respect to the following changes:

(a) Typographical errors.

(b) Other minor wording changes and clarifications which do not affect the substance of the rules.

Executive Order 12866

This final rule constitutes a ''significant'' rule within the meaning of Executive Order 12866. The Department believes, however, that this rule will not have a significant economic impact on the economy, or any person or organization subject to the proposed changes. The changes will have little or no effect on the level of benefits paid (which in any case involve payments almost exclusively to Federal employees from funds appropriated by Congress); nor will there be a significant economic impact upon the hospitals and pharmacies which, for the first time, will be subject to the fee schedules established by these rules. The total dollar amount paid for inpatient hospital services in fiscal year 1996 was $81,955,562.00, and subjecting these charges to the DRG schedule is expected to result in a 20 percent decrease in the amount paid, or about $16.4 million. The total dollar amount paid for pharmacy costs in fiscal year 1996 was $31.9 million, and subjecting these charges to the fee schedule is expected to result in a 10 to 15 percent decrease in the amount paid, or about $3–4.5 million. Insofar as the new rules make it easier to seek benefits under the FECA and streamline the administration of the program, they would decrease administrative costs. These changes have been reviewed by the Office of Management and Budget for consistency with the President's priorities and the principles set forth in Executive Order 12866.

Unfunded Mandates Reform Act and Federalism Executive Order

For purposes of the Unfunded Mandates Reform Act of 1995, as well as E.O. 12875, this rule does not include any Federal mandate that may result in increased expenditures by State, local and tribal Governments, or increased expenditures by the private sector of more than $100 million.

Paperwork Reduction Act

The new collection of information contained in this rulemaking has been approved by the Office of Management and Budget (OMB) in accordance with the Paperwork Reduction Act of 1995. No person is required to respond to a collection of information request unless the collection of information displays a valid OMB control number.

The new information collection requirements contained in this proposed rule are set forth in §§ 10.801 and 10.802, and they relate to information required to be submitted by pharmacies and hospitals covering certain inpatient bills. The Department has adopted a new form (Universal Pharmacy Billing Form) which will be used by pharmacies in submitting claims for payment. Another form (the claimant reimbursement form) will be used by claimants seeking reimbursement for medical expenses for which they have paid the providers directly. The public reporting burden for these collections of information is estimated to average as follows: Universal Pharmacy Billing Form—It will take five (5) minutes to complete the form, including time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed and completing and reviewing the collection of information; Claimant Reimbursement Form—It will take an average of ten (10) minutes to complete this form, including reviewing instructions, searching for existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information.

Type of Review: New Collection.

Agency: Employment Standards Administration.

Title: Claimant Medical Reimbursement Form (CA–915).

OMB Number: 1215–0193.

Affected Public: Individuals or households, Federal Government.

Total Respondents: 40,500.

Frequency: On occasion.

Total Responses: 40,500.

Average Time per Response: 10 minutes.

Total Hours: 6,723.

Total Burden Cost (capital/startup): 0.

Total Burden Cost (operating/maintenance): 0.

Type of Review: New Collection.

Agency: Employment Standards Administration.

Title: NCPDP Universal Pharmacy Billing Form (79–1A) .

OMB Number: 1215–0194.
Affected Public: Businesses or other for-profit; Not-for-profit Institutions; Individuals or households; Federal Government; State, Local or Tribal Government.
Total Respondents: 406,198.
Frequency: On occasion.
Total Responses: 406,198.
Average Time per Response: 5 minutes.
Total Hours: 33,714.
Total Burden Cost (capital/startup): 0.
Total Burden Cost (operating/maintenance): 0.

Regulatory Flexibility Act

The Department believes that the rule will have ''no significant economic impact upon a substantial number of small entities'' within the meaning of section 3(a) of the Regulatory Flexibility Act Pub. L. 96–354, 91 Stat. 1164 (5 U.S.C. 605(b)). The provision of the final rules extending cost control measures to hospital inpatient services and pharmacies is the only provision of the regulations which may have a monetary effect on small businesses. That effect will not be significant for a substantial number of those businesses, however, for no one business bills a significant amount to OWCP for FECA-related services, and the effect on those bills which are submitted, while a worthwhile savings for the Government in the aggregate, will be not be significant for individual businesses affected.

The two new cost containment provisions are: (1) A set schedule for payment of pharmacy bills; and (2) a prospective payment system for hospital inpatient services. The two methodologies are fully explained in the text of the Preamble to the Proposed Rule, including the fact that the use of Diagnostic Related Groups (DRGs) for setting payment for inpatient hospital charges essentially is an adaptation of a system used by the Health Care Finance Agency (HCFA) in payment of Medicare bills. The use of Average Wholesale Prices (AWP) in setting the maximum reimbursable amount for pharmacy bills is also commonplace in the industry.

The method selected by OWCP is therefore one which contains efficiencies both for the Government and providers. The Government benefits because OWCP did not develop a new system, but rather minimized the use of resources by adopting existing and well-recognized systems already in place. The providers benefit because submitting a bill to OWCP and receiving payment will be almost the same process as submitting it to Medicare, a program with which hospitals are already familiar and have in place for billing, so they will not have to learn a new process and the FECA bills will not represent an unnecessary administrative cost because the FECA bill process will not be essentially distinguished from that for Medicare. Similarly, the pharmacies are used to billing through clearing houses and having charges subject to limits by private insurers. By adopting the uniform billing statement and a familiar cost control methodology, OWCP has kept close to the environment with which the pharmacies are already familiar. The methods chosen, therefore, represent a familiar environment to the providers.

The costs savings resulting from the implementation of these cost containment methods will have no significant effect on any individual business. First, the need for cost containment in the FECA program is self-evident and these methods are already used by Medicare, CHAMPUS and the Department of Veterans Affairs, among Government entities, and for the private insurance carriers which cover Federal employees as part of the Federal employees' health benefit insurance programs. The costs to providers whose charges may be reduced are relatively small, both in incremental and in actual terms.

Incrementally, FECA bills simply do not represent a large share of any one provider's total business. Since Federal employees are spread throughout the United States and this system covers only those Federal employees who are injured on the job and require either prescription drugs or inpatient hospital care (a tiny subset of all employees), the number of bills submitted by any one provider which may be subject to these provisions is likely to be very small.

Second, in actual terms, the amount by which these bills might be reduced will not have a significant impact on any business. In fiscal year (FY) 1998, the program paid $100.1 million dollars on about 13,150 bills received for inpatient hospital services (an average charge of $7,600.00 per stay). The total number of hospitals on the program's provider files is about 5,000, for an average patient load of slightly over three FECA-claimant patients per hospital. If we assume that no hospital had more than three patients, then the average annual billings subject to these rules for any hospital would be about $22,800 (3 X $7,600). As noted in the Preamble to the Proposed Rule, the DRG method will reduce the $100.1 million by about 20 percent, or $20.2 million. Thus, the average dollar amount of the reduction in bills submitted by any one hospital resulting from these rules would be about $4,560.00.

A similarly small actual dollar reduction applies to pharmacy charges. OWCP paid about $32,000,000 for pharmacy charges, although the program cannot identify exactly what portion of this amount was paid to institutions, since much of this dollar figure represents reimbursements directly to claimants. OWCP cannot identify with certainty the number of pharmacies who provided supplies, for the same reason, but there are about 4,000 pharmacies in the program's provider files. Similarly, OWCP cannot determine the exact number of bills paid, since the program captures only those submitted by a provider for direct payment and not those submitted by a claimant for reimbursement. Assuming for purposes of this analysis that the reimbursements were evenly divided among pharmacies already part of our provider files, we divide 4,000 providers into the total number of dollars paid to get an average annual aggregate of charges paid to a provider of about $8,000. It is estimated that the schedule would result in an average reduction of five percent in pharmacy charges; based on these figures, the average pharmacy would see a reduction in the total amount received of about $400.

These figures illustrate that the ''cost'' of these rules to any one provider is negligible. On the other hand, OWCP will see substantial aggregate cost savings as a result (estimated at $18,000,000). These savings benefit OWCP (by strengthening the integrity of the program), the employing agencies (which ultimately foot the bill for FECA through the chargeback system), and taxpayer and rate payers to whom the ultimate costs of the program are eventually charged through appropriations.

The Assistant Secretary for Employment Standards has certified to the Chief Counsel for Advocacy of the Small Business Administration that these rules will not have a significant impact on a substantial number of small entities. The factual basis for this certification has been provided above. Accordingly, no regulatory impact analysis is required.

Executive Order 13045 Protection of Children From Environmental, Health Risks and Safety Risks

In accordance with Executive Order 13045, OWCP has evaluated the environmental health and safety effects of the rule on children. The agency has determined that the final rule will have no effect on children.

Submission to Congress and the General Accounting Office

In accordance with the Small Business Regulatory Enforcement Fairness Act, the Department will submit to each House of the Congress and to the Comptroller General a report regarding the issuance of today's final rule prior to the effective date set forth at the outset of this notice. The report will note that this rule does not constitute a ''major rule'' as defined by 5 U.S.C. 804(2).

List of Subjects in 20 CFR Parts 10 and 25

Administrative practices and procedures, Claims, Government employees, Labor, Workers' compensation.

For reasons set forth in the preamble, 20 Chapter I is amended to read as follows:

1. Part 10 is revised to read as follows:

PART 10—CLAIMS FOR COMPENSATION UNDER THE FEDERAL EMPLOYEES' COMPENSATION ACT, AS AMENDED

Subpart A—General Provisions

Sec.

Subpart B—Filing Notices and Claims; Submitting Evidence

Subpart C—Continuation of Pay

Subpart D—Medical and Related Benefits

Authority: 5 U.S.C. 301, 8103, 8145 and 8149; 31 U.S.C. 3716 and 3717; Reorganization Plan No. 6 of 1950, 15 FR 3174, 64 Stat. 1263; Secretary's Order 5–96, 62 FR 107.

Subpart A—General Provisions

Introduction

§ 10.0 What are the provisions of the FECA, in general?

The Federal Employees' Compensation Act (FECA) as amended (5 U.S.C. 8101 et seq.) provides for the payment of workers' compensation benefits to civilian officers and employees of all branches of the Government of the United States. The regulations in this part describe the rules for filing, processing, and paying claims for benefits under the FECA. Proceedings under the FECA are non-adversarial in nature.

(a) The FECA has been amended and extended a number of times to provide workers' compensation benefits to volunteers in the Civil Air Patrol (5 U.S.C. 8141), members of the Reserve Officers' Training Corps (5 U.S.C. 8140), Peace Corps Volunteers (5 U.S.C. 8142), Job Corps enrollees and Volunteers in Service to America (5 U.S.C. 8143), members of the National Teachers Corps (5 U.S.C. 8143a), certain student employees (5 U.S.C. 5351 and 8144), certain law enforcement officers not employed by the United States (5 U.S.C. 8191–8193), and various other classes of persons who provide or have provided services to the Government of the United States.

(b) The FECA provides for payment of several types of benefits, including compensation for wage loss, schedule awards, medical and related benefits, and vocational rehabilitation services for conditions resulting from injuries sustained in performance of duty while in service to the United States.

(c) The FECA also provides for payment of monetary compensation to specified survivors of an employee whose death resulted from a work-related injury and for payment of certain burial expenses subject to the provisions of 5 U.S.C. 8134.

(d) All types of benefits and conditions of eligibility listed in this section are subject to the provisions of the FECA and of this part. This section shall not be construed to modify or enlarge upon the provisions of the FECA.

§ 10.1 What rules govern the administration of the FECA and this chapter?

In accordance with 5 U.S.C. 8145 and Secretary's Order 5–96, the responsibility for administering the FECA, except for 5 U.S.C. 8149 as it pertains to the Employees' Compensation Appeals Board, has been delegated to the Assistant Secretary for Employment Standards. The Assistant Secretary, in turn, has delegated the authority and responsibility for administering the FECA to the Director of the Office of Workers' Compensation Programs (OWCP). Except as otherwise provided by law, the Director, OWCP and his or her designees have the exclusive authority to administer, interpret and enforce the provisions of the Act.

§ 10.2 What do these regulations contain?

This part 10 sets forth the regulations governing administration of all claims filed under the FECA, except to the extent specified in certain particular provisions. Its provisions are intended to assist persons seeking compensation benefits under the FECA, as well as personnel in the various Federal agencies and the Department of Labor who process claims filed under the FECA or who perform administrative functions with respect to the FECA. This part 10 applies to part 25 of this chapter except as modified by part 25. The various subparts of this part contain the following:

(a) Subpart A: The general statutory and administrative framework for processing claims under the FECA. It contains a statement of purpose and scope, together with definitions of terms, descriptions of basic forms, information about the disclosure of OWCP records, and a description of rights and penalties under the FECA, including convictions for fraud.

(b) Subpart B: The rules for filing notices of injury and claims for benefits under the FECA. It also addresses evidence and burden of proof, as well as the process of making decisions concerning eligibility for benefits.

(c) Subpart C: The rules governing claims for and payment of continuation of pay.

(d) Subpart D: The rules governing emergency and routine medical care, second opinion and referee medical examinations directed by OWCP, and medical reports and records in general. It also addresses the kinds of treatment which may be authorized and how medical bills are paid.

(e) Subpart E: The rules relating to the payment of monetary compensation benefits for disability, impairment and death. It includes the provisions for identifying and processing overpayments of compensation.

(f) Subpart F: The rules governing the payment of continuing compensation benefits. It includes provisions concerning the employee's and the employer's responsibilities in returning the employee to work. It also contains provisions governing reports of earnings and dependents, recurrences, and reduction and termination of compensation benefits.

(g) Subpart G: The rules governing the appeals of decisions under the FECA. It includes provisions relating to hearings, reconsiderations, and appeals before the Employees' Compensation Appeals Board.

(h) Subpart H: The rules concerning legal representation and for adjustment and recovery from a third party. It also contains provisions relevant to three groups of employees whose status requires special application of the provisions of the FECA: Federal grand and petit jurors, Peace Corps volunteers, and non-Federal law enforcement officers.

(i) Subpart I: Information for medical providers. It includes rules for medical reports, medical bills, and the OWCP medical fee schedule, as well as the provisions for exclusion of medical providers.

§ 10.3 Have the collection of information requirements of this part been approved by the Office of Management and Budget (OMB)?

The collection of information requirements in this part have been approved by OMB and assigned OMB control numbers 1215–0055, 1215–0067, 1215–0078, 1215–0103, 1215–0105, 1215–0115, 1215–0116, 1215–0144, 1215–0151, 1215–0154, 1215–0155, 1215–0161, 1215–0167, 1215–0176, 1215–0178, 1215–0182, 1215–0193 and 1215–0194.

Definitions and Forms

§ 10.5 What definitions apply to these regulations?

Certain words and phrases found in this part are defined in this section or in the FECA. Some other words and phrases that are used only in limited situations are defined in the later subparts of these regulations.

(a) *Benefits* or *Compensation* means the money OWCP pays to or on behalf of a beneficiary from the Employees' Compensation Fund for lost wages, a loss of wage-earning capacity or a permanent physical impairment, as well as the money paid to beneficiaries for an employee's death. These two terms also include any other amounts paid out of the Employees' Compensation Fund for such things as medical treatment, medical examinations conducted at the request of OWCP as part of the claims adjudication process, vocational rehabilitation services, services of an attendant and funeral expenses, but does not include continuation of pay.

(b) *Beneficiary* means an individual who is entitled to a benefit under the FECA and this part.

(c) *Claim* means a written assertion of an individual's entitlement to benefits under the FECA, submitted in a manner authorized by this part.

(d) *Claimant* means an individual whose claim has been filed.

(e) *Director* means the Director of OWCP or a person designated to carry out his or her functions.

(f) *Disability* means the incapacity, because of an employment injury, to earn the wages the employee was receiving at the time of injury. It may be partial or total.

(g) *Earnings from employment or self-employment* means:

(1) Gross earnings or wages before any deductions and includes the value of subsistence, quarters, reimbursed expenses and any other goods or services received in kind as remuneration; or

(2) A reasonable estimate of the cost to have someone else perform the duties of an individual who accepts no remuneration. Neither lack of profits, nor the characterization of the duties as a hobby, removes an unremunerated individual's responsibility to report the estimated cost to have someone else perform his or her duties.

(h) *Employee means,* but is not limited to, an individual who fits within one of the following listed groups:

(1) A civil officer or employee in any branch of the Government of the United States, including an officer or employee of an instrumentality wholly owned by the United States;

(2) An individual rendering personal service to the United States similar to the service of a civil officer or employee of the United States, without pay or for nominal pay, when a statute authorizes the acceptance or use of the service, or authorizes payment of travel or other expenses of the individual;

(3) An individual, other than an independent contractor or an individual employed by an independent contractor, employed on the Menominee Indian Reservation in Wisconsin in operations conducted under a statute relating to tribal timber and logging operations on that reservation;

(4) An individual appointed to a position on the office staff of a former President; or

(5) An individual selected and serving as a Federal petit or grand juror.

(i) *Employer or Agency* means any civil agency or instrumentality of the United States Government, or any other organization, group or institution employing an individual defined as an ''employee'' by this section. These terms also refer to officers and employees of an employer having responsibility for the supervision, direction or control of employees of that employer as an ''immediate superior,'' and to other employees designated by the employer to carry out the functions vested in the employer under the FECA and this part, including officers or employees delegated responsibility by an employer for authorizing medical treatment for injured employees.

(j) *Entitlement* means entitlement to benefits as determined by OWCP under the FECA and the procedures described in this part.

(k) *FECA* means the Federal Employees' Compensation Act, as amended.

(l) *Hospital services* means services and supplies provided by hospitals within the scope of their practice as defined by State law.

(m) *Impairment* means any anatomic or functional abnormality or loss. A permanent impairment is any such abnormality or loss after maximum medical improvement has been achieved.

(n) *Knowingly* means with knowledge, consciously, willfully or intentionally.

(o) *Medical services* means services and supplies provided by or under the supervision of a physician. Reimbursable chiropractic services are limited to physical examinations (and related laboratory tests), x-rays performed to diagnose a subluxation of the spine and treatment consisting of manual manipulation of the spine to correct a subluxation.

(p) *Medical support services* means services, drugs, supplies and appliances provided by a person other than a physician or hospital.

(q) *Occupational disease* or *Illness* means a condition produced by the work environment over a period longer than a single workday or shift.

(r) *OWCP* means the Office of Workers' Compensation Programs.

(s) *Pay rate for compensation purposes* means the employee's pay, as determined under 5 U.S.C. 8114, at the time of injury, the time disability begins or the time compensable disability recurs if the recurrence begins more than six months after the injured employee resumes regular full-time employment with the United States, whichever is greater, except as otherwise determined under 5 U.S.C. 8113 with respect to any period.

(t) *Physician* means an individual defined as such in 5 U.S.C. 8101(2), except during the period for which his or her license to practice medicine has been suspended or revoked by a State licensing or regulatory authority.

(u) *Qualified hospital* means any hospital licensed as such under State law which has not been excluded under the provisions of subpart I of this part. Except as otherwise provided by regulation, a qualified hospital shall be deemed to be designated or approved by OWCP.

(v) *Qualified physician* means any physician who has not been excluded under the provisions of subpart I of this part. Except as otherwise provided by regulation, a qualified physician shall be deemed to be designated or approved by OWCP.

(w) *Qualified provider of medical support services or supplies* means any person, other than a physician or a hospital, who provides services, drugs, supplies and appliances for which OWCP makes payment, who possesses any applicable licenses required under State law, and who has not been excluded under the provisions of subpart I of this part.

(x) *Recurrence of disability* means an inability to work after an employee has returned to work, caused by a spontaneous change in a medical condition which had resulted from a previous injury or illness without an intervening injury or new exposure to the work environment that caused the illness. This term also means an inability to work that takes place when a light-duty assignment made specifically to accommodate an employee's physical limitations due to his or her work-related injury or illness is withdrawn (except when such withdrawal occurs for reasons of misconduct, non-performance of job duties or a reduction-in-force), or when the physical requirements of such an assignment are altered so that they exceed his or her established physical limitations.

(y) *Recurrence of medical condition* means a documented need for further medical treatment after release from treatment for the accepted condition or injury when there is no accompanying work stoppage. Continuous treatment for the original condition or injury is not considered a ''need for further medical treatment after release from treatment,'' nor is an examination without treatment.

(z) *Representative* means an individual properly authorized by a claimant in writing to act for the claimant in connection with a claim or proceeding under the FECA or this part.

(aa) *Student* means an individual defined at 5 U.S.C. 8101(17). Two terms used in that particular definition are further defined as follows:

(1) *Additional type of educational or training institution* means a technical, trade, vocational, business or professional school accredited or licensed by the United States Government or a State Government or any political subdivision thereof providing courses of not less than three months duration, that prepares the individual for a livelihood in a trade, industry, vocation or profession.

(2) *Year beyond the high school level* means:

(i) The 12-month period beginning the month after the individual graduates from high school, provided he or she had indicated an intention to continue schooling within four months of high school graduation, and each successive 12-month period in which there is school attendance or the payment of

compensation based on such attendance; or

(ii) If the individual has indicated that he or she will not continue schooling within four months of high school graduation, the 12-month period beginning with the month that the individual enters school to continue his or her education, and each successive 12-month period in which there is school attendance or the payment of compensation based on such attendance.

(bb) *Subluxation* means an incomplete dislocation, off-centering, misalignment, fixation or abnormal spacing of the vertebrae which must be demonstrable on any x-ray film to an individual trained in the reading of x-rays.

(cc) *Surviving spouse* means the husband or wife living with or dependent for support upon a deceased employee at the time of his or her death, or living apart for reasonable cause or because of the deceased employee's desertion.

(dd) *Temporary aggravation* of a pre-existing condition means that factors of employment have directly caused that condition to be more severe for a limited period of time and have left no greater impairment than existed prior to the employment injury.

(ee) *Traumatic injury* means a condition of the body caused by a specific event or incident, or series of events or incidents, within a single workday or shift. Such condition must be caused by external force, including stress or strain, which is identifiable as to time and place of occurrence and member or function of the body affected.

§ 10.6 What special statutory definitions apply to dependents and survivors?

(a) 5 U.S.C. 8133 provides that certain benefits are payable to certain enumerated survivors of employees who have died from an injury sustained in the performance of duty.

(b) 5 U.S.C. 8148 also provides that certain other benefits may be payable to certain family members of employees who have been incarcerated due to a felony conviction.

(c) 5 U.S.C. 8110(b) further provides that any employee who is found to be eligible for a basic benefit shall be entitled to have such basic benefit augmented at a specified rate for certain persons who live in the beneficiary's household or who are dependent upon the beneficiary for support.

(d) 5 U.S.C. 8101, 8110, 8133 and 8148, which define the nature of such survivorship or dependency necessary to qualify a beneficiary for a survivor's benefit or an augmented benefit, apply to the provisions of this part.

§ 10.7 What forms are needed to process claims under the FECA?

(a) Notice of injury, claims and certain specified reports shall be made on forms prescribed by OWCP. Employers shall not modify these forms or use substitute forms. Employers are expected to maintain an adequate supply of the basic forms needed for the proper recording and reporting of injuries.

Form No.	Title
(1) CA–1	Federal Employee's Notice of Traumatic Injury and Claim for Continuation of Pay/ Compensation.
(2) CA–2	Notice of Occupational Disease and Claim for Compensation.
(3) CA–2a	Notice of Employee's Recurrence of Disability and Claim for Pay/ Compensation.
(4) CA–5	Claim for Compensation by Widow, Widower and/or Children.
(5) CA–5b	Claim for Compensation by Parents, Brothers, Sisters, Grandparents, or Grandchildren.
(6) CA–6	Official Superior's Report of Employee's Death.
(7) CA–7	Claim for Compensation Due to Traumatic Injury or Occupational Disease.
(8) CA–7a	Time Analysis Form.
(9) CA–7b	Leave Buy Back (LBB) Worksheet/Certification and Election.
(10) CA–8	Claim for Continuing Compensation on Account of Disability.
(11) CA–16	Authorization of Examination and/or Treatment.
(12) CA–17	Duty Status Report.
(13) CA–20	Attending Physician's Report.
(14) CA–20a ..	Attending Physician's Supplemental Report.

(b) Copies of the forms listed in this paragraph are available for public inspection at the Office of Workers' Compensation Programs, Employment Standards Administration, U.S. Department of Labor, Washington, DC 20210. They may also be obtained from district offices, employers (i.e., safety and health offices, supervisors), and the Internet, at www.dol.gov./dol/esa/owcp.htm.

Information in Program Records

§ 10.10 Are all documents relating to claims filed under the FECA considered confidential?

All records relating to claims for benefits, including copies of such records maintained by an employer, are considered confidential and may not be released, inspected, copied or otherwise disclosed except as provided in the Freedom of Information Act and the Privacy Act of 1974.

§ 10.11 Who maintains custody and control of FECA records?

All records relating to claims for benefits filed under the FECA, including any copies of such records maintained by an employing agency, are covered by the government-wide Privacy Act system of records entitled DOL/GOVT–1 (Office of Workers' Compensation Programs, Federal Employees' Compensation Act File). This system of records is maintained by and under the control of OWCP, and, as such, all records covered by DOL/GOVT–1 are official records of OWCP. The protection, release, inspection and copying of records covered by DOL/GOVT–1 shall be accomplished in accordance with the rules, guidelines and provisions of this part, as well as those contained in 29 CFR parts 70 and 71, and with the notice of the system of records and routine uses published in the **Federal Register**. All questions relating to access/disclosure, and/or amendment of FECA records maintained by OWCP or the employing agency, are to be resolved in accordance with this section.

§ 10.12 How may a FECA claimant or beneficiary obtain copies of protected records?

(a) A claimant seeking copies of his or her official FECA file should address a request to the District Director of the OWCP office having custody of the file. A claimant seeking copies of FECA-related documents in the custody of the employer should follow the procedures established by that agency.

(b) (1) While an employing agency may establish procedures that an injured employee or beneficiary should follow in requesting access to documents it maintains, any decision issued in response to such a request must comply with the rules and regulations of the Department of Labor which govern all other aspects of safeguarding these records.

(2) No employing agency has the authority to issue determinations with respect to requests for the correction or amendment of records contained in or covered by DOL/GOVT–1. That authority is within the exclusive control of OWCP. Thus, any request for correction or amendment received by an employing agency must be referred to OWCP for review and decision.

(3) Any administrative appeal taken from a denial issued by the employing agency or OWCP shall be filed with the

Solicitor of Labor in accordance with 29 CFR 71.7 and 71.9.

§ 10.13 What process is used by a person who wants to correct FECA-related documents?

Any request to amend a record covered by DOL/GOVT–1 should be directed to the district office having custody of the official file. No employer has the authority to issue determinations with regard to requests for the correction of records contained in or covered by DOL/GOVT–1. Any request for correction received by an employer must be referred to OWCP for review and decision.

Rights and Penalties

§ 10.15 May compensation rights be waived?

No employer or other person may require an employee or other claimant to enter into any agreement, either before or after an injury or death, to waive his or her right to claim compensation under the FECA. No waiver of compensation rights shall be valid.

§ 10.16 What criminal penalties may be imposed in connection with a claim under the FECA?

(a) A number of statutory provisions make it a crime to file a false or fraudulent claim or statement with the Government in connection with a claim under the FECA, or to wrongfully impede a FECA claim. Included among these provisions are sections 287, 1001, 1920, and 1922 of title 18, United States Code. Enforcement of these and other criminal provisions that may apply to claims under the FECA are within the jurisdiction of the Department of Justice.

(b) In addition, administrative proceedings may be initiated under the Program Fraud Civil Remedies Act of 1986 (PFCRA), 31 U.S.C. 3801–12, to impose civil penalties and assessments against persons who make, submit, or present, or cause to be made, submitted or presented, false, fictitious or fraudulent claims or written statements to OWCP in connection with a claim under the FECA. The Department of Labor's regulations implementing the PFRCA are found at 29 CFR part 22.

§ 10.17 Is a beneficiary who defrauds the Government in connection with a claim for benefits still entitled to those benefits?

When a beneficiary either pleads guilty to or is found guilty on either Federal or State criminal charges of defrauding the Federal Government in connection with a claim for benefits, the beneficiary's entitlement to any further compensation benefits will terminate effective the date either the guilty plea is accepted or a verdict of guilty is returned after trial, for any injury occurring on or before the date of such guilty plea or verdict. Termination of entitlement under this section is not affected by any subsequent change in or recurrence of the beneficiary's medical condition.

§ 10.18 Can a beneficiary who is incarcerated based on a felony conviction still receive benefits?

(a) Whenever a beneficiary is incarcerated in a State or Federal jail, prison, penal institution or other correctional facility due to a State or Federal felony conviction, he or she forfeits all rights to compensation benefits during the period of incarceration. A beneficiary's right to compensation benefits for the period of his or her incarceration is not restored after such incarceration ends, even though payment of compensation benefits may resume.

(b) If the beneficiary has eligible dependents, OWCP will pay compensation to such dependents at a reduced rate during the period of his or her incarceration, by applying the percentages of 5 U.S.C. 8133(a)(1) through (5) to the beneficiary's gross current entitlement rather than to the beneficiary's monthly pay.

(c) If OWCP's decision on entitlement is pending when the period of incarceration begins, and compensation is due for a period of time prior to such incarceration, payment for that period will only be made to the beneficiary following his or her release.

Subpart B—Filing Notices and Claims; Submitting Evidence

Notices and Claims for Injury, Disease, and Death—Employee or Survivor's Actions

§ 10.100 How and when is a notice of traumatic injury filed?

(a) To claim benefits under the FECA, an employee who sustains a work-related traumatic injury must give notice of the injury in writing on Form CA–1, which may be obtained from the employer or from the Internet at www.dol.gov./dol/esa/owcp.htm. The employee must forward this notice to the employer. Another person, including the employer, may give notice of injury on the employee's behalf. The person submitting a notice shall include the Social Security Number (SSN) of the injured employee.

(b) For injuries sustained on or after September 7, 1974, a notice of injury must be filed within three years of the injury. (The form contains the necessary words of claim.) The requirements for filing notice are further described in 5 U.S.C. 8119. Also see § 10.205 concerning time requirements for filing claims for continuation of pay.

(1) If the claim is not filed within three years, compensation may still be allowed if notice of injury was given within 30 days or the employer had actual knowledge of the injury or death within 30 days after occurrence. This knowledge may consist of written records or verbal notification. An entry into an employee's medical record may also satisfy this requirement if it is sufficient to place the employer on notice of a possible work-related injury or disease.

(2) OWCP may excuse failure to comply with the three-year time requirement because of truly exceptional circumstances (for example, being held prisoner of war).

(3) The claimant may withdraw his or her claim (but not the notice of injury) by so requesting in writing to OWCP at any time before OWCP determines eligibility for benefits. Any continuation of pay (COP) granted to an employee after a claim is withdrawn must be charged to sick or annual leave, or considered an overpayment of pay consistent with 5 U.S.C. 5584, at the employee's option.

(c) However, in cases of latent disability, the time for filing claim does not begin to run until the employee has a compensable disability and is aware, or reasonably should have been aware, of the causal relationship between the disability and the employment (see 5 U.S.C. 8122(b)).

§ 10.101 How and when is a notice of occupational disease filed?

(a) To claim benefits under the FECA, an employee who has a disease which he or she believes to be work-related must give notice of the condition in writing on Form CA–2, which may be obtained from the employer or from the Internet at www.dol.gov./dol/esa/owcp.htm. The employee must forward this notice to the employer. Another person, including the employer, may do so on the employee's behalf. The person submitting a notice shall include the Social Security Number (SSN) of the injured employee. The claimant may withdraw his or her claim (but not the notice of occupational disease) by so requesting in writing to OWCP at any time before OWCP determines eligibility for benefits.

(b) For occupational diseases sustained as a result of exposure to injurious work factors that occurs on or after September 7, 1974, a notice of occupational disease must be filed within three years of the onset of the

condition. (The form contains the necessary words of claim.) The requirements for timely filing are described in § 10.100(b)(1) through (3).

(c) However, in cases of latent disability, the time for filing claim does not begin to run until the employee has a compensable disability and is aware, or reasonably should have been aware, of the causal relationship between the disability and the employment (see 5 U.S.C. 8122(b)).

§ 10.102 How and when is a claim for wage loss compensation filed?

(a) Form CA–7 is used to claim compensation for periods of disability not covered by COP.

(1) An employee who is disabled with loss of pay for more than three calendar days due to an injury, or someone acting on his or her behalf, must file Form CA–7 before compensation can be paid.

(2) The employee shall complete the front of Form CA–7 and submit the form to the employer for completion and transmission to OWCP. The form should be completed as soon as possible, but no more than 14 calendar days after the date pay stops due to the injury or disease.

(3) The requirements for filing claims are further described in 5 U.S.C. 8121.

(b) Form CA–8 is used to claim compensation for additional periods of disability after Form CA–7 is submitted to OWCP.

(1) It is the employee's responsibility to submit Form CA–8. Without receipt of such claim, OWCP has no knowledge of continuing wage loss. Therefore, while disability continues, the employee should submit a claim on Form CA–8 each two weeks until otherwise instructed by OWCP.

(2) The employee shall complete the front of Form CA–8 and submit the form to the employer for completion and transmission to OWCP.

(3) The employee is responsible for submitting, or arranging for the submittal of, medical evidence to OWCP which establishes both that disability continues and that the disability is due to the work-related injury. Form CA–20a is attached to Form CA–8 for this purpose.

§ 10.103 How and when is a claim for permanent impairment filed?

Form CA–7 is used to claim compensation for impairment to a body part covered under the schedule established by 5 U.S.C. 8107. If Form CA–7 has already been filed to claim disability compensation, an employee may file a claim for such impairment by sending a letter to OWCP which specifies the nature of the benefit claimed.

§ 10.104 How and when is a claim for recurrence filed?

(a) A recurrence should be reported on Form CA–2a if it causes the employee to lose time from work and incur a wage loss, or if the employee experiences a renewed need for treatment after previously being released from care. However, a notice of recurrence should not be filed when a new injury, new occupational disease, or new event contributing to an already-existing occupational disease has occurred. In these instances, the employee should file Form CA–1 or CA–2.

(b) The employee has the burden of establishing by the weight of reliable, probative and substantial evidence that the recurrence of disability is causally related to the original injury.

(1) The employee must include a detailed factual statement as described on Form CA–2a. The employer may submit comments concerning the employee's statement.

(2) The employee should arrange for the submittal of a detailed medical report from the attending physician as described on Form CA–2a. The employee should also submit, or arrange for the submittal of, similar medical reports for any examination and/or treatment received after returning to work following the original injury.

§ 10.105 How and when is a notice of death and claim for benefits filed?

(a) If an employee dies from a work-related traumatic injury or an occupational disease, any survivor may file a claim for death benefits using Form CA–5 or CA–5b, which may be obtained from the employer or from the Internet at www.dol.gov./dol/esa/owcp.htm. The survivor must provide this notice in writing and forward it to the employer. Another person, including the employer, may do so on the survivor's behalf. The survivor may also submit the completed Form CA–5 or CA–5b directly to OWCP. The survivor shall disclose the SSNs of all survivors on whose behalf claim for benefits is made in addition to the SSN of the deceased employee. The survivor may withdraw his or her claim (but not the notice of death) by so requesting in writing to OWCP at any time before OWCP determines eligibility for benefits.

(b) For deaths that occur on or after September 7, 1974, a notice of death must be filed within three years of the death. The form contains the necessary words of claim. The requirements for timely filing are described in § 10.100(b)(1) through (3).

(c) However, in cases of death due to latent disability, the time for filing the claim does not begin to run until the survivor is aware, or reasonably should have been aware, of the causal relationship between the death and the employment (see 5 U.S.C. 8122(b)).

(d) The filing of a notice of injury or occupational disease will satisfy the time requirements for a death claim based on the same injury or occupational disease. If an injured employee or someone acting on the employee's behalf does not file a claim before the employee's death, the right to claim compensation for disability other than medical expenses ceases and does not survive.

(e) A survivor must be alive to receive any payment; there is no vested right to such payment. A report as described in § 10.414 of this part must be filed once each year to support continuing payments of compensation.

Notices and Claims for Injury, Disease, and Death—Employer's Actions

§ 10.110 What should the employer do when an employee files a notice of traumatic injury or occupational disease?

(a) The employer shall complete the agency portion of Form CA–1 (for traumatic injury) or CA–2 (for occupational disease) no more than 10 working days after receipt of notice from the employee. The employer shall also complete the Receipt of Notice and give it to the employee, along with copies of both sides of Form CA–1 or Form CA–2.

(b) The employer must complete and transmit the form to OWCP within 10 working days after receipt of notice from the employee if the injury or disease will likely result in:

(1) A medical charge against OWCP;

(2) Disability for work beyond the day or shift of injury;

(3) The need for more than two appointments for medical examination and/or treatment on separate days, leading to time loss from work;

(4) Future disability;

(5) Permanent impairment; or

(6) Continuation of pay pursuant to 5 U.S.C. 8118.

(c) The employer should not wait for submittal of supporting evidence before sending the form to OWCP.

(d) If none of the conditions in paragraph (b) of this section applies, the Form CA–1 or CA–2 shall be retained as a permanent record in the Employee Medical Folder in accordance with the guidelines established by the Office of Personnel Management.

§ 10.111 What should the employer do when an employee files an initial claim for compensation due to disability or permanent impairment?

(a) When an employee is disabled by a work-related injury and loses pay for more than three calendar days, or has a permanent impairment or serious disfigurement as described in 5 U.S.C. 8107, the employer shall furnish the employee with Form CA–7 for the purpose of claiming compensation.

(b) If the employee is receiving continuation of pay (COP), the employer should give Form CA–7 to the employee by the 30th day of the COP period and submit the form to OWCP by the 40th day of the COP period. If the employee has not returned the form to the employer by the 40th day of the COP period, the employer should ask him or her to submit it as soon as possible.

(c) Upon receipt of Form CA–7 from the employee, or someone acting on his or her behalf, the employer shall complete the appropriate portions of the form. As soon as possible, but no more than five working days after receipt from the employee, the employer shall forward the completed Form CA–7 and any accompanying medical report to OWCP.

§ 10.112 What should the employer do when an employee files a claim for continuing compensation due to disability?

(a) If the employee continues in a leave-without-pay status due to a work-related injury after the period of compensation initially claimed on Form CA–7, the employer shall furnish the employee with Form CA–8 for the purpose of claiming continuing compensation.

(b) Upon receipt of Form CA–8 from the employee, or someone acting on his or her behalf, the employer shall complete the appropriate portions of the form. As soon as possible, but no more than five working days after receipt from the employee, the employer shall forward the completed Form CA–8 and any accompanying medical report to OWCP.

§ 10.113 What should the employer do when an employee dies from a work-related injury or disease?

(a) The employer shall immediately report a death due to a work-related traumatic injury or occupational disease to OWCP by telephone, telegram, or facsimile (fax). No more than 10 working days after notification of the death, the employer shall complete and send Form CA–6 to OWCP.

(b) When possible, the employer shall furnish a Form CA–5 or CA–5b to all persons likely to be entitled to compensation for death of an employee. The employer should also supply information about completing and filing the form.

(c) The employer shall promptly transmit Form CA–5 or CA–5b to OWCP. The employer shall also promptly transmit to OWCP any other claim or paper submitted which appears to claim compensation on account of death.

Evidence and Burden of Proof

§ 10.115 What evidence is needed to establish a claim?

Forms CA–1, CA–2, CA–5 and CA–5b describe the basic evidence required. OWCP may send any request for additional evidence to the claimant and to his or her representative, if any. Evidence should be submitted in writing. The evidence submitted must be reliable, probative and substantial. Each claim for compensation must meet five requirements before OWCP can accept it. These requirements, which the employee must establish to meet his or her burden of proof, are as follows:

(a) The claim was filed within the time limits specified by the FECA;

(b) The injured person was, at the time of injury, an employee of the United States as defined in 5 U.S.C. 8101(1) and § 10.5(h) of this part;

(c) The fact that an injury, disease or death occurred;

(d) The injury, disease or death occurred while the employee was in the performance of duty; and

(e) The medical condition for which compensation or medical benefits is claimed is causally related to the claimed injury, disease or death. Neither the fact that the condition manifests itself during a period of Federal employment, nor the belief of the claimant that factors of employment caused or aggravated the condition, is sufficient in itself to establish causal relationship.

(f) In all claims, the claimant is responsible for submitting, or arranging for submittal of, a medical report from the attending physician. For wage loss benefits, the claimant must also submit medical evidence showing that the condition claimed is disabling. The rules for submitting medical reports are found in §§ 10.330 through 10.333.

§ 10.116 What additional evidence is needed in cases based on occupational disease?

(a) The employee must submit the specific detailed information described on Form CA–2 and on any checklist (Form CA–35, A–H) provided by the employer. OWCP has developed these checklists to address particular occupational diseases. The medical report should also include the information specified on the checklist for the particular disease claimed.

(b) The employer should submit the specific detailed information described on Form CA–2 and on any checklist pertaining to the claimed disease.

§ 10.117 What happens if, in any claim, the employer contests any of the facts as stated by the claimant?

(a) An employer who has reason to disagree with any aspect of the claimant's report shall submit a statement to OWCP that specifically describes the factual allegation or argument with which it disagrees and provide evidence or argument to support its position. The employer may include supporting documents such as witness statements, medical reports or records, or any other relevant information.

(b) Any such statement shall be submitted to OWCP with the notice of traumatic injury or death, or within 30 calendar days from the date notice of occupational disease or death is received from the claimant. If the employer does not submit a written explanation to support the disagreement, OWCP may accept the claimant's report of injury as established. The employer may not use a disagreement with an aspect of the claimant's report to delay forwarding the claim to OWCP or to compel or induce the claimant to change or withdraw the claim.

§ 10.118 Does the employer participate in the claims process in any other way?

(a) The employer is responsible for submitting to OWCP all relevant and probative factual and medical evidence in its possession, or which it may acquire through investigation or other means. Such evidence may be submitted at any time.

(b) The employer may ascertain the events surrounding an injury and the extent of disability where it appears that an employee who alleges total disability may be performing other work, or may be engaging in activities which would indicate less than total disability. This authority is in addition to that given in § 10.118(a). However, the provisions of the Privacy Act apply to any endeavor by the employer to ascertain the facts of the case (see §§ 10.10 and 10.11).

(c) The employer does not have the right, except as provided in subpart C of this part, to actively participate in the claims adjudication process.

§ 10.119 What action will OWCP take with respect to information submitted by the employer?

OWCP will consider all evidence submitted appropriately, and OWCP will inform the employee, the employee's representative, if any, and the employer of any action taken. Where an employer contests a claim within 30 days of the initial submittal and the claim is later approved, OWCP will notify the employer of the rationale for approving the claim.

§ 10.120 May a claimant submit additional evidence?

A claimant or a person acting on his or her behalf may submit to OWCP at any time any other evidence relevant to the claim.

§ 10.121 What happens if OWCP needs more evidence from the claimant?

If the claimant submits factual evidence, medical evidence, or both, but OWCP determines that this evidence is not sufficient to meet the burden of proof, OWCP will inform the claimant of the additional evidence needed. The claimant will be allowed at least 30 days to submit the evidence required. OWCP is not required to notify the claimant a second time if the evidence submitted in response to its first request is not sufficient to meet the burden of proof.

Decisions on Entitlement to Benefits

§ 10.125 How does OWCP determine entitlement to benefits?

(a) In reaching any decision with respect to FECA coverage or entitlement, OWCP considers the claim presented by the claimant, the report by the employer, and the results of such investigation as OWCP may deem necessary.

(b) OWCP claims staff apply the law, the regulations, and its procedures to the facts as reported or obtained upon investigation. They also apply decisions of the Employees' Compensation Appeals Board and administrative decisions of OWCP as set forth in FECA Program Memoranda.

§ 10.126 What does the decision contain?

The decision shall contain findings of fact and a statement of reasons. It is accompanied by information about the claimant's appeal rights, which may include the right to a hearing, a reconsideration, and/or a review by the Employees' Compensation Appeals Board. (See subpart G of this part.)

§ 10.127 To whom is the decision sent?

A copy of the decision shall be mailed to the employee's last known address. If the employee has a designated representative before OWCP, a copy of the decision will also be mailed to the representative. Notification to either the employee or the representative will be considered notification to both. A copy of the decision will also be sent to the employer.

Subpart C—Continuation of Pay

§ 10.200 What is continuation of pay?

(a) For most employees who sustain a traumatic injury, the FECA provides that the employer must continue the employee's regular pay during any periods of resulting disability, up to a maximum of 45 calendar days. This is called continuation of pay, or COP. The employer, not OWCP, pays COP. Unlike wage loss benefits, COP is subject to taxes and all other payroll deductions that are made from regular income.

(b) The employer must continue the pay of an employee who is eligible for COP, and may not require the employee to use his or her own sick or annual leave, unless the provisions of §§ 10.200(c), 10.220, or § 10.222 apply. However, while continuing the employee's pay, the employer may controvert the employee's COP entitlement pending a final determination by OWCP. OWCP has the exclusive authority to determine questions of entitlement and all other issues relating to COP.

(c) The FECA excludes certain persons from eligibility for COP. COP cannot be authorized for members of these excluded groups, which include but are not limited to: persons rendering personal service to the United States similar to the service of a civil officer or employee of the United States, without pay or for nominal pay; volunteers (for instance, in the Civil Air Patrol and Peace Corps); Job Corps and Youth Conservation Corps enrollees; individuals in work-study programs, and grand or petit jurors (unless otherwise Federal employees).

Eligibility for COP

§ 10.205 What conditions must be met to receive COP?

(a) To be eligible for COP, a person must:

(1) Have a ''traumatic injury'' as defined at § 10.5(ee) which is job-related and the cause of the disability, and/or the cause of lost time due to the need for medical examination and treatment;

(2) File Form CA–1 within 30 days of the date of the injury (but if that form is not available, using another form would not alone preclude receipt); and

(3) Begin losing time from work due to the traumatic injury within 45 days of the injury.

(b) OWCP may find that the employee is not entitled to COP for other reasons consistent with the statute (see § 10.220).

§ 10.206 May an employee who uses leave after an injury later decide to use COP instead?

On Form CA–1, an employee may elect to use accumulated sick or annual leave, or leave advanced by the agency, instead of electing COP. The employee can change the election between leave and COP for prospective periods at any point while eligibility for COP remains. The employee may also change the election for past periods and request COP in lieu of leave already taken for the same period. In either situation, the following provisions apply:

(a) The request must be made to the employer within one year of the date the leave was used or the date of the written approval of the claim by OWCP (if written approval is issued), whichever is later.

(b) Where the employee is otherwise eligible, the agency shall restore leave taken in lieu of any of the 45 COP days. Where any of the 45 COP days remain unused, the agency shall continue pay prospectively.

(c) The use of leave may not be used to delay or extend the 45-day COP period or to otherwise affect the time limitation as provided by 5 U.S.C. 8117. Therefore, any leave used during the period of eligibility counts towards the 45-day maximum entitlement to COP.

§ 10.207 May an employee who returns to work, then stops work again due to the effects of the injury, receive COP?

If the employee recovers from disability and returns to work, then becomes disabled again and stops work, the employer shall pay any of the 45 days of entitlement to COP not used during the initial period of disability where:

(a) The employee completes Form CA–2a and elects to receive regular pay;

(b) OWCP did not deny the original claim for disability;

(c) The disability recurs and the employee stops work within 45 days of the time the employee first returned to work following the initial period of disability; and

(d) Pay has not been continued for the entire 45 days.

Responsibilities

§ 10.210 What are the employee's responsibilities in COP cases?

An employee who sustains a traumatic injury which he or she considers disabling, or someone authorized to act on his or her behalf,

must take the following actions to ensure continuing eligibility for COP. The employee must:

(a) Complete and submit Form CA–1 to the employing agency as soon as possible, but no later than 30 days from the date the traumatic injury occurred.

(b) Ensure that medical evidence supporting disability resulting from the claimed traumatic injury, including a statement as to when the employee can return to his or her date of injury job, is provided to the employer within 10 calendar days after filing the claim for COP.

(c) Ensure that relevant medical evidence is submitted to OWCP, and cooperate with OWCP in developing the claim.

(d) Ensure that the treating physician specifies work limitations and provides them to the employer and/or representatives of OWCP.

(e) Provide to the treating physician a description of any specific alternative positions offered the employee, and ensure that the treating physician responds promptly to the employer and/or OWCP, with an opinion as to whether and how soon the employee could perform that or any other specific position.

§ 10.211 What are the employer's responsibilities in COP cases?

Once the employer learns of a traumatic injury sustained by an employee, it shall:

(a) Provide a Form CA–1 and Form CA–16 to authorize medical care in accordance with § 10.300. Failure to do so may mean that OWCP will not uphold any termination of COP by the employer.

(b) Advise the employee of the right to receive COP, and the need to elect among COP, annual or sick leave or leave without pay, for any period of disability.

(c) Inform the employee of any decision to controvert COP and/or terminate pay, and the basis for doing so.

(d) Complete Form CA–1 and transmit it, along with all other available pertinent information, (including the basis for any controversion), to OWCP within 10 working days after receiving the completed form from the employee.

Calculation of COP

§ 10.215 How does OWCP compute the number of days of COP used?

COP is payable for a maximum of 45 calendar days, and every day used is counted toward this maximum. The following rules apply:

(a) Time lost on the day or shift of the injury does not count toward COP. (Instead, the agency must keep the employee in a pay status for that period);

(b) The first COP day is the first day disability begins following the date of injury (providing it is within the 30 days following the date of injury), except where the injury occurs before the beginning of the work day or shift, in which case the date of injury is charged to COP;

(c) Any part of a day or shift (except for the day of the injury) counts as a full day toward the 45 calendar day total;

(d) Regular days off are included if COP has been used on the regular work days immediately preceding or following the regular day(s) off, and medical evidence supports disability; and

(e) Leave used during a period when COP is otherwise payable is counted toward the 45-day COP maximum as if the employee had been in a COP status.

(f) For employees with part-time or intermittent schedules, all calendar days on which medical evidence indicates disability are counted as COP days, regardless of whether the employee was or would have been scheduled to work on those days. The rate at which COP is paid for these employees is calculated according to § 10.216(b).

§ 10.216 How is the pay rate for COP calculated?

The employer shall calculate COP using the period of time and the weekly pay rate.

(a) The pay rate for COP purposes is equal to the employee's regular ''weekly'' pay (the average of the weekly pay over the preceding 52 weeks).

(1) The pay rate excludes overtime pay, but includes other applicable extra pay except to the extent prohibited by law.

(2) Changes in pay or salary (for example, promotion, demotion, within-grade increases, termination of a temporary detail, etc.) which would have otherwise occurred during the 45-day period are to be reflected in the weekly pay determination.

(b) The weekly pay for COP purposes is determined according to the following formulas:

(1) For full or part-time workers (permanent or temporary) who work the same number of hours each week of the year (or of the appointment), the weekly pay rate is the hourly pay rate (A) in effect on the date of injury multiplied by (×) the number of hours worked each week (B): $A \times B$ = Weekly Pay Rate.

(2) For part-time workers (permanent or temporary) who do not work the same number of hours each week, but who do work each week of the year (or period of appointment), the weekly pay rate is an average of the weekly earnings, established by dividing (÷) the total earnings (excluding overtime) from the year immediately preceding the injury (A) by the number of weeks (or partial weeks) worked in that year (B): $A \div B$ = Weekly Pay Rate.

(3) For intermittent, seasonal and on-call workers, whether permanent or temporary, who do not work either the same number of hours or every week of the year (or period of appointment), the weekly pay rate is the average weekly earnings established by dividing (÷) the total earnings during the full 12-month period immediately preceding the date of injury (excluding overtime) (A), by the number of weeks (or partial weeks) worked during that year (B) (that is, $A \div B$); or 150 times the average daily wage earned in the employment during the days employed within the full year immediately preceding the date of injury divided by 52 weeks, whichever is greater.

§ 10.217 Is COP charged if the employee continues to work, but in a different job that pays less?

If the employee cannot perform the duties of his or her regular position, but instead works in another job with different duties with no loss in pay, then COP is not chargeable. COP must be paid and the days counted against the 45 days authorized by law whenever an actual reduction of pay results from the injury, including a reduction of pay for the employee's normal administrative workweek that results from a change or diminution in his or her duties following an injury. However, this does not include a reduction of pay that is due solely to an employer being prohibited by law from paying extra pay to an employee for work he or she does not actually perform.

Controversion and Termination of COP

§ 10.220 When is an employer not required to pay COP?

An employer shall continue the regular pay of an eligible employee without a break in time for up to 45 calendar days, except when, and only when:

(a) The disability was not caused by a traumatic injury;

(b) The employee is not a citizen of the United States or Canada;

(c) No written claim was filed within 30 days from the date of injury;

(d) The injury was not reported until after employment has been terminated;

(e) The injury occurred off the employing agency's premises and was otherwise not within the performance of official duties;

(f) The injury was caused by the employee's willful misconduct, intent to injure or kill himself or herself or another person, or was proximately caused by intoxication by alcohol or illegal drugs; or

(g) Work did not stop until more than 30 days following the injury.

§ 10.221 How is a claim for COP controverted?

When the employer stops an employee's pay for one of the reasons cited in § 10.220, the employer must controvert the claim for COP on Form CA–1, explaining in detail the basis for the refusal. The final determination on entitlement to COP always rests with OWCP.

§ 10.222 When may an employer terminate COP which has already begun?

(a) Where the employer has continued the pay of the employee, it may be stopped only when at least one of the following circumstances is present:

(1) Medical evidence which on its face supports disability due to a work-related injury is not received within 10 calendar days after the claim is submitted (unless the employer's own investigation shows disability to exist). Where the medical evidence is later provided, however, COP shall be reinstated retroactive to the date of termination;

(2) The medical evidence from the treating physician shows that the employee is not disabled from his or her regular position;

(3) Medical evidence from the treating physician shows that the employee is not totally disabled, and the employee refuses a written offer of a suitable alternative position which is approved by the attending physician. If OWCP later determines that the position was not suitable, OWCP will direct the employer to grant the employee COP retroactive to the termination date.

(4) The employee returns to work with no loss of pay;

(5) The employee's period of employment expires or employment is otherwise terminated (as established prior to the date of injury);

(6) OWCP directs the employer to stop COP; and/or

(7) COP has been paid for 45 calendar days.

(b) An employer may not interrupt or stop COP to which the employee is otherwise entitled because of a disciplinary action, unless a preliminary notice was issued to the employee before the date of injury and the action becomes final or otherwise takes effect during the COP period.

(c) An employer cannot otherwise stop COP unless it does so for one of the reasons found in this section or § 10.220. Where an employer stops COP, it must file a controversion with OWCP, setting forth the basis on which it terminated COP, no later than the effective date of the termination.

§ 10.223 Are there other circumstances under which OWCP will not authorize payment of COP?

When OWCP finds that an employee or his or her representative refuses or obstructs a medical examination required by OWCP, the right to COP is suspended until the refusal or obstruction ceases. COP already paid or payable for the period of suspension is forfeited. If already paid, the COP may be charged to annual or sick leave or considered an overpayment of pay consistent with 5 U.S.C. 5584.

§ 10.224 What happens if OWCP finds that the employee is not entitled to COP after it has been paid?

Where OWCP finds that the employee is not entitled to COP after it has been paid, the employee may chose to have the time charged to annual or sick leave, or considered an overpayment of pay under 5 U.S.C. 5584. The employer must correct any deficiencies in COP as directed by OWCP.

Subpart D—Medical and Related Benefits

Emergency Medical Care

§ 10.300 What are the basic rules for authorizing emergency medical care?

(a) When an employee sustains a work-related traumatic injury that requires medical examination, medical treatment, or both, the employer shall authorize such examination and/or treatment by issuing a Form CA–16. This form may be used for occupational disease or illness only if the employer has obtained prior permission from OWCP.

(b) The employer shall issue Form CA–16 within four hours of the claimed injury. If the employer gives verbal authorization for such care, he or she should issue a Form CA–16 within 48 hours. The employer is not required to issue a Form CA–16 more than one week after the occurrence of the claimed injury. The employer may not authorize examination or medical or other treatment in any case that OWCP has disallowed.

(c) Form CA–16 must contain the full name and address of the qualified physician or qualified medical facility authorized to provide service. The authorizing official must sign and date the form and must state his or her title. Form CA–16 authorizes treatment for 60 days from the date of issuance, unless OWCP terminates the authorization sooner.

(d) The employer should advise the employee of the right to his or her initial choice of physician. The employer shall allow the employee to select a qualified physician, after advising him or her of those physicians excluded under subpart I of this part. The physician may be in private practice, including a health maintenance organization (HMO), or employed by a Federal agency such as the Department of the Army, Navy, Air Force, or Veterans Affairs. Any qualified physician may provide initial treatment of a work-related injury in an emergency. See also § 10.825(b).

§ 10.301 May the physician designated on Form CA–16 refer the employee to another medical specialist or medical facility?

The physician designated on Form CA–16 may refer the employee for further examination, testing, or medical care. OWCP will pay this physician or facility's bill on the authority of Form CA–16. The employer should not issue a second Form CA–16.

§ 10.302 Should the employer authorize medical care if he or she doubts that the injury occurred, or that it is work-related?

If the employer doubts that the injury occurred, or that it is work-related, he or she should authorize medical care by completing Form CA–16 and checking block 6B of the form. If the medical and factual evidence sent to OWCP shows that the condition treated is not work-related, OWCP will notify the employee, the employer, and the physician or hospital that OWCP will not authorize payment for any further treatment.

§ 10.303 Should the employer use a Form CA–16 to authorize medical testing when an employee is exposed to a workplace hazard just once?

(a) Simple exposure to a workplace hazard, such as an infectious agent, does not constitute a work-related injury entitling an employee to medical treatment under the FECA. The employer therefore should not use a Form CA–16 to authorize medical testing for an employee who has merely been exposed to a workplace hazard, unless the employee has sustained an identifiable injury or medical condition as a result of that exposure. OWCP will authorize preventive treatment only under certain well-defined circumstances (see § 10.313).

(b) Employers may be required under other statutes or regulations to provide their employees with medical testing and/or other services in situations described in paragraph (a) of this section. For example, regulations issued

by the Occupational Safety and Health Administration at 29 CFR chapter XVII require employers to provide their employees with medical consultations and/or examinations when they either exhibit symptoms consistent with exposure to a workplace hazard, or when an identifiable event such as a spill, leak or explosion occurs and results in the likelihood of exposure to a workplace hazard. In addition, 5 U.S.C. 7901 authorizes employers to establish health programs whose staff can perform tests for workplace hazards, counsel employees for exposure or feared exposure to such hazards, and provide health care screening and other associated services.

§ 10.304 Are there any exceptions to these procedures for obtaining medical care?

In cases involving emergencies or unusual circumstances, OWCP may authorize treatment in a manner other than as stated in this subpart.

Medical Treatment and Related Issues

§ 10.310 What are the basic rules for obtaining medical care?

(a) The employee is entitled to receive all medical services, appliances or supplies which a qualified physician prescribes or recommends and which OWCP considers necessary to treat the work-related injury. The employee need not be disabled to receive such treatment. If there is any doubt as to whether a specific service, appliance or supply is necessary to treat the work-related injury, the employee should consult OWCP prior to obtaining it.

(b) Any qualified physician or qualified hospital may provide such services, appliances and supplies. A qualified provider of medical support services may also furnish appropriate services, appliances, and supplies. OWCP may apply a test of cost-effectiveness to appliances and supplies. With respect to prescribed medications, OWCP may require the use of generic equivalents where they are available.

§ 10.311 What are the special rules for the services of chiropractors?

(a) The services of chiropractors that may be reimbursed are limited by the FECA to treatment to correct a spinal subluxation. The costs of physical and related laboratory tests performed by or required by a chiropractor to diagnose such a subluxation are also payable.

(b) In accordance with 5 U.S.C. 8101(3), a diagnosis of spinal ''subluxation as demonstrated by X-ray to exist'' must appear in the chiropractor's report before OWCP can consider payment of a chiropractor's bill.

(c) A chiropractor may interpret his or her x-rays to the same extent as any other physician. To be given any weight, the medical report must state that x-rays support the finding of spinal subluxation. OWCP will not necessarily require submittal of the x-ray, or a report of the x-ray, but the report must be available for submittal on request.

(d) A chiropractor may also provide services in the nature of physical therapy under the direction of a qualified physician.

§ 10.312 What are the special rules for the services of clinical psychologists?

A clinical psychologist may serve as a physician only within the scope of his or her practice as defined by State law. Therefore, a clinical psychologist may not serve as a physician for conditions that include a physical component unless the applicable State law allows clinical psychologists to treat physical conditions. A clinical psychologist may also perform testing, evaluation and other services under the direction of a qualified physician.

§ 10.313 Will OWCP pay for preventive treatment?

The FECA does not authorize payment for preventive measures such as vaccines and inoculations, and in general, preventive treatment may be a responsibility of the employing agency under the provisions of 5 U.S.C. 7901 (see § 10.303). However, OWCP can authorize treatment for the following conditions, even though such treatment is designed, in part, to prevent further injury:

(a) Complications of preventive measures which are provided or sponsored by the agency, such as an adverse reaction to prophylactic immunization.

(b) Actual or probable exposure to a known contaminant due to an injury, thereby requiring disease-specific measures against infection. Examples include the provision of tetanus antitoxin or booster toxoid injections for puncture wounds; administration of rabies vaccine for a bite from a rabid or potentially rabid animal; or appropriate measures where exposure to human immunodeficiency virus (HIV) has occurred.

(c) Conversion of tuberculin reaction from negative to positive following exposure to tuberculosis in the performance of duty. In this situation, the appropriate therapy may be authorized.

(d) Where injury to one eye has resulted in loss of vision, periodic examination of the uninjured eye to detect possible sympathetic involvement of the uninjured eye at an early stage.

§ 10.314 Will OWCP pay for the services of an attendant?

Yes, OWCP will pay for the services of an attendant up to a maximum of $1,500 per month, where the need for such services has been medically documented. In the exercise of the discretion afforded by 5 U.S.C. 8111(a), the Director has determined that, except where payments were being made prior to January 4, 1999, direct payments to the claimant to cover such services will no longer be made. Rather, the cost of providing attendant services will be paid under section 8103 of the Act, and medical bills for these services will be considered under § 10.801. This decision is based on the following factors:

(a) The additional payments authorized under section 8111(a) should not be necessary since OWCP will authorize payment for personal care services under 5 U.S.C. 8103, whether or not such care includes medical services, so long as the personal care services have been determined to be medically necessary and are provided by a home health aide, licensed practical nurse, or similarly trained individual.

(b) A home health aide, licensed practical nurse, or similarly trained individual is better able to provide quality personal care services, including assistance in feeding, bathing, and using the toilet. In the past, provision of supplemental compensation directly to injured employees may have encouraged family members to take on these responsibilities even though they may not have been trained to provide such services. By paying for the services under section 8103, OWCP can better determine whether the services provided are necessary and/or adequate to meet the needs of the injured employee. In addition, a system requiring the personal care provider to submit a bill to OWCP, where the amount billed will be subject to OWCP's fee schedule, will result in greater fiscal accountability.

§ 10.315 Will OWCP pay for transportation to obtain medical treatment?

The employee is entitled to reimbursement of reasonable and necessary expenses, including transportation needed to obtain authorized medical services, appliances or supplies. To determine what is a reasonable distance to travel, OWCP will consider the availability of services,

the employee's condition, and the means of transportation. Generally, 25 miles from the place of injury, the work site, or the employee's home, is considered a reasonable distance to travel. The standard form designated for Federal employees to claim travel expenses should be used to seek reimbursement under this section.

§ 10.316 After selecting a treating physician, may an employee choose to be treated by another physician instead?

(a) When the physician originally selected to provide treatment for a work-related injury refers the employee to a specialist for further medical care, the employee need not consult OWCP for approval. In all other instances, however, the employee must submit a written request to OWCP with his or her reasons for desiring a change of physician.

(b) OWCP will approve the request if it determines that the reasons submitted are sufficient. Requests that are often approved include those for transfer of care from a general practitioner to a physician who specializes in treating conditions like the work-related one, or the need for a new physician when an employee has moved. The employer may not authorize a change of physicians.

Directed Medical Examinations

§ 10.320 Can OWCP require an employee to be examined by another physician?

OWCP sometimes needs a second opinion from a medical specialist. The employee must submit to examination by a qualified physician as often and at such times and places as OWCP considers reasonably necessary. The employee may have a qualified physician, paid by him or her, present at such examination. However, the employee is not entitled to have anyone else present at the examination unless OWCP decides that exceptional circumstances exist. For example, where a hearing-impaired employee needs an interpreter, the presence of an interpreter would be allowed. Also, OWCP may send a case file for second opinion review where actual examination is not needed, or where the employee is deceased.

§ 10.321 What happens if the opinion of the physician selected by OWCP differs from the opinion of the physician selected by the employee?

(a) If one medical opinion holds more probative value, OWCP will base its determination of entitlement on that medical conclusion (see § 10.502). A difference in medical opinion sufficient to be considered a conflict occurs when two reports of virtually equal weight and rationale reach opposing conclusions (*see James P. Roberts, 31 ECAB 1010 (1980)*).

(b) If a conflict exists between the medical opinion of the employee's physician and the medical opinion of either a second opinion physician or an OWCP medical adviser or consultant, OWCP shall appoint a third physician to make an examination (see § 10.502). This is called a referee examination. OWCP will select a physician who is qualified in the appropriate specialty and who has had no prior connection with the case. The employee is not entitled to have anyone present at the examination unless OWCP decides that exceptional circumstances exist. For example, where a hearing-impaired employee needs an interpreter, the presence of an interpreter would be allowed. Also, a case file may be sent for referee medical review where there is no need for an actual examination, or where the employee is deceased.

§ 10.322 Who pays for second opinion and referee examinations?

OWCP will pay second opinion and referee medical specialists directly. OWCP will reimburse the employee all necessary and reasonable expenses incident to such an examination, including transportation costs and actual wages lost for the time needed to submit to an examination required by OWCP.

§ 10.323 What are the penalties for failing to report for or obstructing a second opinion or referee examination?

If an employee refuses to submit to or in any way obstructs an examination required by OWCP, his or her right to compensation under the FECA is suspended until such refusal or obstruction stops. The action of the employee's representative is considered to be the action of the employee for purposes of this section. The employee will forfeit compensation otherwise paid or payable under the FECA for the period of the refusal or obstruction, and any compensation already paid for that period will be declared an overpayment and will be subject to recovery pursuant to 5 U.S.C. 8129.

§ 10.324 May an employer require an employee to undergo a physical examination in connection with a work-related injury?

The employer may have authority independent of the FECA to require the employee to undergo a medical examination to determine whether he or she meets the medical requirements of the position held or can perform the duties of that position. Nothing in the FECA or in this part affects such authority. However, no agency-required examination or related activity shall interfere with the employee's initial choice of physician or the provision of any authorized examination or treatment, including the issuance of Form CA–16.

Medical Reports

§ 10.330 What are the requirements for medical reports?

In all cases reported to OWCP, a medical report from the attending physician is required. This report should include:

(a) Dates of examination and treatment;

(b) History given by the employee;

(c) Physical findings;

(d) Results of diagnostic tests;

(e) Diagnosis;

(f) Course of treatment;

(g) A description of any other conditions found but not due to the claimed injury;

(h) The treatment given or recommended for the claimed injury;

(i) The physician's opinion, with medical reasons, as to causal relationship between the diagnosed condition(s) and the factors or conditions of the employment;

(j) The extent of disability affecting the employee's ability to work due to the injury;

(k) The prognosis for recovery; and

(l) All other material findings.

§ 10.331 How and when should the medical report be submitted?

(a) Form CA–16 may be used for the initial medical report; Form CA–20 may be used for the initial report and for subsequent reports; and Form CA–20a may be used where continued compensation is claimed. Use of medical report forms is not required, however. The report may also be made in narrative form on the physician's letterhead stationery. The report should bear the physician's signature or signature stamp. OWCP may require an original signature on the report.

(b) The report shall be submitted directly to OWCP as soon as possible after medical examination or treatment is received, either by the employee or the physician. (See also § 10.210.) The employer may request a copy of the report from OWCP. The employer should use Form CA–17 to obtain interim reports concerning the duty status of an employee with a disabling injury.

§ 10.332 What additional medical information will OWCP require to support continuing payment of benefits?

In all cases of serious injury or disease, especially those requiring hospital treatment or prolonged care, OWCP will request detailed narrative reports from the attending physician at periodic intervals. The physician will be asked to describe continuing medical treatment for the condition accepted by OWCP, a prognosis, a description of work limitations, if any, and the physician's opinion as to the continuing causal relationship between the employee's condition and factors of his or her Federal employment.

§ 10.333 What additional medical information will OWCP require to support a claim for a schedule award?

To support a claim for a schedule award, a medical report must contain accurate measurements of the function of the organ or member, in accordance with the American Medical Association's *Guides to the Evaluation of Permanent Impairment.* These measurements may include: The actual degree of loss of active or passive motion or deformity; the amount of atrophy; the decrease, if any, in strength; the disturbance of sensation; and pain due to nerve impairment.

Medical Bills

§ 10.335 How are medical bills submitted?

Usually, medical providers submit bills directly to OWCP. The rules for submitting and paying bills are stated in subpart I of this part. An employee claiming reimbursement of medical expenses should submit an itemized bill as described in § 10.802.

§ 10.336 What are the time frames for submitting bills?

To be considered for payment, bills must be submitted by the end of the calendar year after the year when the expense was incurred, or by the end of the calendar year after the year when OWCP first accepted the claim as compensable, whichever is later.

§ 10.337 If OWCP reimburses an employee only partially for a medical expense, must the provider refund the balance of the amount paid to the employee?

(a) The OWCP fee schedule sets maximum limits on the amounts payable for many services (see § 10.805). The employee may be only partially reimbursed for medical expenses because the amount he or she paid to the medical provider for a service exceeds the maximum allowable charge set by the OWCP fee schedule.

(b) If this happens, OWCP shall advise the employee of the maximum allowable charge for the service in question and of his or her responsibility to ask the provider to refund to the employee, or credit to the employee's account, the amount he or she paid which exceeds the maximum allowable charge. The provider may request reconsideration of the fee determination as set forth in § 10.812.

(c) If the provider does not refund to the employee or credit to his or her account the amount of money paid in excess of the charge which OWCP allows, the employee should submit documentation of the attempt to obtain such refund or credit to OWCP. OWCP may make reasonable reimbursement to the employee after reviewing the facts and circumstances of the case.

Subpart E—Compensation and Related Benefits

Compensation for Disability and Impairment

§ 10.400 What is total disability?

(a) Permanent total disability is presumed to result from the loss of use of both hands, both arms, both feet, or both legs, or the loss of sight of both eyes. However, the presumption of permanent total disability as a result of such loss may be rebutted by evidence to the contrary, such as evidence of continued ability to work and to earn wages despite the loss.

(b) Temporary total disability is defined as the inability to return to the position held at the time of injury or earn equivalent wages, or to perform other gainful employment, due to the work-related injury. Except as presumed under paragraph (a) of this section, an employee's disability status is always considered temporary pending return to work.

§ 10.401 When and how is compensation for total disability paid?

(a) Compensation is payable when the employee starts to lose pay if the injury causes permanent disability or if pay loss continues for more than 14 calendar days. Otherwise, compensation is payable on the fourth day after pay stops. Compensation may not be paid while an injured employee is in a continuation of pay status or receives pay for leave.

(b) Compensation for total disability is payable at the rate of 66⅔ percent of the pay rate if the employee has no dependents, or 75 percent of the pay rate if the employee has at least one dependent. (''Dependents'' are defined at 5 U.S.C. 8110(a).)

§ 10.402 What is partial disability?

An injured employee who cannot return to the position held at the time of injury (or earn equivalent wages) due to the work-related injury, but who is not totally disabled for all gainful employment, is considered to be partially disabled.

§ 10.403 When and how is compensation for partial disability paid?

(a) 5 U.S.C. 8115 outlines how compensation for partial disability is determined. If the employee has actual earnings which fairly and reasonably represent his or her wage-earning capacity, those earnings may form the basis for payment of compensation for partial disability. (See §§ 10.500 through 10.520 concerning return to work.) If the employee's actual earnings do not fairly and reasonably represent his or her wage-earning capacity, or if the employee has no actual earnings, OWCP uses the factors stated in 5 U.S.C. 8115 to select a position which represents his or her wage-earning capacity. However, OWCP will not secure employment for the employee in the position selected for establishing a wage-earning capacity.

(b) Compensation for partial disability is payable as a percentage of the difference between the employee's pay rate for compensation purposes and the employee's wage-earning capacity. The percentage is 66⅔ percent of this difference if the employee has no dependents, or 75 percent of this difference if the employee has at least one dependent.

(c) The formula which OWCP uses to compute the compensation payable for partial disability employs the following terms: Pay rate for compensation purposes, which is defined in § 10.5(s) of this part; current pay rate, which means the salary or wages for the job held at the time of injury at the time of the determination; and earnings, which means the employee's actual earnings, or the salary or pay rate of the position selected by OWCP as representing the employee's wage-earning capacity.

(d) The employee's wage-earning capacity in terms of percentage is computed by dividing the employee's earnings by the current pay rate. The comparison of earnings and ''current'' pay rate for the job held at the time of injury need not be made as of the beginning of partial disability. OWCP may use any convenient date for making the comparison as long as both wage rates are in effect on the date used for comparison.

(e) The employee's wage-earning capacity in terms of dollars is computed by first multiplying the pay rate for compensation purposes by the

percentage of wage-earning capacity. The resulting dollar amount is then subtracted from the pay rate for compensation purposes to obtain the employee's loss of wage-earning capacity.

§ 10.404 When and how is compensation for a schedule impairment paid?

Compensation is provided for specified periods of time for the permanent loss or loss of use of certain members, organs and functions of the body. Such loss or loss of use is known as permanent impairment. Compensation for proportionate periods of time is payable for partial loss or loss of use of each member, organ or function. OWCP evaluates the degree of impairment to schedule members, organs and functions as defined in 5 U.S.C. 8107 according to the standards set forth in the specified (by OWCP) edition of the American Medical Association's *Guides to the Evaluation of Permanent Impairment.*

(a) 5 U.S.C. 8107(c) provides a list of schedule members. Pursuant to the authority provided by 5 U.S.C. 8107(c)(22), the Secretary has added the following organs to the compensation schedule for injuries that were sustained on or after September 7, 1974:

Member	Weeks
Breast (one)	52
Kidney (one)	156
Larynx	160
Lung (one)	156
Penis	205
Testicle (one)	52
Tongue	160
Ovary (one)	52
Uterus/cervix and vulva/vagina	205

(b) Compensation for schedule awards is payable at 66⅔ percent of the employee's pay, or 75 percent of the pay when the employee has at least one dependent.

(c) The period of compensation payable under 5 U.S.C. 8107(c) shall be reduced by the period of compensation paid or payable under the schedule for an earlier injury if:

(1) Compensation in both cases is for impairment of the same member or function or different parts of the same member or function, or for disfigurement; and

(2) OWCP finds that compensation payable for the later impairment in whole or in part would duplicate the compensation payable for the pre-existing impairment.

(d) Compensation not to exceed $3,500 may be paid for serious disfigurement of the face, head or neck which is likely to handicap a person in securing or maintaining employment.

§ 10.405 Who is considered a dependent in a claim based on disability or impairment?

(a) Dependents include a wife or husband; an unmarried child under 18 years of age; an unmarried child over 18 who is incapable of self-support; a student, until he or she reaches 23 years of age or completes four years of school beyond the high school level; or a wholly dependent parent.

(b) Augmented compensation payable for an unmarried child, which would otherwise terminate when the child reached the age of 18, may be continued while the child is a student as defined in 5 U.S.C. 8101(17).

§ 10.406 What are the maximum and minimum rates of compensation in disability cases?

(a) Compensation for total or partial disability may not exceed 75 percent of the basic monthly pay of the highest step of grade 15 of the General Schedule. (Basic monthly pay does not include locality adjustments.) However, this limit does not apply to disability sustained in the performance of duty which was due to an assault which occurred during an attempted assassination of a Federal official described under 10 U.S.C. 351(a) or 1751(a).

(b) Compensation for total disability may not be less than 75 percent of the basic monthly pay of the first step of grade 2 of the General Schedule or actual pay, whichever is less. (Basic monthly pay does not include locality adjustments.)

Compensation for Death

§ 10.410 Who is entitled to compensation in case of death, and what are the rates of compensation payable in death cases?

(a) If there is no child entitled to compensation, the employee's surviving spouse will receive compensation equal to 50 percent of the employee's monthly pay until death or remarriage before reaching age 55. Upon remarriage, the surviving spouse will be paid a lump sum equal to 24 times the monthly compensation payment (excluding compensation payable on account of another individual) to which the surviving spouse was entitled immediately before the remarriage. If remarriage occurs at age 55 or older, the lump-sum payment will not be paid and compensation will continue until death.

(b) If there is a child entitled to compensation, the compensation for the surviving spouse will equal 45 percent of the employee's monthly pay plus 15 percent for each child, but the total percentage may not exceed 75 percent.

(c) If there is a child entitled to compensation and no surviving spouse, compensation for one child will equal 40 percent of the employee's monthly pay. Fifteen percent will be awarded for each additional child, not to exceed 75 percent, the total amount to be shared equally among all children.

(d) If there is no child or surviving spouse entitled to compensation, the parents will receive compensation equal to 25 percent of the employee's monthly pay if one parent was wholly dependent on the employee at the time of death and the other was not dependent to any extent, or 20 percent each if both were wholly dependent on the employee, or a proportionate amount in the discretion of the Director if one or both were partially dependent on the employee. If there is a child or surviving spouse entitled to compensation, the parents will receive so much of the compensation described in the preceding sentence as, when added to the total percentages payable to the surviving spouse and children, will not exceed a total of 75 percent of the employee's monthly pay.

(e) If there is no child, surviving spouse or dependent parent entitled to compensation, the brothers, sisters, grandparents and grandchildren will receive compensation equal to 20 percent of the employee's monthly pay to such dependent if one was wholly dependent on the employee at the time of death; or 30 percent if more than one was wholly dependent, divided among such dependents equally; or 10 percent if no one was wholly dependent but one or more was partly dependent, divided among such dependents equally. If there is a child, surviving spouse or dependent parent entitled to compensation, the brothers, sisters, grandparents and grandchildren will receive so much of the compensation described in the preceding sentence as, when added to the total percentages payable to the children, surviving spouse and dependent parents, will not exceed a total of 75 percent of the employee's monthly pay.

(f) A child, brother, sister or grandchild may be entitled to receive death benefits until death, marriage, or reaching age 18. Regarding entitlement after reaching age 18, refer to § 10.417 of these regulations.

§ 10.411 What are the maximum and minimum rates of compensation in death cases?

(a) Compensation for death may not exceed the employee's pay or 75 percent of the basic monthly pay of the highest

step of grade 15 of the General Schedule, except that compensation may exceed the employee's basic monthly pay if such excess is created by authorized cost-of-living increases. (Basic monthly pay does not include locality adjustments.) However, the maximum limit does not apply when the death occurred during an assassination of a Federal official described under 18 U.S.C. 351(a) or 18 U.S.C. 1751(a).

(b) Compensation for death is computed on a minimum pay rate equal to the basic monthly pay of an employee at the first step of grade 2 of the General Schedule. (Basic monthly pay does not include locality adjustments.)

§ 10.412 Will OWCP pay the costs of burial and transportation of the remains?

In a case accepted for death benefits, OWCP will pay up to $800 for funeral and burial expenses. When an employee's home is within the United States and the employee dies outside the United States, or away from home or the official duty station, an additional amount may be paid for transporting the remains to the employee's home. An additional amount of $200 is paid to the personal representative of the decedent for reimbursement of the costs of terminating the decedent's status as an employee of the United States.

§ 10.413 If a person dies while receiving a schedule award, to whom is the balance of the schedule award payable?

The circumstances under which the balance of a schedule award may be paid to an employee's survivors are described in 5 U.S.C. 8109. Therefore, if there is no surviving spouse or child, OWCP will pay benefits as follows:

(a) To the parent, or parents, wholly dependent for support on the decedent in equal shares with any wholly dependent brother, sister, grandparent or grandchild;

(b) To the parent, or parents, partially dependent for support on the decedent in equal shares when there are no wholly dependent brothers, sisters, grandparents or grandchildren (or other wholly dependent parent); and

(c) To the parent, or parents, partially dependent upon the decedent, 25 percent of the amount payable, shared equally, and the remaining 75 percent to any wholly dependent brother, sister, grandparent or grandchild (or wholly dependent parent), shared equally.

§ 10.414 What reports of dependents are needed in death cases?

If a beneficiary is receiving compensation benefits on account of an employee's death, OWCP will ask him or her to complete a report once each year on Form CA–12. The report requires the beneficiary to note changes in marital status and dependents. If the beneficiary fails to submit the form (or an equivalent written statement) within 30 days of the date of request, OWCP shall suspend compensation until the requested form or equivalent written statement is received. The suspension will include compensation payable for or on behalf of another person (for example, compensation payable to a widow on behalf of a child). When the form or statement is received, compensation will be reinstated at the appropriate rate retroactive to the date of suspension, provided the beneficiary is entitled to such compensation.

§ 10.415 What must a beneficiary do if the number of beneficiaries decreases?

The circumstances under which compensation on account of death shall be terminated are described in 5 U.S.C. 8133(b). A beneficiary in a claim for death benefits should promptly notify OWCP of any event which would affect his or her entitlement to continued compensation. The terms ''marriage'' and ''remarriage'' include common-law marriage as recognized and defined by State law in the State where the beneficiary resides. If a beneficiary, or someone acting on his or her behalf, receives a check which includes payment of compensation for any period after the date when entitlement ended, he or she must promptly return the check to OWCP.

§ 10.416 How does a change in the number of beneficiaries affect the amount of compensation paid to the other beneficiaries?

If compensation to a beneficiary is terminated, the amount of compensation payable to one or more of the remaining beneficiaries may be reapportioned. Similarly, the birth of a posthumous child may result in a reapportionment of the amount of compensation payable to other beneficiaries. The parent, or someone acting on the child's behalf, shall promptly notify OWCP of the birth and submit a copy of the birth certificate.

§ 10.417 What reports are needed when compensation payments continue for children over age 18?

(a) Compensation payable on behalf of a child, brother, sister, or grandchild, which would otherwise end when the person reaches 18 years of age, shall be continued if and for so long as he or she is not married and is either a student as defined in 5 U.S.C. 8101(17), or physically or mentally incapable of self-support.

(b) At least twice each year, OWCP will ask a beneficiary receiving compensation based on the student status of a dependent to provide proof of continuing entitlement to such compensation, including certification of school enrollment.

(c) Likewise, at least twice each year, OWCP will ask a beneficiary or legal guardian receiving compensation based on a dependent's physical or mental inability to support himself or herself to submit a medical report verifying that the dependent's medical condition persists and that it continues to preclude self-support.

Adjustments to Compensation

§ 10.420 How are cost-of-living adjustments applied?

(a) In cases of disability, a beneficiary is eligible for cost-of-living adjustments under 5 U.S.C. 8146a where injury-related disability began more than one year prior to the date the cost-of-living adjustment took effect. The employee's use of continuation of pay as provided by 5 U.S.C. 8118, or of sick or annual leave, during any part of the period of disability does not affect the computation of the one-year period.

(b) Where an injury does not result in disability but compensation is payable for permanent impairment of a covered member, organ or function of the body, a beneficiary is eligible for cost-of-living adjustments under 5 U.S.C. 8146a where the award for such impairment began more than one year prior to the date the cost-of-living adjustment took effect.

(c) In cases of recurrence of disability, where the pay rate for compensation purposes is the pay rate at the time disability recurs, a beneficiary is eligible for cost-of-living adjustments under 5 U.S.C. 8146a where the effective date of that pay rate began more than one year prior to the date the cost-of living adjustment took effect.

(d) In cases of death, entitlement to cost-of-living adjustments under 5 U.S.C. 8146a begins with the first such adjustment occurring more than one year after the date of death. However, if the death was preceded by a period of injury-related disability, compensation payable to the survivors will be increased by the same percentages as the cost-of-living adjustments paid or payable to the deceased employee for the period of disability, as well as by subsequent cost-of-living adjustments to which the survivors would otherwise be entitled.

§ 10.421 May a beneficiary receive other kinds of payments from the Federal Government concurrently with compensation?

(a) 5 U.S.C. 8116(a) provides that a beneficiary may not receive wage-loss compensation concurrently with a Federal retirement or survivor annuity. The beneficiary must elect the benefit that he or she wishes to receive, and the election, once made, is revocable.

(b) An employee may receive compensation concurrently with military retired pay, retirement pay, retainer pay or equivalent pay for service in the Armed Forces or other uniformed services, subject to the reduction of such pay in accordance with 5 U.S.C. 5532(b).

(c) An employee may not receive compensation for total disability concurrently with severance pay or separation pay. However, an employee may concurrently receive compensation for partial disability or permanent impairment to a schedule member, organ or function with severance pay or separation pay.

(d) Pursuant to 5 U.S.C. 8116(d), a beneficiary may receive compensation under the FECA for either the death or disability of an employee concurrently with benefits under title II of the Social Security Act on account of the age or death of such employee. However, this provision of the FECA also requires OWCP to reduce the amount of any such compensation by the amount of any Social Security Act benefits that are attributable to the Federal service of the employee.

(e) To determine the employee's entitlement to compensation, OWCP may require an employee to submit an affidavit or statement as to the receipt of any Federally funded or Federally assisted benefits. If an employee fails to submit such affidavit or statement within 30 days of the date of the request, his or her right to compensation shall be suspended until such time as the requested affidavit or statement is received. At that time compensation will be reinstated retroactive to the date of suspension provided the employee is entitled to such compensation.

§ 10.422 May compensation payments be issued in a lump sum?

(a) In exercise of the discretion afforded under 5 U.S.C. 8135(a), OWCP has determined that lump-sum payments will not be made to persons entitled to wage-loss benefits (that is, those payable under 5 U.S.C. 8105 and 8106). Therefore, when OWCP receives requests for lump-sum payments for wage-loss benefits, OWCP will not exercise further discretion in the matter. This determination is based on several factors, including:

(1) The purpose of the FECA, which is to replace lost wages;

(2) The prudence of providing wage-loss benefits on a regular, recurring basis; and

(3) The high cost of the long-term borrowing that is needed to pay out large lump sums.

(b) However, a lump-sum payment may be made to an employee entitled to a schedule award under 5 U.S.C. 8107 where OWCP determines that such a payment is in the employee's best interest. Lump-sum payments of schedule awards generally will be considered in the employee's best interest only where the employee does not rely upon compensation payments as a substitute for lost wages (that is, the employee is working or is receiving annuity payments). An employee possesses no absolute right to a lump-sum payment of benefits payable under 5 U.S.C. 8107.

(c) Lump-sum payments to surviving spouses are addressed in 5 U.S.C. 8135(b).

§ 10.423 May compensation payments be assigned to, or attached by, creditors?

(a) As a general rule, compensation and claims for compensation are exempt from the claims of private creditors. This rule does not apply to claims submitted by Federal agencies. Further, any attempt by a FECA beneficiary to assign his or her claim is null and void. However, pursuant to provisions of the Social Security Act, 42 U.S.C. 659, and regulations issued by the Office of Personnel Management (OPM) at 5 CFR part 581, FECA benefits, including survivor's benefits, may be garnished to collect overdue alimony and child support payments.

(b) Garnishment for child support and alimony may be requested by providing a copy of the State agency or court order to the district office handling the FECA claim.

§ 10.424 May someone other than the beneficiary be designated to receive compensation payments?

A beneficiary may be incapable of managing or directing the management of his or her benefits because of a mental or physical disability, or because of legal incompetence, or because he or she is under 18 years of age. In this situation, absent the appointment of a guardian or other party to manage the financial affairs of the claimant by a court or administrative body authorized to do so, OWCP in its sole discretion may approve a person to serve as the representative payee for funds due the beneficiary.

§ 10.425 May compensation be claimed for periods of restorable leave?

The employee may claim compensation for periods of annual and sick leave which are restorable in accordance with the rules of the employing agency. Forms CA–7a and CA–7b are used for this purpose.

Overpayments

§ 10.430 How does OWCP notify an individual of a payment made?

(a) In addition to providing narrative descriptions to recipients of benefits paid or payable, OWCP includes on each periodic check a clear indication of the period for which payment is being made. A form is sent to the recipient with each supplemental check which states the date and amount of the payment and the period for which payment is being made. For payments sent by electronic funds transfer (EFT), a notification of the date and amount of payment appears on the statement from the recipient's financial institution.

(b) By these means, OWCP puts the recipient on notice that a payment was made and the amount of the payment. If the amount received differs from the amount indicated on the written notice or bank statement, the recipient is responsible for notifying OWCP of the difference. Absent affirmative evidence to the contrary, the beneficiary will be presumed to have received the notice of payment, whether mailed or transmitted electronically.

§ 10.431 What does OWCP do when an overpayment is identified?

Before seeking to recover an overpayment or adjust benefits, OWCP will advise the beneficiary in writing that:

(a) The overpayment exists, and the amount of overpayment;

(b) A preliminary finding shows either that the individual was or was not at fault in the creation of the overpayment;

(c) He or she has the right to inspect and copy Government records relating to the overpayment; and

(d) He or she has the right to present evidence which challenges the fact or amount of the overpayment, and/or challenges the preliminary finding that he or she was at fault in the creation of the overpayment. He or she may also request that recovery of the overpayment be waived.

§ 10.432 How can an individual present evidence to OWCP in response to a preliminary notice of an overpayment?

The individual may present this evidence to OWCP in writing or at a pre-recoupment hearing. The evidence must

be presented or the hearing requested within 30 days of the date of the written notice of overpayment. Failure to request the hearing within this 30-day time period shall constitute a waiver of that right.

§ 10.433 Under what circumstances can OWCP waive recovery of an overpayment?

(a) OWCP may consider waiving an overpayment only if the individual to whom it was made was not at fault in accepting or creating the overpayment. Each recipient of compensation benefits is responsible for taking all reasonable measures to ensure that payments he or she receives from OWCP are proper. The recipient must show good faith and exercise a high degree of care in reporting events which may affect entitlement to or the amount of benefits. A recipient who has done any of the following will be found to be at fault with respect to creating an overpayment:

(1) Made an incorrect statement as to a material fact which he or she knew or should have known to be incorrect; or

(2) Failed to provide information which he or she knew or should have known to be material; or

(3) Accepted a payment which he or she knew or should have known to be incorrect. (This provision applies only to the overpaid individual.)

(b) Whether or not OWCP determines that an individual was at fault with respect to the creation of an overpayment depends on the circumstances surrounding the overpayment. The degree of care expected may vary with the complexity of those circumstances and the individual's capacity to realize that he or she is being overpaid.

§ 10.434 If OWCP finds that the recipient of an overpayment was not at fault, what criteria are used to decide whether to waive recovery of it?

If OWCP finds that the recipient of an overpayment was not at fault, repayment will still be required unless:

(a) Adjustment or recovery of the overpayment would defeat the purpose of the FECA (see § 10.436), or

(b) Adjustment or recovery of the overpayment would be against equity and good conscience (see § 10.437).

§ 10.435 Is an individual responsible for an overpayment that resulted from an error made by OWCP or another Government agency?

(a) The fact that OWCP may have erred in making the overpayment, or that the overpayment may have resulted from an error by another Government agency, does not by itself relieve the individual who received the overpayment from liability for repayment if the individual also was at fault in accepting the overpayment.

(b) However, OWCP may find that the individual was not at fault if failure to report an event affecting compensation benefits, or acceptance of an incorrect payment, occurred because:

(1) The individual relied on misinformation given in writing by OWCP (or by another Government agency which he or she had reason to believe was connected with the administration of benefits) as to the interpretation of a pertinent provision of the FECA or its regulations; or

(2) OWCP erred in calculating cost-of-living increases, schedule award length and/or percentage of impairment, or loss of wage-earning capacity.

§ 10.436 Under what circumstances would recovery of an overpayment defeat the purpose of the FECA?

Recovery of an overpayment will defeat the purpose of the FECA if such recovery would cause hardship to a currently or formerly entitled beneficiary because:

(a) The beneficiary from whom OWCP seeks recovery needs substantially all of his or her current income (including compensation benefits) to meet current ordinary and necessary living expenses; and

(b) The beneficiary's assets do not exceed a specified amount as determined by OWCP from data furnished by the Bureau of Labor Statistics. A higher amount is specified for a beneficiary with one or more dependents.

§ 10.437 Under what circumstances would recovery of an overpayment be against equity and good conscience?

(a) Recovery of an overpayment is considered to be against equity and good conscience when any individual who received an overpayment would experience severe financial hardship in attempting to repay the debt.

(b) Recovery of an overpayment is also considered to be against equity and good conscience when any individual, in reliance on such payments or on notice that such payments would be made, gives up a valuable right or changes his or her position for the worse. In making such a decision, OWCP does not consider the individual's current ability to repay the overpayment.

(1) To establish that a valuable right has been relinquished, it must be shown that the right was in fact valuable, that it cannot be regained, and that the action was based chiefly or solely in reliance on the payments or on the notice of payment. Donations to charitable causes or gratuitous transfers of funds to other individuals are not considered relinquishments of valuable rights.

(2) To establish that an individual's position has changed for the worse, it must be shown that the decision made would not otherwise have been made but for the receipt of benefits, and that this decision resulted in a loss.

§ 10.438 Can OWCP require the individual who received the overpayment to submit additional financial information?

(a) The individual who received the overpayment is responsible for providing information about income, expenses and assets as specified by OWCP. This information is needed to determine whether or not recovery of an overpayment would defeat the purpose of the FECA, or be against equity and good conscience. This information will also be used to determine the repayment schedule, if necessary.

(b) Failure to submit the requested information within 30 days of the request shall result in denial of waiver, and no further request for waiver shall be considered until the requested information is furnished.

§ 10.439 What is addressed at a pre-recoupment hearing?

At a pre-recoupment hearing, the OWCP representative will consider all issues in the claim on which a formal decision has been issued. Such a hearing will thus fulfill OWCP's obligation to provide pre-recoupment rights and a hearing under 5 U.S.C. 8124(b). Pre-recoupment hearings shall be conducted in exactly the same manner as provided in § 10.615 through § 10.622.

§ 10.440 How does OWCP communicate its final decision concerning recovery of an overpayment, and what appeal right accompanies it?

(a) OWCP will send a copy of the final decision to the individual from whom recovery is sought; his or her representative, if any; and the employing agency.

(b) The only review of a final decision concerning an overpayment is to the Employees' Compensation Appeals Board. The provisions of 5 U.S.C. 8124(b) (concerning hearings) and 5 U.S.C. 8128(a) (concerning reconsiderations) do not apply to such a decision.

§ 10.441 How are overpayments collected?

(a) When an overpayment has been made to an individual who is entitled to further payments, the individual shall refund to OWCP the amount of the

overpayment as soon as the error is discovered or his or her attention is called to same. If no refund is made, OWCP shall decrease later payments of compensation, taking into account the probable extent of future payments, the rate of compensation, the financial circumstances of the individual, and any other relevant factors, so as to minimize any hardship. Should the individual die before collection has been completed, collection shall be made by decreasing later payments, if any, payable under the FECA with respect to the individual's death.

(b) When an overpayment has been made to an individual who is not entitled to further payments, the individual shall refund to OWCP the amount of the overpayment as soon as the error is discovered or his or her attention is called to same. The overpayment is subject to the provisions of the Federal Claims Collection Act of 1966 (as amended) and may be reported to the Internal Revenue Service as income. If the individual fails to make such refund, OWCP may recover the same through any available means, including offset of salary, annuity benefits, or other Federal payments, including tax refunds as authorized by the Tax Refund Offset Program, or referral of the debt to a collection agency or to the Department of Justice.

Subpart F—Continuing Benefits

Rules and Evidence

§ 10.500 What are the basic rules governing continuing receipt of compensation benefits and return to work?

(a) Benefits are available only while the effects of a work-related condition continue. Compensation for wage loss due to disability is available only for any periods during which an employee's work-related medical condition prevents him or her from earning the wages earned before the work-related injury. Payment of medical benefits is available for all treatment necessary due to a work-related medical condition.

(b) Each disabled employee is obligated to perform such work as he or she can, and OWCP's goal is to return each disabled employee to suitable work as soon as he or she is medically able. In determining what constitutes ''suitable work'' for a particular disabled employee, OWCP considers the employee's current physical limitations, whether the work is available within the employee's demonstrated commuting area, the employee's qualifications to perform such work, and other relevant factors. (See § 10.508 with respect to the payment of relocation expenses.)

§ 10.501 What medical evidence is necessary to support continuing receipt of compensation benefits?

(a) The employee is responsible for providing sufficient medical evidence to justify payment of any compensation sought.

(1) To support payment of continuing compensation, narrative medical evidence must be submitted whenever OWCP requests it but ordinarily not less than once a year. It must contain a physician's rationalized opinion as to whether the specific period of alleged disability is causally related to the employee's accepted injury or illness.

(2) The physician's opinion must be based on the facts of the case and the complete medical background of the employee, must be one of reasonable medical certainty and must include objective findings in support of its conclusions. Subjective complaints of pain are not sufficient, in and of themselves, to support payment of continuing compensation. Likewise, medical limitations based solely on the fear of a possible future injury are also not sufficient to support payment of continuing compensation. See § 10.330 for a fuller discussion of medical evidence.

(b) OWCP may require any kind of non-invasive testing to determine the employee's functional capacity. Failure to undergo such testing will result in a suspension of benefits. In addition, OWCP may direct the employee to undergo a second opinion or referee examination in any case it deems appropriate (see §§ 10.320 and 10.321).

§ 10.502 How does OWCP evaluate evidence in support of continuing receipt of compensation benefits?

In considering the medical and factual evidence, OWCP will weigh the probative value of the attending physician's report, any second opinion physician's report, any other medical reports, or any other evidence in the file. If OWCP determines that the medical evidence supporting one conclusion is more consistent, logical, and well-reasoned than evidence supporting a contrary conclusion, OWCP will use the conclusion that is supported by the weight of the medical evidence as the basis for awarding or denying further benefits. If medical reports that are equally well-reasoned support inconsistent determinations of an issue under consideration, OWCP will direct the employee to undergo a referee examination to resolve the issue. The results of the referee examination will be given special weight in determining the issue.

§ 10.503 Under what circumstances may OWCP reduce or terminate compensation benefits?

Once OWCP has advised the employee that it has accepted a claim and has either approved continuation of pay or paid medical benefits or compensation, benefits will not be terminated or reduced unless the weight of the evidence establishes that:

(a) The disability for which compensation was paid has ceased;

(b) The disabling condition is no longer causally related to the employment;

(c) The employee is only partially disabled;

(d) The employee has returned to work;

(e) The beneficiary was convicted of fraud in connection with a claim under the FECA, or the beneficiary was incarcerated based on any felony conviction; or

(f) OWCP's initial decision was in error.

Return to Work—Employer's Responsibilities

§ 10.505 What actions must the employer take?

Upon authorizing medical care, the employer should advise the employee in writing as soon as possible of his or her obligation to return to work under § 10.210 and as defined in this subpart. The term ''return to work'' as used in this subpart is not limited to returning to work at the employee's normal worksite or usual position, but may include returning to work at other locations and in other positions. In general, the employer should make all reasonable efforts to place the employee in his or her former or an equivalent position, in accordance with 5 U.S.C. 8151(b)(2), if the employee has fully recovered after one year. The Office of Personnel Management (not OWCP) administers this provision.

(a) Where the employer has specific alternative positions available for partially disabled employees, the employer should advise the employee in writing of the specific duties and physical requirements of those positions.

(b) Where the employer has no specific alternative positions available for an employee who can perform restricted or limited duties, the employer should advise the employee of any accommodations the agency can make to accommodate the employee's limitations due to the injury.

§ 10.506 May the employer monitor the employee's medical care?

The employer may monitor the employee's medical progress and duty status by obtaining periodic medical reports. Form CA–17 is usually adequate for this purpose. To aid in returning an injured employee to suitable employment, the employer may also contact the employee's physician in writing concerning the work limitations imposed by the effects of the injury and possible job assignments. (However, the employer shall not contact the physician by telephone or through personal visit.) When such contact is made, the employer shall send a copy of any such correspondence to OWCP and the employee, as well as a copy of the physician's response when received. The employer may also contact the employee at reasonable intervals to request periodic medical reports addressing his or her ability to return to work.

§ 10.507 How should the employer make an offer of suitable work?

Where the attending physician or OWCP notifies the employer in writing that the employee is partially disabled (that is, the employee can perform some work but not return to the position held at date of injury), the employer should act as follows:

(a) If the employee can perform in a specific alternative position available in the agency, and the employer has advised the employee in writing of the specific duties and physical requirements, the employer shall notify the employee in writing immediately of the date of availability.

(b) If the employee can perform restricted or limited duties, the employer should determine whether such duties are available or whether an existing job can be modified. If so, the employer shall advise the employee in writing of the duties, their physical requirements and availability.

(c) The employer must make any job offer in writing. However, the employer may make a job offer verbally as long as it provides the job offer to the employee in writing within two business days of the verbal job offer.

(d) The offer must include a description of the duties of the position, the physical requirements of those duties, and the date by which the employee is either to return to work or notify the employer of his or her decision to accept or refuse the job offer. The employer must send a complete copy of any job offer to OWCP when it is sent to the employee.

§ 10.508 May relocation expenses be paid for an employee who would need to move to accept an offer of reemployment?

If possible, the employer should offer suitable reemployment in the location where the employee currently resides. If this is not practical, the employer may offer suitable reemployment at the employee's former duty station or other location. Where the distance between the location of the offered job and the location where the employee currently resides is at least 50 miles, OWCP may pay such relocation expenses as are considered reasonable and necessary if the employee has been terminated from the agency's employment rolls and would incur relocation expenses by accepting the offered reemployment. OWCP may also pay such relocation expenses when the new employer is other than a Federal employer. OWCP will notify the employee that relocation expenses are payable if it makes a finding that the job is suitable. To determine whether a relocation expense is reasonable and necessary, OWCP shall use as a guide the Federal travel regulations for permanent changes of duty station.

§ 10.509 If an employee's light-duty job is eliminated due to downsizing, what is the effect on compensation?

(a) In general, an employee will not be considered to have experienced a compensable recurrence of disability as defined in § 10.5(x) merely because his or her employer has eliminated the employee's light-duty position in a reduction-in-force or some other form of downsizing. When this occurs, OWCP will determine the employee's wage-earning capacity based on his or her actual earnings in such light-duty position if this determination is appropriate on the basis that such earnings fairly and reasonably represent the employee's wage-earning capacity and such a determination has not already been made.

(b) For the purposes of this section only, a *light-duty position* means a classified position to which the injured employee has been formally reassigned that conforms to the established physical limitations of the injured employee and for which the employer has already prepared a written position description such that the position constitutes ''regular'' Federal employment. In the absence of a ''light-duty position'' as described in this paragraph, OWCP will assume that the employee was instead engaged in non-competitive employment which does not represent the employee's wage-earning capacity, i.e., work of the type provided to injured employees who cannot otherwise be employed by the Federal Government or in any well-known branch of the general labor market.

Return to Work—Employee's Responsibilities

§ 10.515 What actions must the employee take with respect to returning to work?

(a) If an employee can resume regular Federal employment, he or she must do so. No further compensation for wage loss is payable once the employee has recovered from the work-related injury to the extent that he or she can perform the duties of the position held at the time of injury, or earn equivalent wages.

(b) If an employee cannot return to the job held at the time of injury due to partial disability from the effects of the work-related injury, but has recovered enough to perform some type of work, he or she must seek work. In the alternative, the employee must accept suitable work offered to him or her. (See § 10.500 for a definition of ''suitable work''.) This work may be with the original employer or through job placement efforts made by or on behalf of OWCP.

(c) If the employer has advised an employee in writing that specific alternative positions exist within the agency, the employee shall provide the description and physical requirements of such alternate positions to the attending physician and ask whether and when he or she will be able to perform such duties.

(d) If the employer has advised an employee that it is willing to accommodate his or her work limitations, the employee shall so advise the attending physician and ask him or her to specify the limitations imposed by the injury. The employee is responsible for advising the employer immediately of these limitations.

(e) From time to time, OWCP may require the employee to report his or her efforts to obtain suitable employment, whether with the Federal Government, State and local Governments, or in the private sector.

§ 10.516 How will an employee know if OWCP considers a job to be suitable?

OWCP shall advise the employee that it has found the offered work to be suitable and afford the employee 30 days to accept the job or present any reasons to counter OWCP's finding of suitability. If the employee presents such reasons, and OWCP determines that the reasons are unacceptable, it will notify the employee of that determination and that he or she has 15 days in which to accept the offered work without penalty. At that point in

time, OWCP's notification need not state the reasons for finding that the employee's reasons are not acceptable.

§ 10.517 What are the penalties for refusing to accept a suitable job offer?

(a) 5 U.S.C. 8106(c) provides that a partially disabled employee who refuses to seek suitable work, or refuses to or neglects to work after suitable work is offered to or arranged for him or her, is not entitled to compensation. An employee who refuses or neglects to work after suitable work has been offered or secured for him or her has the burden to show that this refusal or failure to work was reasonable or justified.

(b) After providing the two notices described in § 10.516, OWCP will terminate the employee's entitlement to further compensation under 5 U.S.C. 8105, 8106, and 8107, as provided by 5 U.S.C. 8106(c)(2). However, the employee remains entitled to medical benefits as provided by 5 U.S.C. 8103.

§ 10.518 Does OWCP provide services to help employees return to work?

(a) OWCP may, in its discretion, provide vocational rehabilitation services as authorized by 5 U.S.C. 8104. These services include assistance from registered nurses working under the direction of OWCP. Among other things, these nurses visit the worksite, ensure that the duties of the position do not exceed the medical limitations as represented by the weight of medical evidence established by OWCP, and address any problems the employee may have in adjusting to the work setting. The nurses do not evaluate medical evidence; OWCP claims staff perform this function.

(b) Vocational rehabilitation services may also include vocational evaluation, testing, training, and placement services with either the original employer or a new employer, when the injured employee cannot return to the job held at the time of injury. These services also include functional capacity evaluations, which help to tailor individual rehabilitation programs to employees' physical reconditioning and behavioral modification needs, and help employees to meet the demands of current or potential jobs.

§ 10.519 What action will OWCP take if an employee refuses to undergo vocational rehabilitation?

Under 5 U.S.C. 8104(a), OWCP may direct a permanently disabled employee to undergo vocational rehabilitation. To ensure that vocational rehabilitation services are available to all who might be entitled to benefit from them, an injured employee who has a loss of wage-earning capacity shall be presumed to be ''permanently disabled,'' for purposes of this section only, unless and until the employee proves that the disability is not permanent. If an employee without good cause fails or refuses to apply for, undergo, participate in, or continue to participate in a vocational rehabilitation effort when so directed, OWCP will act as follows:

(a) Where a suitable job has been identified, OWCP will reduce the employee's future monetary compensation based on the amount which would likely have been his or her wage-earning capacity had he or she undergone vocational rehabilitation. OWCP will determine this amount in accordance with the job identified through the vocational rehabilitation planning process, which includes meetings with the OWCP nurse and the employer. The reduction will remain in effect until such time as the employee acts in good faith to comply with the direction of OWCP.

(b) Where a suitable job has not been identified, because the failure or refusal occurred in the early but necessary stages of a vocational rehabilitation effort (that is, meetings with the OWCP nurse, interviews, testing, counseling, functional capacity evaluations, and work evaluations), OWCP cannot determine what would have been the employee's wage-earning capacity.

(c) Under the circumstances identified in paragraph (b) of this section, in the absence of evidence to the contrary, OWCP will assume that the vocational rehabilitation effort would have resulted in a return to work with no loss of wage-earning capacity, and OWCP will reduce the employee's monetary compensation accordingly (that is, to zero). This reduction will remain in effect until such time as the employee acts in good faith to comply with the direction of OWCP.

§ 10.520 How does OWCP determine compensation after an employee completes a vocational rehabilitation program?

After completion of a vocational rehabilitation program, OWCP may adjust compensation to reflect the injured worker's wage-earning capacity. Actual earnings will be used if they fairly and reasonably reflect the earning capacity. The position determined to be the goal of a training plan is assumed to represent the employee's earning capacity if it is suitable and performed in sufficient numbers so as to be reasonably available, whether or not the employee is placed in such a position.

Reports of Earnings From Employment and Self-Employment

§ 10.525 What information must the employee report?

(a) An employee who is receiving compensation for partial or total disability must advise OWCP immediately of any return to work, either part-time or full-time. In addition, an employee who is receiving compensation for partial or total disability will periodically be required to submit a report of earnings from employment or self-employment, either part-time or full-time. (See § 10.5(g) for a definition of ''earnings''.)

(b) The employee must report even those earnings which do not seem likely to affect his or her level of benefits. Many kinds of income, though not all, will result in reduction of compensation benefits. While earning income will not necessarily result in a reduction of compensation, failure to report income may result in forfeiture of all benefits paid during the reporting period.

§ 10.526 Must the employee report volunteer activities?

An employee who is receiving compensation for partial or total disability is periodically required to report volunteer activity or any other kind of activity which shows that the employee is no longer totally disabled for work.

§ 10.527 Does OWCP verify reports of earnings?

To make proper determinations of an employee's entitlement to benefits, OWCP may verify the earnings reported by the employee through a variety of means, including but not limited to computer matches with the Office of Personnel Management and inquiries to the Social Security Administration. Also, OWCP may perform computer matches with records of State agencies, including but not limited to workers' compensation administrations, to determine whether private employers are paying workers' compensation insurance premiums for recipients of benefits under the FECA.

§ 10.528 What action will OWCP take if the employee fails to file a report of activity indicating an ability to work?

OWCP periodically requires each employee who is receiving compensation benefits to complete an affidavit as to any work, or activity indicating an ability to work, which the employee has performed for the prior 15 months. If an employee who is required to file such a report fails to do so within 30 days of the date of the request, his or her right to compensation for wage

loss under 5 U.S.C. 8105 or 8106 is suspended until OWCP receives the requested report. At that time, OWCP will reinstate compensation retroactive to the date of suspension if the employee remains entitled to compensation.

§ 10.529 What action will OWCP take if the employee files an incomplete report?

(a) If an employee knowingly omits or understates any earnings or work activity in making a report, he or she shall forfeit the right to compensation with respect to any period for which the report was required. A false or evasive statement, omission, concealment, or misrepresentation with respect to employment activity or earnings in a report may also subject an employee to criminal prosecution.

(b) Where the right to compensation is forfeited, OWCP shall recover any compensation already paid for the period of forfeiture pursuant to 5 U.S.C. 8129 and other relevant statutes.

Reports of Dependents

§ 10.535 How are dependents defined, and what information must the employee report?

(a) Dependents in disability cases are defined in § 10.405. While the employee has one or more dependents, the employee's basic compensation for wage loss or for permanent impairment shall be augmented as provided in 5 U.S.C. 8110. (The rules for death claims are found in § 10.414.)

(b) An employee who is receiving augmented compensation on account of dependents must advise OWCP immediately of any change in the number or status of dependents. The employee should also promptly refund to OWCP any amounts received on account of augmented compensation after the right to receive augmented compensation has ceased. Any difference between actual entitlement and the amount already paid beyond the date entitlement ended is an overpayment of compensation and may be recovered pursuant to 5 U.S.C. 8129 and other relevant statutes.

(c) An employee who is receiving augmented compensation shall be periodically required to submit a statement as to any dependents, or to submit supporting documents such as birth or marriage certificates or court orders, to determine if he or she is still entitled to augmented compensation.

§ 10.536 What is the penalty for failing to submit a report of dependents?

If an employee fails to submit a requested statement or supporting document within 30 days of the date of the request, OWCP will suspend his or her right to augmented compensation until OWCP receives the requested statement or supporting document. At that time, OWCP will reinstate augmented compensation retroactive to the date of suspension, provided that the employee is entitled to receive augmented compensation.

§ 10.537 What reports are needed when compensation payments continue for children over age 18?

(a) Compensation payable on behalf of a child that would otherwise end when the child reaches 18 years of age will continue if and for so long as he or she is not married and is either a student as defined in 5 U.S.C. 8101(17), or physically or mentally incapable of self-support.

(b) At least twice each year, OWCP will ask an employee who receives compensation based on the student status of a child to provide proof of continuing entitlement to such compensation, including certification of school enrollment.

(c) Likewise, at least twice each year, OWCP will ask an employee who receives compensation based on a child's physical or mental inability to support himself or herself to submit a medical report verifying that the child's medical condition persists and that it continues to preclude self-support.

(d) If an employee fails to submit proof within 30 days of the date of the request, OWCP will suspend the employee's right to compensation until the requested information is received. At that time OWCP will reinstate compensation retroactive to the date of suspension, provided the employee is entitled to such compensation.

Reduction and Termination of Compensation

§ 10.540 When and how is compensation reduced or terminated?

(a) Except as provided in paragraphs (b) and (c) of this section, where the evidence establishes that compensation should be either reduced or terminated, OWCP will provide the beneficiary with written notice of the proposed action and give him or her 30 days to submit relevant evidence or argument to support entitlement to continued payment of compensation. This notice will include a description of the reasons for the proposed action and a copy of the specific evidence upon which OWCP is basing its determination. Payment of compensation will continue until any evidence or argument submitted has been reviewed and an appropriate decision has been issued, or until 30 days have elapsed if no additional evidence or argument is submitted.

(b) OWCP will not provide such written notice when the beneficiary has no reasonable basis to expect that payment of compensation will continue. For example, when a claim has been made for a specific period of time and that specific period expires, no written notice will be given. Written notice will also not be given when a beneficiary dies, when OWCP either reduces or terminates compensation upon an employee's return to work, when OWCP terminates only medical benefits after a physician indicates that further medical treatment is not necessary or has ended, or when OWCP denies payment for a particular medical expense.

(c) OWCP will also not provide such written notice when compensation is terminated, suspended or forfeited due to one of the following: A beneficiary's conviction for fraud in connection with a claim under the FECA; a beneficiary's incarceration based on any felony conviction; an employee's failure to report earnings from employment or self-employment; an employee's failure or refusal to either continue performing suitable work or to accept an offer of suitable work; or an employee's refusal to undergo or obstruction of a directed medical examination or treatment for substance abuse.

§ 10.541 What action will OWCP take after issuing written notice of its intention to reduce or terminate compensation?

(a) If the beneficiary submits evidence or argument prior to the issuance of the decision, OWCP will evaluate it in light of the proposed action and undertake such further development as it may deem appropriate, if any. Evidence or argument which is repetitious, cumulative, or irrelevant will not require any further development. If the beneficiary does not respond within 30 days of the written notice, OWCP will issue a decision consistent with its prior notice. OWCP will not grant any request for an extension of this 30-day period.

(b) Evidence or argument which refutes the evidence upon which the proposed action was based will result in the continued payment of compensation. If the beneficiary submits evidence or argument which fails to refute the evidence upon which the proposed action was based but which requires further development, OWCP will not provide the beneficiary with another notice of its proposed action upon completion of such development. Once any further development of the evidence is completed, OWCP will either continue payment or issue a decision consistent with its prior notice.

Subpart G—Appeals Process

§ 10.600 How can final decisions of OWCP be reviewed?

There are three methods for reviewing a formal decision of the OWCP (§§ 10.125–10.127 discuss how decisions are made). These methods are: reconsideration by the district office; a hearing before an OWCP hearing representative; and appeal to the Employees' Compensation Appeals Board (ECAB). For each method there are time limitations and other restrictions which may apply, and not all options are available for all decisions, so the employee should consult the requirements set forth below. Further rules governing appeals to the ECAB are found at part 501 of this title.

Reconsiderations and Reviews by the Director

§ 10.605 What is reconsideration?

The FECA provides that the Director may review an award for or against compensation upon application by an employee (or his or her representative) who receives an adverse decision. The employee shall exercise this right through a request to the district office. The request, along with the supporting statements and evidence, is called the ''application for reconsideration.''

§ 10.606 How does a claimant request reconsideration?

(a) An employee (or representative) seeking reconsideration should send the application for reconsideration to the address as instructed by OWCP in the final decision.

(b) The application for reconsideration, including all supporting documents, must:

(1) Be submitted in writing;

(2) Set forth arguments and contain evidence that either:

(i) Shows that OWCP erroneously applied or interpreted a specific point of law;

(ii) Advances a relevant legal argument not previously considered by OWCP; or

(iii) Constitutes relevant and pertinent new evidence not previously considered by OWCP.

§ 10.607 What is the time limit for requesting reconsideration?

(a) An application for reconsideration must be sent within one year of the date of the OWCP decision for which review is sought. If submitted by mail, the application will be deemed timely if postmarked by the U.S. Postal Service within the time period allowed. If there is no such postmark, or it is not legible, other evidence such as (but not limited to) certified mail receipts, certificate of service, and affidavits, may be used to establish the mailing date.

(b) OWCP will consider an untimely application for reconsideration only if the application demonstrates clear evidence of error on the part of OWCP in its most recent merit decision. The application must establish, on its face, that such decision was erroneous.

(c) The year in which a claimant has to timely request reconsideration shall not include any period subsequent to an OWCP decision for which the claimant can establish through probative medical evidence that he or she is unable to communicate in any way and that his or her testimony is necessary in order to obtain modification of the decision.

§ 10.608 How does OWCP decide whether to grant or deny the request for reconsideration?

(a) A timely request for reconsideration may be granted if OWCP determines that the employee has presented evidence and/or argument that meets at least one of the standards described in § 10.606(b)(2). If reconsideration is granted, the case is reopened and the case is reviewed on its merits (see § 10.609).

(b) Where the request is timely but fails to meet at least one of the standards described in § 10.606(b)(2), or where the request is untimely and fails to present any clear evidence of error, OWCP will deny the application for reconsideration without reopening the case for a review on the merits. A decision denying an application for reconsideration cannot be the subject of another application for reconsideration. The only review for this type of non-merit decision is an appeal to the ECAB (see § 10.625), and OWCP will not entertain a request for reconsideration or a hearing on this decision denying reconsideration.

§ 10.609 How does OWCP decide whether new evidence requires modification of the prior decision?

When application for reconsideration is granted, OWCP will review the decision for which reconsideration is sought on the merits and determine whether the new evidence or argument requires modification of the prior decision.

(a) After OWCP decides to grant reconsideration, but before undertaking the review, OWCP will send a copy of the reconsideration application to the employer, which will have 20 days from the date sent to comment or submit relevant documents. OWCP will provide any such comments to the employee, who will have 20 days from the date the comments are sent to him or her within which to comment. If no comments are received from the employer, OWCP will proceed with the merit review of the case.

(b) A claims examiner who did not participate in making the contested decision will conduct the merit review of the claim. When all evidence has been reviewed, OWCP will issue a new merit decision, based on all the evidence in the record. A copy of the decision will be provided to the agency.

(c) An employee dissatisfied with this new merit decision may again request reconsideration under this subpart or appeal to the ECAB. An employee may not request a hearing on this decision.

§ 10.610 What is a review by the Director?

The FECA specifies that an award for or against payment of compensation may be reviewed at any time on the Director's own motion. Such review may be made without regard to whether there is new evidence or information. If the Director determines that a review of the award is warranted (including, but not limited to circumstances indicating a mistake of fact or law or changed conditions), the Director (at any time and on the basis of existing evidence) may modify, rescind, decrease or increase compensation previously awarded, or award compensation previously denied. A review on the Director's own motion is not subject to a request or petition and none shall be entertained.

(a) The decision whether or not to review an award under this section is solely within the discretion of the Director. The Director's exercise of this discretion is not subject to review by the ECAB, nor can it be the subject of a reconsideration or hearing request.

(b) Where the Director reviews an award on his or her own motion, any resulting decision is subject as appropriate to reconsideration, a hearing and/or appeal to the ECAB. Jurisdiction on review or on appeal to ECAB is limited to a review of the merits of the resulting decision. The Director's determination to review the award is not reviewable.

Hearings

§ 10.615 What is a hearing?

A hearing is a review of an adverse decision by a hearing representative. Initially, the claimant can choose between two formats: An oral hearing or a review of the written record. At the discretion of the hearing representative, an oral hearing may be conducted by telephone or teleconference. In addition to the evidence of record, the employee

may submit new evidence to the hearing representative.

§ 10.616 How does a claimant obtain a hearing?

(a) A claimant, injured on or after July 4, 1966, who has received a final adverse decision by the district office may obtain a hearing by writing to the address specified in the decision. The hearing request must be sent within 30 days (as determined by postmark or other carrier's date marking) of the date of the decision for which a hearing is sought. The claimant must not have previously submitted a reconsideration request (whether or not it was granted) on the same decision.

(b) The claimant may specify the type of hearing desired when making the original hearing request. If the request does not specify a format, OWCP will schedule an oral hearing. The claimant can request a change in the format of the hearing by making a written request to the Branch of Hearings and Review. OWCP will grant a request received by the Branch of Hearings and Review within 30 days of: The date OWCP acknowledges the initial hearing request, or the date OWCP issues a notice setting a date for an oral hearing, in cases where the initial request was for, or was treated as a request for, an oral hearing. A request received after those dates will be subject to OWCP's discretion. The decision to grant or deny a change of format is not reviewable.

§ 10.617 How is an oral hearing conducted?

(a) The hearing representative retains complete discretion to set the time and place of the hearing, including the amount of time allotted for the hearing, considering the issues to be resolved.

(b) Unless otherwise directed in writing by the claimant, the hearing representative will mail a notice of the time and place of the oral hearing to the claimant and any representative at least 30 days before the scheduled date. The employer will also be mailed a notice at least 30 days before the scheduled date.

(c) The hearing is an informal process, and the hearing representative is not bound by common law or statutory rules of evidence, by technical or formal rules of procedure or by section 5 of the Administrative Procedure Act, but the hearing representative may conduct the hearing in such manner as to best ascertain the rights of the claimant. During the hearing process, the claimant may state his or her arguments and present new written evidence in support of the claim.

(d) Testimony at oral hearings is recorded, then transcribed and placed in the record. Oral testimony shall be made under oath.

(e) OWCP will furnish a transcript of the oral hearing to the claimant and the employer, who have 20 days from the date it is sent to comment. Any comments received from the employer shall be sent to the claimant, who will be given an additional 20 days to comment from the date OWCP sends any agency comments.

(f) The hearing remains open for the submittal of additional evidence until 30 days after the hearing is held, unless the hearing representative, in his or her sole discretion, grants an extension. Only one such extension may be granted. A copy of the decision will be mailed to the claimant's last known address, to any representative, and to the employer.

(g) The hearing representative determines the conduct of the oral hearing and may terminate the hearing at any time he or she determines that all relevant evidence has been obtained, or because of misbehavior on the part of the claimant and/or representative at or near the place of the oral presentation.

§ 10.618 How is a review of the written record conducted?

(a) The hearing representative will review the official record and any additional evidence submitted by the claimant and by the agency. The hearing representative may also conduct whatever investigation is deemed necessary. New evidence and arguments are to be submitted at any time up to the time specified by OWCP, but they should be submitted as soon as possible to avoid delaying the hearing process.

(b) The claimant should submit, with his or her application for review, all evidence or argument that he or she wants to present to the hearing representative. A copy of all pertinent material will be sent to the employer, which will have 20 days from the date it is sent to comment. (Medical evidence is not considered ''pertinent'' for review and comment by the agency, and it will therefore not be furnished to the agency. OWCP has sole responsibility for evaluating medical evidence.) The employer shall send any comments to the claimant, who will have 20 more days from the date of the agency's certificate of service to comment.

§ 10.619 May subpoenas be issued for witnesses and documents?

A claimant may request a subpoena, but the decision to grant or deny such a request is within the discretion of the hearing representative. The hearing representative may issue subpoenas for the attendance and testimony of witnesses, and for the production of books, records, correspondence, papers or other relevant documents. Subpoenas are issued for documents only if they are relevant and cannot be obtained by other means, and for witnesses only where oral testimony is the best way to ascertain the facts.

(a) A claimant may request a subpoena only as part of the hearings process, and no subpoena will be issued under any other part of the claims process. To request a subpoena, the requestor must:

(1) Submit the request in writing and send it to the hearing representative as early as possible but no later than 60 days (as evidenced by postmark, electronic marker or other objective date mark) after the date of the original hearing request.

(2) Explain why the testimony or evidence is directly relevant to the issues at hand, and a subpoena is the best method or opportunity to obtain such evidence because there are no other means by which the documents or testimony could have been obtained.

(b) No subpoena will be issued for attendance of employees of OWCP acting in their official capacities as decision-makers or policy administrators. For hearings taking the form of a review of the written record, no subpoena for the appearance of witnesses will be considered.

(c) The hearing representative issues the subpoena under his or her own name. It may be served in person or by certified mail, return receipt requested, addressed to the person to be served at his or her last known principal place of business or residence. A decision to deny a subpoena can only be appealed as part of an appeal of any adverse decision which results from the hearing.

§ 10.620 Who pays the costs associated with subpoenas?

(a) Witnesses who are not employees or former employees of the Federal Government shall be paid the same fees and mileage as paid for like services in the District Court of the United States where the subpoena is returnable, except that expert witnesses shall be paid a fee not to exceed the local customary fee for such services.

(b) Where OWCP asked that the witness submit evidence into the case record or asked that the witness attend, OWCP shall pay the fees and mileage. Where the claimant requested the subpoena, and where the witness submitted evidence into the record at the request of the claimant, the claimant shall pay the fees and mileage.

§ 10.621 What is the employer's role when an oral hearing has been requested?

(a) The employer may send one (or more, where appropriate) representative(s) to observe the proceeding, but the agency representative cannot give testimony or argument or otherwise participate in the hearing, except where the claimant or the hearing representative specifically asks the agency representative to testify.

(b) The hearing representative may deny a request by the claimant that the agency representative testify where the claimant cannot show that the testimony would be relevant or where the agency representative does not have the appropriate level of knowledge to provide such evidence at the hearing. The employer may also comment on the hearing transcript, as described in § 10.617(e).

§ 10.622 May a claimant withdraw a request for or postpone a hearing?

(a) The claimant and/or representative may withdraw the hearing request at any time up to and including the day the hearing is held, or the decision issued. Withdrawing the hearing request means the record is returned to the jurisdiction of the district office and no further requests for a hearing on the underlying decision will be considered.

(b) OWCP will entertain any reasonable request for scheduling the oral hearing, but such requests should be made at the time of the original application for hearing. Scheduling is at the sole discretion of the hearing representative, and is not reviewable. Once the oral hearing is scheduled and OWCP has mailed appropriate written notice to the claimant, the oral hearing cannot be postponed at the claimant's request for any reason except those stated in paragraph (c) of this section, unless the hearing representative can reschedule the hearing on the same docket (that is, during the same hearing trip). When the request to postpone a scheduled hearing does not meet the test of paragraph (c) of this section and cannot be accommodated on the docket, no further opportunity for an oral hearing will be provided. Instead, the hearing will take the form of a review of the written record and a decision issued accordingly. In the alternative, a teleconference may be substituted for the oral hearing at the discretion of the hearing representative.

(c) Where the claimant is hospitalized for a reason which is not elective, or where the death of the claimant's parent, spouse, or child prevents attendance at the hearing, a postponement may be granted upon proper documentation.

Review by the Employees' Compensation Appeals Board (ECAB)

§ 10.625 What kinds of decisions may be appealed?

Only final decisions of OWCP may be appealed to the ECAB. However, certain types of final decisions, described in this part as not subject to further review, cannot be appealed to the ECAB. Decisions that are not appealable to the ECAB include: Decisions concerning the amounts payable for medical services, decisions concerning exclusion and reinstatement of medical providers, decisions by the Director to review an award on his or her own motion, and denials of subpoenas independent of the appeal of the underlying decision. In appeals before the ECAB, attorneys from the Office of the Solicitor of Labor shall represent OWCP.

§ 10.626 Who has jurisdiction of cases on appeal to the ECAB?

While a case is on appeal to the ECAB, OWCP has no jurisdiction over the claim with respect to issues which directly relate to the issue or issues on appeal. The OWCP continues to administer the claim and retains jurisdiction over issues unrelated to the issue or issues on appeal and issues which arise after the appeal as a result of ongoing administration of the case. Such issues would include, for example, the ability to terminate benefits where an individual returns to work while an appeal is pending at the ECAB.

Subpart H—Special Provisions

Representation

§ 10.700 May a claimant designate a representative?

(a) The claims process under the FECA is informal. Unlike many workers' compensation laws, the employer is not a party to the claim, and OWCP acts as an impartial evaluator of the evidence. Nevertheless, a claimant may appoint one individual to represent his or her interests, but the appointment must be in writing.

(b) There can be only one representative at any one time, so after one representative has been properly appointed, OWCP will not recognize another individual as representative until the claimant withdraws the authorization of the first individual. In addition, OWCP will recognize only certain types of individuals (see § 10.701).

(c) A properly appointed representative who is recognized by OWCP may make a request or give direction to OWCP regarding the claims process, including a hearing. This authority includes presenting or eliciting evidence, making arguments on facts or the law, and obtaining information from the case file, to the same extent as the claimant. Any notice requirement contained in this part or the FECA is fully satisfied if served on the representative, and has the same force and effect as if sent to the claimant.

§ 10.701 Who may serve as a representative?

A claimant may authorize any individual to represent him or her in regard to a claim under the FECA, unless that individual's service as a representative would violate any applicable provision of law (such as 18 U.S.C. 205 and 208). A Federal employee may act as a representative only:

(a) On behalf of immediate family members, defined as a spouse, children, parents, and siblings of the representative, provided no fee or gratuity is charged; or

(b) While acting as a union representative, defined as any officially sanctioned union official, and no fee or gratuity is charged.

§ 10.702 How are fees for services paid?

A representative may charge the claimant a fee and other costs associated with the representation before OWCP. The claimant is solely responsible for paying the fee and other charges. The claimant will not be reimbursed by OWCP, nor is OWCP in any way liable for the amount of the fee.

Administrative costs (mailing, copying, messenger services, travel and the like, but not including secretarial services, paralegal and other activities) need not be approved before the representative collects them. Before any fee for services can be collected, however, the fee must be approved by the Secretary. (Collecting a fee without this approval may constitute a misdemeanor under 18 U.S.C. 292.)

§ 10.703 How are fee applications approved?

(a) *Fee Application.* (1) The representative must submit the fee application to the district office and/or the Branch of Hearings and Review, according to where the work for which the fee is charged was performed. The application shall contain the following:

(i) An itemized statement showing the representative's hourly rate, the number of hours worked and specifically identifying the work performed and a total amount charged for the representation (excluding administrative costs).

(ii) A statement of agreement or disagreement with the amount charged, signed by the claimant. The statement must also acknowledge that the claimant is aware that he or she must pay the fees and that OWCP is not responsible for paying the fee or other costs.

(2) An incomplete application will be returned with no further comment.

(b) *Approval where there is no dispute.* Where a fee application is accompanied by a signed statement indicating the claimant's agreement with the fee as described in paragraph (a)(1)(ii) of this section, the application is deemed approved.

(c) *Disputed requests.* (1) Where the claimant disagrees with the amount of the fee, as indicated in the statement accompanying the submittal, OWCP will evaluate the objection and decide whether or not to approve the request. OWCP will provide a copy of the request to the claimant and ask him or her to submit any further information in support of the objection within 15 days from the date the request is forwarded. After that period has passed, OWCP will evaluate the information received to determine whether the amount of the fee is substantially in excess of the value of services received by looking at the following factors:

(i) Usefulness of the representative's services;

(ii) The nature and complexity of the claim;

(iii) The actual time spent on development and presentation of the claim; and

(iv) Customary local charges for similar services.

(2) Where the claimant disputes the representative's request and files an objection with OWCP, an appealable decision will be issued.

Third Party Liability

§ 10.705 When must an employee or other FECA beneficiary take action against a third party?

(a) If an injury or death for which benefits are payable under the FECA is caused, wholly or partially, by someone other than a Federal employee acting within the scope of his or her employment, the claimant can be required to take action against that third party.

(b) The Office of the Solicitor of Labor (SOL) is hereby delegated authority to administer the subrogation aspects of certain FECA claims for OWCP. Either OWCP or SOL can require a FECA beneficiary to assign his or her claim for damages to the United States or to prosecute the claim in his or her own name.

§ 10.706 How will a beneficiary know if OWCP or SOL has determined that action against a third party is required?

When OWCP determines that an employee or other FECA beneficiary must take action against a third party, it will notify the employee or beneficiary in writing. If the case is transferred to SOL, a second notification may be issued.

§ 10.707 What must a FECA beneficiary who is required to take action against a third party do to satisfy the requirement that the claim be ''prosecuted''?

At a minimum, a FECA beneficiary must do the following:

(a) Seek damages for the injury or death from the third party, either through an attorney or on his or her own behalf;

(b) Either initiate a lawsuit within the appropriate statute of limitations period or obtain a written release of this obligation from OWCP or SOL unless recovery is possible through a negotiated settlement prior to filing suit;

(c) Refuse to settle or dismiss the case for any amount less than the amount necessary to repay OWCP's refundable disbursements, as defined in § 10.714, without receiving permission from OWCP or SOL;

(d) Provide periodic status updates and other relevant information in response to requests from OWCP or SOL;

(e) Submit detailed information about the amount recovered and the costs of the suit on a ''Statement of Recovery'' form approved by OWCP; and

(f) Pay any required refund.

§ 10.708 Can a FECA beneficiary who refuses to comply with a request to assign a claim to the United States or to prosecute the claim in his or her own name be penalized?

When a FECA beneficiary refuses a request to either assign a claim or prosecute a claim in his or her own name, OWCP may determine that he or she has forfeited his or her right to all past or future compensation for the injury with respect to which the request is made. Alternatively, OWCP may also suspend the FECA beneficiary's compensation payments until he or she complies with the request.

§ 10.709 What happens if a beneficiary directed by OWCP or SOL to take action against a third party does not believe that a claim can be successfully prosecuted at a reasonable cost?

If a beneficiary consults an attorney and is informed that a suit for damages against a third party for the injury or death for which benefits are payable is unlikely to prevail or that the costs of such a suit are not justified by the potential recovery, he or she should request that OWCP or SOL release him or her from the obligation to proceed. This request should be in writing and provide evidence of the attorney's opinion. If OWCP or SOL agrees, the beneficiary will not be required to take further action against the third party.

§ 10.710 Under what circumstances must a recovery of money or other property in connection with an injury or death for which benefits are payable under the FECA be reported to OWCP or SOL?

Any person who has filed a FECA claim that has been accepted by OWCP (whether or not compensation has been paid), or who has received FECA benefits in connection with a claim filed by another, is required to notify OWCP or SOL of the receipt of money or other property as a result of a settlement or judgment in connection with the circumstances of that claim. This includes an injured employee, and in the case of a claim involving the death of an employee, a spouse, children or other dependents entitled to receive survivor's benefits. OWCP or SOL should be notified in writing within 30 days of the receipt of such money or other property or the acceptance of the FECA claim, whichever occurs later.

§ 10.711 How much of any settlement or judgment must be paid to the United States?

The statute permits a FECA beneficiary to retain, as a minimum, one-fifth of the net amount of money or property remaining after a reasonable attorney's fee and the costs of litigation have been deducted from the third-party recovery. The United States shares in the litigation expense by allowing the beneficiary to retain, at the time of distribution, an amount equivalent to a reasonable attorney's fee proportionate to the refund due the United States. After the refund owed to the United States is calculated, the FECA beneficiary retains any surplus remaining, and this amount is credited, dollar for dollar, against future compensation for the same injury, as defined in § 10.719. OWCP will resume the payment of compensation only after the FECA beneficiary has been awarded compensation which exceeds the amount of the surplus.

(a) The refund to the United States is calculated as follows, using the Statement of Recovery form approved by OWCP:

(1) Determine the gross recovery as set forth in § 10.712;

(2) Subtract the amount of attorney's fees actually paid, but not more than the maximum amount of attorney's fees

considered by OWCP or SOL to be reasonable, from the gross recovery (Subtotal A);

(3) Subtract the costs of litigation, as allowed by OWCP or SOL (Subtotal B);

(4) Subtract one fifth of Subtotal B from Subtotal B (Subtotal C);

(5) Compare Subtotal C and the refundable disbursements as defined in § 10.714. Subtotal D is the lower of the two amounts.

(6) Multiply Subtotal D by a percentage that is determined by dividing the gross recovery into the amount of attorney's fees actually paid, but not more than the maximum amount of attorney's fees considered by OWCP or SOL to be reasonable, to determine the Government's allowance for attorney's fees, and subtract this amount from Subtotal D.

(b) The credit against future benefits (also referred to as the surplus) is calculated as follows:

(1) If Subtotal C, as calculated according to paragraph (a)(4) of this section, is less than the refundable disbursements, as defined in § 10.714, there is no credit to be applied against future benefits;

(2) If Subtotal C is greater than the refundable disbursements, the credit against future benefits (or surplus) amount is determined by subtracting the refundable disbursements from Subtotal C.

(c) An example of how these calculations are made follows. In this example, a Federal employee sues another party for causing injuries for which the employee has received $22,000 in benefits under the FECA, subject to refund. The suit is settled and the injured employee receives $100,000, all of which was for his injury. The injured worker paid attorney's fees of $25,000 and costs for the litigation of $3,000.

(1) Gross recovery	$100,000
Attorney's fees	−25,000
(2) Subtotal A	75,000
(3) Costs of suit	−3,000
Subtotal B	72,000
One-fifth of Subtotal B	−14,400
(4) Subtotal C	57,600
Refundable Disbursements	22,000
(5) Subtotal D (lower of Subtotal C or refundable disbursements)	22,000
(6) Government's allowance for attorney's fees [25,000/100,000) × 22,000] (attorney's fees divided by gross recovery then multiplied by Subtotal D)	−5,500
Refund to the United States	16,500
(7) Credit against future benefits [57,600–22,000] (Subtotal C minus refundable disbursements)	35,600

§ 10.712 What amounts are included in the gross recovery?

(a) When a settlement or judgment is paid to, or for, one individual, the entire amount, except for the portion representing damage to real or personal property, is reported as the gross recovery. If a settlement or judgment is paid to or for more than one individual or in more than one capacity, such as a joint payment to a husband and wife for personal injury and loss of consortium or a payment to a spouse representing both loss of consortium and wrongful death, the gross recovery to be reported is the amount allocated to the injured employee. If a judge or jury specifies the percentage of a contested verdict attributable to each of several plaintiffs, OWCP or SOL will accept that division.

(b) In any other case, where a judgment or settlement is paid to or on behalf of more than one individual, OWCP or SOL will determine the appropriate amount of the FECA beneficiary's gross recovery and advise the beneficiary of its determination. FECA beneficiaries may accept OWCP's or SOL's determination or demonstrate good cause for a different allocation. Whether to accept a specific allocation is at the discretion of SOL or OWCP.

§ 10.713 How is a structured settlement (that is, a settlement providing for receipt of funds over a specified period of time) treated for purposes of reporting the gross recovery?

In this situation, the gross recovery to be reported is the present value of the right to receive all of the payments included in the structured settlement, allocated in the case of multiple recipients in the same manner as single payment recoveries.

§ 10.714 What amounts are included in the refundable disbursements?

The refundable disbursements of a specific claim consist of the total money paid by OWCP from the Employees' Compensation Fund with respect to that claim to or on behalf of a FECA beneficiary, less charges for any medical file review (i.e., the physician does not examine the employee) done at the request of OWCP. Charges for medical examinations also may be subtracted if the FECA beneficiary establishes that the examinations were required to be made available to the employee under a statute other than the FECA by the employing agency or at the employing agency's cost.

§ 10.715 Is a beneficiary required to pay interest on the amount of the refund due to the United States?

If the refund due to the United States is not submitted within 30 days of receiving a request for payment from SOL or OWCP, interest shall accrue on the refund due to the United States from the date of the request. The rate of interest assessed shall be the rate of the current value of funds to the United States Treasury as published in the **Federal Register** (as of the date the request for payment is sent). Waiver of the collection of interest shall be in accordance with the provisions of the Department of Labor regulations on Federal Claims Collection governing waiver of interest, 29 CFR 20.61.

§ 10.716 If the required refund is not paid within 30 days of the request for repayment, can it be collected from payments due under the FECA?

If the required refund is not paid within 30 days of the request for payment, OWCP can, in its discretion, collect the refund by withholding all or part of any payments currently payable to the beneficiary under the FECA with respect to any injury. The waiver provisions of §§ 10.432 through 10.440 do not apply to such determinations.

§ 10.717 Is a settlement or judgment received as a result of allegations of medical malpractice in treating an injury covered by the FECA a gross recovery that must be reported to OWCP or SOL?

Since an injury caused by medical malpractice in treating an injury covered by the FECA is also an injury covered under the FECA, any recovery in a suit alleging such an injury is treated as a gross recovery that must be reported to OWCP or SOL.

§ 10.718 Are payments to a beneficiary as a result of an insurance policy which the beneficiary has purchased a gross recovery that must be reported to OWCP or SOL?

Since payments received by a FECA beneficiary pursuant to an insurance policy purchased by someone other than a liable third party are not payments in satisfaction of liability for causing an injury covered by the FECA, they are not considered a gross recovery covered by section 8132 that requires filing a Statement of Recovery and paying any required refund.

§ 10.719 If a settlement or judgment is received for more than one wound or medical condition, can the refundable disbursements paid on a single FECA claim be attributed to different conditions for purposes of calculating the refund or credit owed to the United States?

(a) All wounds, diseases or other medical conditions accepted by OWCP in connection with a single claim are treated as the same injury for the purpose of computing any required refund and any credit against future benefits in connection with the receipt of a recovery from a third party, except that an injury caused by medical malpractice in treating an injury covered under the FECA will be treated as a separate injury for purposes of section 8132.

(b) If an injury covered under the FECA is caused under circumstances creating a legal liability in more than one person, other than the United States, to pay damages, OWCP or SOL will determine whether recoveries received from one or more third parties should be attributed to separate conditions for which compensation is payable in connection with a single FECA claim. If such an attribution is both practicable and equitable, as determined by OWCP or SOL, in its discretion, the conditions will be treated as separate injuries for purposes of calculating the refund and credit owed to the United States under section 8132.

Federal Grand and Petit Jurors

§ 10.725 When is a Federal grand or petit juror covered under the FECA?

(a) Federal grand and petit jurors are covered under the FECA when they are in performance of duty as a juror, which includes that time when a juror is:

(1) In attendance at court pursuant to a summons;

(2) In deliberation;

(3) Sequestered by order of a judge; or

(4) At a site, by order of the court, for the taking of a view.

(b) A juror is not considered to be in the performance of duty while traveling to or from home in connection with the activities enumerated in paragraphs (a)(1) through (4) of this section.

§ 10.726 When does a juror's entitlement to disability compensation begin?

Pursuant to 28 U.S.C. 1877, entitlement to disability compensation does not commence until the day after the date of termination of service as a juror.

§ 10.727 What is the pay rate of jurors for compensation purposes?

For the purpose of computing compensation payable for disability or death, a juror is deemed to receive pay at the minimum rate for Grade GS–2 of the General Schedule unless his or her actual pay as an ''employee'' of the United States while serving on court leave is higher, in which case the pay rate for compensation purposes is determined in accordance with 5 U.S.C. 8114.

Peace Corps Volunteers

§ 10.730 What are the conditions of coverage for Peace Corps volunteers and volunteer leaders injured while serving outside the United States?

(a) Any injury sustained by a volunteer or volunteer leader while he or she is located abroad shall be presumed to have been sustained in the performance of duty, and any illness contracted during such time shall be presumed to be proximately caused by the employment. However, this presumption will be rebutted by evidence that:

(1) The injury or illness was caused by the claimant's willful misconduct, intent to bring about the injury or death of self or another, or was proximately caused by the intoxication by alcohol or illegal drugs of the injured claimant; or

(2) The illness is shown to have pre-existed the period of service abroad; or

(3) The injury or illness claimed is a manifestation of symptoms of, or consequent to, a pre-existing congenital defect or abnormality.

(b) If the presumption that an injury or illness was sustained in the performance of duty is rebutted as provided by paragraph (a) of this section, the claimant has the burden of proving by the submittal of substantial and probative evidence that such injury or illness was sustained in the performance of duty with the Peace Corps.

(c) If an injury or illness, or episode thereof, comes within one of the exceptions described in paragraph (a)(2) or (3) of this section, the claimant may nonetheless be entitled to compensation. This will be so provided he or she meets the burden of proving by the submittal of substantial, probative and rationalized medical evidence that the illness or injury was proximately caused by factors or conditions of Peace Corps service, or that it was materially aggravated, accelerated or precipitated by factors of Peace Corps service.

§ 10.731 What is the pay rate of Peace Corps volunteers and volunteer leaders for compensation purposes?

The pay rate for these claimants is defined as the pay rate in effect on the date following separation, provided that the rate equals or exceeds the pay rate on the date of injury. It is defined in accordance with 5 U.S.C. 8142(a), not 8101(4).

Non-Federal Law Enforcement Officers

§ 10.735 When is a non-Federal law enforcement officer (LEO) covered under the FECA?

(a) A law enforcement officer (officer) includes an employee of a State or local Government, the Governments of U.S. possessions and territories, or an employee of the United States pensioned or pensionable under sections 521–535 of Title 4, D.C. Code, whose functions include the activities listed in 5 U.S.C. 8191.

(b) Benefits are available to officers who are not ''employees'' under 5 U.S.C. 8101, and who are determined in the discretion of OWCP to have been engaged in the activities listed in 5 U.S.C. 8191 with respect to the enforcement of crimes against the United States. Individuals who only perform administrative functions in support of officers are not considered officers.

(c) Except as provided by 5 U.S.C. 8191 and 8192 and elsewhere in this part, the provisions of the FECA and of subparts A, B, and D through I of this part apply to officers.

§ 10.736 What are the time limits for filing a LEO claim?

OWCP must receive a claim for benefits under 5 U.S.C. 8191 within five years after the injury or death. This five-year limitation is not subject to waiver. The tolling provisions of 5 U.S.C. 8122(d) do not apply to these claims.

§ 10.737 How is a LEO claim filed, and who can file a LEO claim?

A claim for injury or occupational disease should be filed on Form CA–721; a death claim should be filed on Form CA–722. All claims should be submitted to the officer's employer for completion and forwarding to OWCP. A claim may be filed by the officer, the officer's survivor, or any person or association authorized to act on behalf of an officer or an officer's survivors.

§ 10.738 Under what circumstances are benefits payable in LEO claims?

(a) Benefits are payable when an officer is injured while apprehending, or attempting to apprehend, an individual for the commission of a Federal crime. However, either an actual Federal crime must be in progress or have been committed, or objective evidence (of which the officer is aware at the time of injury) must exist that a potential Federal crime was in progress or had already been committed. The actual or potential Federal crime must be an integral part of the criminal activity toward which the officer's actions are directed. The fact that an injury to an officer is related in some way to the commission of a Federal crime does not necessarily bring the injury within the coverage of the FECA. The FECA is not intended to cover officers who are merely enforcing local laws.

(b) For benefits to be payable when an officer is injured preventing, or attempting to prevent, a Federal crime, there must be objective evidence that a Federal crime is about to be committed. An officer's belief, unsupported by objective evidence, that he or she is acting to prevent the commission of a Federal crime will not result in coverage. Moreover, the officer's subjective intent, as measured by all available evidence (including the officer's own statements and testimony, if available), must have been directed toward the prevention of a Federal crime. In this context, an officer's own statements and testimony are relevant to, but do not control, the determination of coverage.

§ 10.739 What kind of objective evidence of a potential Federal crime must exist for coverage to be extended?

Based on the facts available at the time of the event, the officer must have an awareness of sufficient information which would lead a reasonable officer, under the circumstances, to conclude that a Federal crime was in progress, or was about to occur. This awareness need not extend to the precise particulars of the crime (the section of Title 18, United States Code, for example), but there must be sufficient evidence that the officer was in fact engaged in actual or attempted apprehension of a Federal criminal or prevention of a Federal crime.

§ 10.740 In what situations will OWCP automatically presume that a law enforcement officer is covered by the FECA?

(a) Where an officer is detailed by a competent State or local authority to assist a Federal law enforcement authority in the protection of the President of the United States, or any other person actually provided or entitled to U.S. Secret Service protection, coverage will be extended.

(b) Coverage for officers of the U.S. Park Police and those officers of the Uniformed Division of the U.S. Secret Service who participate in the District of Columbia Retirement System is adjudicated under the principles set forth in paragraph (a) of this section, and does not extend to numerous tangential activities of law enforcement (for example, reporting to work, changing clothes). However, officers of the Non-Uniformed Division of the U.S. Secret Service who participate in the District of Columbia Retirement System are covered under the FECA during the performance of all official duties.

§ 10.741 How are benefits calculated in LEO claims?

(a) Except for continuation of pay, eligible officers and survivors are entitled to the same benefits as if the officer had been an employee under 5 U.S.C. 8101. However, such benefits may be reduced or adjusted as OWCP in its discretion may deem appropriate to reflect comparable benefits which the officer or survivor received or would have been entitled to receive by virtue of the officer's employment.

(b) For the purpose of this section, a comparable benefit includes any benefit that the officer or survivor is entitled to receive because of the officer's employment, including pension and disability funds, State workers' compensation payments, Public Safety Officers' Benefits Act payments, and State and local lump-sum payments. Health benefits coverage and proceeds of life insurance policies purchased by the employer are not considered to be comparable benefits.

(c) The FECA provides that, where an officer receives comparable benefits, compensation benefits are to be reduced proportionally in a manner that reflects the relative percentage contribution of the officer and the officer's employer to the fund which is the source of the comparable benefit. Where the source of the comparable benefit is a retirement or other system which is not fully funded, the calculation of the amount of the reduction will be based on a per capita comparison between the contribution by the employer and the contribution by all covered officers during the year prior to the officer's injury or death.

(d) The non-receipt of compensation during a period where a dual benefit (such as a lump-sum payment on the death of an officer) is being offset against compensation entitlement does not result in an adjustment of the respective benefit percentages of remaining beneficiaries because of a cessation of compensation under 5 U.S.C. 8133(c).

Subpart I—Information for Medical Providers

Medical Records and Bills

§ 10.800 What kind of medical records must providers keep?

Agency medical officers, private physicians and hospitals are required to keep records of all cases treated by them under the FECA so they can supply OWCP with a history of the injury, a description of the nature and extent of injury, the results of any diagnostic studies performed, the nature of the treatment rendered and the degree of any impairment and/or disability arising from the injury.

§ 10.801 How are medical bills to be submitted?

(a) All charges for medical and surgical treatment, appliances or supplies furnished to injured employees, except for treatment and supplies provided by nursing homes, shall be supported by medical evidence as provided in § 10.800. The physician or provider shall itemize the charges on the standard Health Insurance Claim Form, HCFA 1500 or OWCP 1500, (for professional charges), the UB–92 (for hospitals), the Universal Claim Form (for pharmacies), or other form as warranted, and submit the form promptly to OWCP.

(b) The provider shall identify each service performed using the Physician's Current Procedural Terminology (CPT) code, the Health Care Financing Administration Common Procedure Coding System (HCPCS) code, the National Drug Code (NDC), or the

Revenue Center Code (RCC), with a brief narrative description. Where no code is applicable, a detailed description of services performed should be provided.

(c) The provider shall also state each diagnosed condition and furnish the corresponding diagnostic code using the ''International Classification of Disease, 9th Edition, Clinical Modification'' (ICD–9-CM), or as revised. A separate bill shall be submitted when the employee is discharged from treatment or monthly, if treatment for the work-related condition is necessary for more than 30 days.

(1) (i) Hospitals shall submit charges for medical and surgical treatment or supplies promptly to OWCP on the Uniform Bill (UB–92). The provider shall identify each outpatient radiology service, outpatient pathology service and physical therapy service performed, using HCPCS/CPT codes with a brief narrative description. The charge for each individual service, or the total charge for all identical services, should also appear in the UB–92.

(ii) Other outpatient hospital services for which HCPCS/CPT codes exist shall also be coded individually using the coding scheme noted in this paragraph. Services for which there are no HCPCS/CPT codes available can be presented using the RCCs described in the ''National Uniform Billing Data Elements Specifications'', current edition. The provider shall also furnish the diagnostic code using the ICD–9–CM. If the outpatient hospital services include surgical and/or invasive procedures, the provider shall code each procedure using the proper CPT/HCPCS codes and furnishing the corresponding diagnostic codes using the ICD–9–CM.

(2) Pharmacies shall itemize charges for prescription medications, appliances, or supplies on the Universal Claim Form and submit them promptly to OWCP. Bills for prescription medications must include the NDC assigned to the product, the generic or trade name of the drug provided, the prescription number, the quantity provided, and the date the prescription was filled.

(3) Nursing homes shall itemize charges for appliances, supplies or services on the provider's billhead stationery and submit them promptly to OWCP.

(d) By submitting a bill and/or accepting payment, the provider signifies that the service for which reimbursement is sought was performed as described and was necessary. In addition, the provider thereby agrees to comply with all regulations set forth in this subpart concerning the rendering of treatment and/or the process for seeking reimbursement for medical services, including the limitation imposed on the amount to be paid for such services.

(e) In summary, bills submitted by providers must: be itemized on the Health Insurance Claim Form (for physicians), the UB–92 (for hospitals), or the Universal Claim Form (for pharmacies); contain the signature or signature stamp of the provider; and identify the procedures using HCPCS/CPT codes, RCCs, or NDCs. Otherwise, OWCP may return the bill to the provider for correction and resubmission.

§ 10.802 How should an employee prepare and submit requests for reimbursement for medical expenses, transportation costs, loss of wages, and incidental expenses?

(a) If an employee has paid bills for medical, surgical or dental services, supplies or appliances due to an injury sustained in the performance of duty, he or she may submit an itemized bill on the Health Insurance Claim Form, HCFA 1500 or OWCP 1500, together with a medical report as provided in § 10.800, to OWCP for consideration.

(1) The provider of such service shall state each diagnosed condition and furnish the applicable ICD–9–CM code and identify each service performed using the applicable HCPCS/CPT code, with a brief narrative description of the service performed, or, where no code is applicable, a detailed description of that service.

(2) The bill must be accompanied by evidence that the provider received payment for the service from the employee and a statement of the amount paid. Acceptable evidence that payment was received includes, but is not limited to, a signed statement by the provider, a mechanical stamp or other device showing receipt of payment, a copy of the employee's canceled check (both front and back) or a copy of the employee's credit card receipt.

(b) If services were provided by a hospital, pharmacy or nursing home, the employee should submit the bill in accordance with the provisions of § 10.801(a). Any request for reimbursement must be accompanied by evidence, as described in paragraph (a) of this section, that the provider received payment for the service from the employee and a statement of the amount paid.

(c) OWCP may waive the requirements of paragraphs (a) and (b) of this section if extensive delays in the filing or the adjudication of a claim make it unusually difficult for the employee to obtain the required information.

(d) OWCP will not accept copies of bills for reimbursement unless they bear the original signature of the provider, with evidence of payment. Payment for medical and surgical treatment, appliances or supplies shall in general be no greater than the maximum allowable charge for such service determined by the Director, as set forth in § 10.805.

(e) An employee will be only partially reimbursed for a medical expense if the amount he or she paid to a provider for the service exceeds the maximum allowable charge set by the Director's schedule. If this happens, OWCP shall advise the employee of the maximum allowable charge for the service in question and of his or her responsibility to ask the provider to refund to the employee, or credit to the employee's account, the amount he or she paid which exceeds the maximum allowable charge. The provider may request reconsideration of the fee determination as set forth in § 10.812.

(f) If the provider fails to make appropriate refund to the employee, or to credit the employee's account, within 60 days after the employee requests a refund of any excess amount, or the date of a subsequent reconsideration decision which continues to disallow all or a portion of the appealed amount, OWCP shall initiate exclusion procedures as provided by § 10.815.

(g) If the provider does not refund to the employee or credit to his or her account the amount of money paid in excess of the charge which OWCP allows, the employee should submit documentation of the attempt to obtain such refund or credit to OWCP. OWCP may make reasonable reimbursement to the employee after reviewing the facts and circumstances of the case.

§ 10.803 What are the time limitations on OWCP's payment of bills?

OWCP will pay providers and reimburse employees promptly for all bills received on an approved form and in a timely manner. However, no bill will be paid for expenses incurred if the bill is submitted more than one year beyond the end of the calendar year in which the expense was incurred or the service or supply was provided, or more than one year beyond the end of the calendar year in which the claim was first accepted as compensable by OWCP, whichever is later.

Medical Fee Schedule

§ 10.805 What services are covered by the OWCP fee schedule?

(a) Payment for medical and other health services furnished by physicians, hospitals and other providers for work-

related injuries shall not exceed a maximum allowable charge for such service as determined by the Director, except as provided in this section.

(b) The schedule of maximum allowable charges does not apply to charges for services provided in nursing homes, but it does apply to charges for treatment furnished in a nursing home by a physician or other medical professional.

(c) The schedule of maximum allowable charges also does not apply to charges for appliances, supplies, services or treatment furnished by medical facilities of the U.S. Public Health Service or the Departments of the Army, Navy, Air Force and Veterans Affairs.

§ 10.806 How are the maximum fees defined?

For professional medical services, the Director shall maintain a schedule of maximum allowable fees for procedures performed in a given locality. The schedule shall consist of: An assignment of a value to procedures identified by Health Care Financing Administration Common Procedure Coding System/ Current Procedural Terminology (HCPCS/CPT) code which represents the relative skill, effort, risk and time required to perform the procedure, as compared to other procedures of the same general class; an index based on a relative value scale that considers skill, labor, overhead, malpractice insurance and other related costs; and a monetary value assignment (conversion factor) for one unit of value in each of the categories of service.

§ 10.807 How are payments for particular services calculated?

Payment for a procedure identified by a HCPCS/CPT code shall not exceed the amount derived by multiplying the relative values for that procedure by the geographic indices for services in that area and by the dollar amount assigned to one unit in that category of service.

(a) The ''locality'' which serves as a basis for the determination of average cost is defined by the Bureau of Census Metropolitan Statistical Areas. The Director shall base the determination of the relative per capita cost of medical care in a locality using information about enrollment and medical cost per county, provided by the Health Care Financing Administration (HCFA).

(b) The Director shall assign the relative value units (RVUs) published by HCFA to all services for which HCFA has made assignments, using the most recent revision. Where there are no RVUs assigned to a procedure, the Director may develop and assign any RVUs that he or she considers appropriate. The geographic adjustment factor shall be that designated by Geographic Practice Cost Indices for Metropolitan Statistical Areas as devised for HCFA and as updated or revised by HCFA from time to time. The Director will devise conversion factors for each category of service, and in doing so may adapt HCFA conversion factors as appropriate using OWCP's processing experience and internal data.

(c) For example, if the unit values for a particular surgical procedure are 2.48 for physician's work (W), 3.63 for practice expense (PE), and 0.48 for malpractice insurance (M), and the dollar value assigned to one unit in that category of service (surgery) is $61.20, then the maximum allowable charge for one performance of that procedure is the product of the three RVUs times the corresponding geographical indices for the locality times the conversion factor. If the geographic indices for the locality are 0.988(W), 0.948 (PE), and 1.174 (M), then the maximum payment calculation is:

$$[(2.48)(0.988) + (3.63)(0.948) + (0.48)(1.174)] \times \$61.20$$
$$[2.45 + 3.44 + .56] \times \$61.20$$
$$6.45 \times \$61.20 = \$394.74$$

§ 10.808 Does the fee schedule apply to every kind of procedure?

Where the time, effort and skill required to perform a particular procedure vary widely from one occasion to the next, the Director may choose not to assign a relative value to that procedure. In this case the allowable charge for the procedure will be set individually based on consideration of a detailed medical report and other evidence. At its discretion, OWCP may set fees without regard to schedule limits for specially authorized consultant examinations, for examinations performed under 5 U.S.C. 8123, and for other specially authorized services.

§ 10.809 How are payments for medicinal drugs determined?

Payment for medicinal drugs prescribed by physicians shall not exceed the amount derived by multiplying the average wholesale price of the medication by the quantity or amount provided, plus a dispensing fee.

(a) All prescription medications identified by National Drug Code (NDC) will be assigned an average wholesale price representing the product's nationally recognized wholesale price as determined by surveys of manufacturers and wholesalers. The Director will establish the dispensing fee.

(b) The NDCs, the average wholesale prices, and the dispensing fee shall be reviewed from time to time and updated as necessary.

§ 10.810 How are payments for inpatient medical services determined?

(a) OWCP will pay for inpatient medical services according to pre-determined, condition-specific rates based on the Prospective Payment System (PPS) devised by HCFA (42 CFR parts 412, 413, 424, 485, and 489). Using this system, payment is derived by multiplying the diagnosis-related group (DRG) weight assigned to the hospital discharge by the provider-specific factors.

(1) All hospital discharges will be classified according to the DRGs prescribed by the HCFA in the form of the DRG Grouper software program. On this list, each DRG represents the average resources necessary to provide care in a case in that DRG relative to the national average of resources consumed per case.

(2) The provider-specific factors will be provided by HCFA in the form of their PPS Pricer software program. The software takes into consideration the type of facility, census division, actual geographic location (MSA) of the hospital, case mix cost per discharge, number of hospital beds, intern/beds ratio, operating cost to charge ratio, and other factors used by HCFA to determine the specific rate for a hospital discharge under their PPS. The Director may devise price adjustment factors as appropriate using OWCP's processing experience and internal data.

(3) OWCP will base payments to facilities excluded from HCFA's PPS on consideration of detailed medical reports and other evidence.

(4) The Director shall review the pre-determined hospital rates at least once a year, and may adjust any or all components when he or she deems it necessary or appropriate.

(b) The Director shall review the schedule of fees at least once a year, and may adjust the schedule or any of its components when he or she deems it necessary or appropriate.

§ 10.811 When and how are fees reduced?

(a) OWCP shall accept a provider's designation of the code to identify a billed procedure or service if the code is consistent with medical reports and other evidence. Where no code is supplied, OWCP may determine the code based on the narrative description of the procedure on the billing form and in associated medical reports. OWCP will pay no more than the maximum allowable fee for that procedure.

(b) If the charge submitted for a service supplied to an injured employee exceeds the maximum amount determined to be reasonable according to the schedule, OWCP shall pay the amount allowed by the schedule for that service and shall notify the provider in writing that payment was reduced for that service in accordance with the schedule. OWCP shall also notify the provider of the method for requesting reconsideration of the balance of the charge.

§ 10.812 If OWCP reduces a fee, may a provider request reconsideration of the reduction?

(a) A physician or other provider whose charge for service is only partially paid because it exceeds a maximum allowable amount set by the Director may, within 30 days, request reconsideration of the fee determination.

(1) The provider should make such a request to the OWCP district office with jurisdiction over the employee's claim. The request must be accompanied by documentary evidence that the procedure performed was incorrectly identified by the original code, that the presence of a severe or concomitant medical condition made treatment especially difficult, or that the provider possessed unusual qualifications. In itself, board-certification in a specialty is not sufficient evidence of unusual qualifications to justify an exception. These are the only three circumstances which will justify reevaluation of the paid amount.

(2) A list of OWCP district offices and their respective areas of jurisdiction is available upon request from the U.S. Department of Labor, Office of Workers' Compensation Programs, Washington, DC 20210, or from the Internet at www.dol.gov./dol/esa/owcp.htm. Within 30 days of receiving the request for reconsideration, the OWCP district office shall respond in writing stating whether or not an additional amount will be allowed as reasonable, considering the evidence submitted.

(b) If the OWCP district office issues a decision which continues to disallow a contested amount, the provider may apply to the Regional Director of the region with jurisdiction over the OWCP district office. The application must be filed within 30 days of the date of such decision, and it may be accompanied by additional evidence. Within 60 days of receipt of such application, the Regional Director shall issue a decision in writing stating whether or not an additional amount will be allowed as reasonable, considering the evidence submitted. This decision shall be final, and shall not be subject to further review.

§ 10.813 If OWCP reduces a fee, may a provider bill the claimant for the balance?

A provider whose fee for service is partially paid by OWCP as a result of the application of its fee schedule or other tests for reasonableness in accordance with this part shall not request reimbursement from the employee for additional amounts.

(a) Where a provider's fee for a particular service or procedure is lower to the general public than as provided by the schedule of maximum allowable charges, the provider shall bill at the lower rate. A fee for a particular service or procedure which is higher than the provider's fee to the general public for that same service or procedure will be considered a charge ''substantially in excess of such provider's customary charges'' for the purposes of § 10.815(d).

(b) A provider whose fee for service is partially paid by OWCP as the result of the application of the schedule of maximum allowable charges and who collects or attempts to collect from the employee, either directly or through a collection agent, any amount in excess of the charge allowed by OWCP, and who does not cease such action or make appropriate refund to the employee within 60 days of the date of the decision of OWCP, shall be subject to the exclusion procedures provided by § 10.815(h).

Exclusion of Providers

§ 10.815 What are the grounds for excluding a provider from payment under the FECA?

A physician, hospital, or provider of medical services or supplies shall be excluded from payment under the FECA if such physician, hospital or provider has:

(a) Been convicted under any criminal statute of fraudulent activities in connection with any Federal or State program for which payments are made to providers for similar medical, surgical or hospital services, appliances or supplies;

(b) Been excluded or suspended, or has resigned in lieu of exclusion or suspension, from participation in any Federal or State program referred to in paragraph (a) of this section;

(c) Knowingly made, or caused to be made, any false statement or misrepresentation of a material fact in connection with a determination of the right to reimbursement under the FECA, or in connection with a request for payment;

(d) Submitted, or caused to be submitted, three or more bills or requests for payment within a twelve-month period under this subpart containing charges which the Director finds to be substantially in excess of such provider's customary charges, unless the Director finds there is good cause for the bills or requests containing such charges;

(e) Knowingly failed to timely reimburse employees for treatment, services or supplies furnished under this subpart and paid for by OWCP;

(f) Failed, neglected or refused on three or more occasions during a 12-month period to submit full and accurate medical reports, or to respond to requests by OWCP for additional reports or information, as required by the FECA and § 10.800;

(g) Knowingly furnished treatment, services or supplies which are substantially in excess of the employee's needs, or of a quality which fails to meet professionally recognized standards; or

(h) Collected or attempted to collect from the employee, either directly or through a collection agent, an amount in excess of the charge allowed by OWCP for the procedure performed, and has failed or refused to make appropriate refund to the employee, or to cease such collection attempts, within 60 days of the date of the decision of OWCP.

§ 10.816 What will cause OWCP to automatically exclude a physician or other provider of medical services and supplies?

(a) OWCP shall automatically exclude a physician, hospital, or provider of medical services or supplies who has been convicted of a crime described in § 10.815(a), or has been excluded or suspended, or has resigned in lieu of exclusion or suspension, from participation in any program as described in § 10.815(b).

(b) The exclusion applies to participating in the program and to seeking payment under the FECA for services performed after the date of the entry of the judgment of conviction or order of exclusion, suspension or resignation, as the case may be, by the court or agency concerned. Proof of the conviction, exclusion, suspension or resignation may consist of a copy thereof authenticated by the seal of the court or agency concerned.

§ 10.817 When are OWCP's exclusion procedures initiated?

Upon receipt of information indicating that a physician, hospital or provider of medical services or supplies (hereinafter the provider) has engaged in activities enumerated in paragraphs (c) through (h) of § 10.815, the Regional Director, after completion of inquiries he or she deems appropriate, may

initiate procedures to exclude the provider from participation in the FECA program. For the purposes of this section, ''Regional Director'' may include any officer designated to act on his or her behalf.

§ 10.818 How is a provider notified of OWCP's intent to exclude him or her?

The Regional Director shall initiate the exclusion process by sending the provider a letter, by certified mail and with return receipt requested, which shall contain the following:

(a) A concise statement of the grounds upon which exclusion shall be based;

(b) A summary of the information, with supporting documentation, upon which the Regional Director has relied in reaching an initial decision that exclusion proceedings should begin;

(c) An invitation to the provider to:

(1) Resign voluntarily from participation in the FECA program without admitting or denying the allegations presented in the letter; or

(2) Request that the decision on exclusion be based upon the existing record and any additional documentary information the provider may wish to furnish;

(d) A notice of the provider's right, in the event of an adverse ruling by the Regional Director, to request a formal hearing before an administrative law judge;

(e) A notice that should the provider fail to answer (as described in § 10.819) the letter of intent within 30 calendar days of receipt, the Regional Director may deem the allegations made therein to be true and may order exclusion of the provider without conducting any further proceedings; and

(f) The name and address of the OWCP representative who shall be responsible for receiving the answer from the provider.

§ 10.819 What requirements must the provider's reply and OWCP's decision meet?

(a) The provider's answer shall be in writing and shall include an answer to OWCP's invitation to resign voluntarily. If the provider does not offer to resign, he or she shall request that a determination be made upon the existing record and any additional information provided.

(b) Should the provider fail to answer the letter of intent within 30 calendar days of receipt, the Regional Director may deem the allegations made therein to be true and may order exclusion of the provider.

(c) By arrangement with the official representative, the provider may inspect or request copies of information in the record at any time prior to the Regional Director's decision.

(d) The Regional Director shall issue his or her decision in writing, and shall send a copy of the decision to the provider by certified mail, return receipt requested. The decision shall advise the provider of his or her right to request, within 30 days of the date of the adverse decision, a formal hearing before an administrative law judge under the procedures set forth in § 10.820. The filing of a request for a hearing within the time specified shall stay the effectiveness of the decision to exclude.

§ 10.820 How can an excluded provider request a hearing?

A request for a hearing shall be sent to the official representative named under § 10.818(f) and shall contain:

(a) A concise notice of the issues on which the provider desires to give evidence at the hearing;

(b) Any request for a more definite statement by OWCP;

(c) Any request for the presentation of oral argument or evidence; and

(d) Any request for a certification of questions concerning professional medical standards, medical ethics or medical regulation for an advisory opinion from a competent recognized professional organization or Federal, State or local regulatory body.

§ 10.821 How are hearings assigned and scheduled?

(a) If the designated OWCP representative receives a timely request for hearing, the OWCP representative shall refer the matter to the Chief Administrative Law Judge of the Department of Labor, who shall assign it for an expedited hearing. The administrative law judge assigned to the matter shall consider the request for hearing, act on all requests therein, and issue a Notice of Hearing and Hearing Schedule for the conduct of the hearing. A copy of the hearing notice shall be served on the provider by certified mail, return receipt requested. The Notice of Hearing and Hearing Schedule shall include:

(1) A ruling on each item raised in the request for hearing;

(2) A schedule for the prompt disposition of all preliminary matters, including requests for more definite statements and for the certification of questions to advisory bodies; and

(3) A scheduled hearing date not less than 30 days after the date the schedule is issued, and not less than 15 days after the scheduled conclusion of preliminary matters, provided that the specific time and place of the hearing may be set on 10 days' notice.

(b) The purpose of the designation of issues is to provide for an effective hearing process. The provider is entitled to be heard on any matter placed in issue by his or her response to the Notice of Intent to Exclude, and may designate ''all issues'' for purposes of hearing. However, a specific designation of issues is required if the provider wishes to interpose affirmative defenses, or request the issuance of subpoenas or the certification of questions for an advisory opinion.

§ 10.822 How are subpoenas or advisory opinions obtained?

(a) The provider may apply to the administrative law judge for the issuance of subpoenas upon a showing of good cause therefor.

(b) A certification of a request for an advisory opinion concerning professional medical standards, medical ethics or medical regulation to a competent recognized or professional organization or Federal, State or local regulatory agency may be made:

(1) As to an issue properly designated by the provider, in the sound discretion of the administrative law judge, provided that the request will not unduly delay the proceedings;

(2) By OWCP on its own motion either before or after the institution of proceedings, and the results thereof shall be made available to the provider at the time that proceedings are instituted or, if after the proceedings are instituted, within a reasonable time after receipt. The opinion, if rendered by the organization or agency, is advisory only and not binding on the administrative law judge.

§ 10.823 How will the administrative law judge conduct the hearing and issue the recommended decision?

(a) To the extent appropriate, proceedings before the administrative law judge shall be governed by 29 CFR part 18.

(b) The administrative law judge shall receive such relevant evidence as may be adduced at the hearing. Evidence shall be presented under oath, orally or in the form of written statements. The administrative law judge shall consider the Notice and Response, including all pertinent documents accompanying them, and may also consider any evidence which refers to the provider or to any claim with respect to which the provider has provided medical services, hospital services, or medical services and supplies, and such other evidence as the administrative law judge may determine to be necessary or useful in evaluating the matter.

(c) All hearings shall be recorded and the original of the complete transcript

shall become a permanent part of the official record of the proceedings.

(d) Pursuant to 5 U.S.C. 8126, the administrative law judge may:

(1) Issue subpoenas for and compel the attendance of witnesses within a radius of 100 miles;

(2) Administer oaths;

(3) Examine witnesses; and

(4) Require the production of books, papers, documents, and other evidence with respect to the proceedings.

(e) At the conclusion of the hearing, the administrative law judge shall issue a written decision and cause it to be served on all parties to the proceeding, their representatives and the Director.

§ 10.824 How can a party request review by the Director of the administrative law judge's recommended decision?

(a) Any party adversely affected or aggrieved by the decision of the administrative law judge may file a petition for discretionary review with the Director within 30 days after issuance of such decision. The administrative law judge's decision, however, shall be effective on the date issued and shall not be stayed except upon order of the Director.

(b) Review by the Director shall not be a matter of right but of the sound discretion of the Director.

(c) Petitions for discretionary review shall be filed only upon one or more of the following grounds:

(1) A finding or conclusion of material fact is not supported by substantial evidence;

(2) A necessary legal conclusion is erroneous;

(3) The decision is contrary to law or to the duly promulgated rules or decisions of the Director;

(4) A substantial question of law, policy, or discretion is involved; or

(5) A prejudicial error of procedure was committed.

(d) Each issue shall be separately numbered and plainly and concisely stated, and shall be supported by detailed citations to the record when assignments of error are based on the record, and by statutes, regulations or principal authorities relied upon. Except for good cause shown, no assignment of error by any party shall rely on any question of fact or law upon which the administrative law judge had not been afforded an opportunity to pass.

(e) A statement in opposition to the petition for discretionary review may be filed, but such filing shall in no way delay action on the petition.

(f) If a petition is granted, review shall be limited to the questions raised by the petition.

(g) A petition not granted within 20 days after receipt of the petition is deemed denied.

(h) The decision of the Director shall be final with respect to the provider's participation in the program, and shall not be subject to further review by any court or agency.

§ 10.825 What are the effects of exclusion?

(a) OWCP shall give notice of the exclusion of a physician, hospital or provider of medical services or supplies to:

(1) All OWCP district offices;

(2) All Federal employers;

(3) The HCFA;

(4) The State or local authority responsible for licensing or certifying the excluded party; and

(5) All employees who are known to have had treatment, services or supplies from the excluded provider within the six-month period immediately preceding the order of exclusion.

(b) Notwithstanding any exclusion of a physician, hospital, or provider of medical services or supplies under this subpart, OWCP shall not refuse an employee reimbursement for any otherwise reimbursable medical treatment, service or supply if:

(1) Such treatment, service or supply was rendered in an emergency by an excluded physician; or

(2) The employee could not reasonably have been expected to have known of such exclusion.

(c) An employee who is notified that his or her attending physician has been excluded shall have a new right to select a qualified physician.

§ 10.826 How can an excluded provider be reinstated?

(a) If a physician, hospital, or provider of medical services or supplies has been automatically excluded pursuant to § 10.816, the provider excluded will automatically be reinstated upon notice to OWCP that the conviction or exclusion which formed the basis of the automatic exclusion has been reversed or withdrawn. However, an automatic reinstatement shall not preclude OWCP from instituting exclusion proceedings based upon the underlying facts of the matter.

(b) A physician, hospital, or provider of medical services or supplies excluded from participation as a result of an order issued pursuant to this subpart may apply for reinstatement one year after the entry of the order of exclusion, unless the order expressly provides for a shorter period. An application for reinstatement shall be addressed to the Director for Federal Employees' Compensation, and shall contain a concise statement of the basis for the application. The application should be accompanied by supporting documents and affidavits.

(c) A request for reinstatement may be accompanied by a request for oral argument. Oral argument will be allowed only in unusual circumstances where it will materially aid the decision process.

(d) The Director for Federal Employees' Compensation shall order reinstatement only in instances where such reinstatement is clearly consistent with the goal of this subpart to protect the FECA program against fraud and abuse. To satisfy this requirement the provider must provide reasonable assurances that the basis for the exclusion will not be repeated.

2. Part 25 is revised to read as follows:

Part 25—Compensation for Disability and Death of Noncitizen Federal Employees Outside the United States

Subpart A—General Provisions

Sec.

Subpart B—The Special Schedule of Compensation

Subpart C—Extensions of the Special Schedule of Compensation

Authority: 5 U.S.C. 301, 8137, 8145 and 8149; 1946 Reorganization Plan No. 2, sec. 3, 3 CFR 1943–1948 Comp., p. 1064; 60 Stat. 1095; Reorganization Plan No. 19 of 1950, sec. 1, 3 CFR 1943–1953 Comp., p. 1010; 64 Stat. 1271; Secretary's Order 5–96, 62 FR 107.

Subpart A—General Provisions

§ 25.1 How are claims of Federal employees who are neither citizens nor residents adjudicated?

This part describes how OWCP pays compensation under the FECA to employees of the United States who are neither citizens nor residents of the United States, any territory or Canada, as well as to any dependents of such employees. It has been determined that the compensation provided under the FECA is substantially disproportionate to the compensation for disability or death which is payable in similar cases under local law, regulation, custom or otherwise, in areas outside the United States, any territory or Canada. Therefore, with respect to the claims of such employees whose injury (or injury resulting in death) has occurred subsequent to December 7, 1941, or may occur, the regulations in this part shall apply.

§ 25.2 In general, what is the Director's policy regarding such claims?

(a) Pursuant to 5 U.S.C. 8137, the benefit features of local workers' compensation laws, or provisions in the nature of workers' compensation, in effect in areas outside the United States, any territory or Canada shall, effective as of December 7, 1941 and as recognized by the Director, be adopted and apply in the cases of employees of the United States who are neither citizens nor residents of the United States, any territory or Canada, unless a special schedule of compensation for injury or death has been established under this part for the particular locality, or for a class of employees in the particular locality.

(b) The benefit provisions adopted under paragraph (a) of this section are those dealing with money payments for injury and death (including medical benefits), as well as those dealing with services and purposes forming an integral part of the local plan, provided they are of a kind or character similar to services and purposes authorized by the FECA.

(1) Procedural provisions, designations of classes of beneficiaries in death cases, limitations (except those affecting amounts of benefit payments), and any other provisions not directly affecting the amounts of the benefit payments, in such local plans, shall not apply, but in lieu thereof the pertinent provisions of the FECA shall apply, unless modified in this section.

(2) However, the Director may at any time modify, limit or redesignate the class or classes of beneficiaries entitled to death benefits, including the designation of persons, representatives or groups entitled to payment under local statute or custom whether or not included in the classes of beneficiaries otherwise specified by this subchapter.

(c) Compensation in all cases of such employees paid and closed prior to January 4, 1999 shall be deemed compromised and paid under 5 U.S.C. 8137. In all other cases, compensation may be adjusted to conform with the regulations in this part, or the beneficiary may by compromise or agreement with the Director have compensation continued on the basis of a previous adjustment of the claim.

(d) Persons employed in a country or area having no well-defined workers' compensation benefits structure shall be accorded the benefits provided—either by local law or special schedule—in a nearby country as determined by the Director. In selecting the benefit structure to be applied, equity and administrative ease will be given consideration, as well as local custom.

(e) Compensation for disability and death of non-citizens outside the United States under this part, whether paid under local law or special schedule, shall in no event exceed that generally payable under the FECA.

§ 25.3 What is the authority to settle and pay such claims?

In addition to the authority to receive, process and pay claims, when delegated such representative or agency receiving delegation of authority shall, in respect to cases adjudicated under this part, and when so authorized by the Director, have authority to make lump-sum awards (in the manner prescribed by 5 U.S.C. 8135) whenever such authorized representative shall deem such settlement to be for the best interest of the United States, and to compromise and pay claims for any benefits provided for under this part, including claims in which there is a dispute as to questions of fact or law. The Director shall, in instructions to the particular representative concerned, establish such procedures in respect to action under this section as he or she may deem necessary, and may specify the scope of any administrative review of such action.

§ 25.4 What type of evidence is required to establish a claim under this part?

Claims of employees of the United States who are neither citizens nor residents of the United States, any territory or Canada, if otherwise compensable, shall be approved only upon evidence of the following nature without regard to the date of injury or death for which claim is made:

(a) Appropriate certification by the Federal employing establishment; or

(b) An armed service's casualty or medical record; or

(c) Verification of the employment and casualty by military personnel; or

(d) Recommendation of an armed service's ''Claim Service'' based on investigations conducted by it.

§ 25.5 What special rules does OWCP apply to claims of third and fourth country nationals?

(a) *Definitions.* A ''third country national'' is a person who is neither a citizen nor resident of the United States who is hired by the United States in the person's country of citizenship or residence for employment in another foreign country, or in a possession or territory of the United States. A ''fourth country national'' is a person who is neither a citizen nor resident of either the country of hire or the place of employment, but who otherwise meets the definition of third country national. ''Benefits applicable to local hires'' are the benefits provided in this part by local law or special schedule, as determined by the Director. With respect to a United States territory or possession, ''local law'' means only the law of the particular territory or possession.

(b) *Benefits payable.* Third and fourth country nationals shall be paid the benefits applicable to local hires in the country of hire or the place of employment, whichever benefits are greater, provided that all benefits payable on account of one injury must be paid under the same benefit structure.

(1) Where no well-defined workers' compensation benefits structure is provided in either the country of hire or the place of employment, the provisions of § 25.2(d) shall apply.

(2) Where equitable considerations as determined by the Director so warrant, a fourth country national may be awarded benefits applicable to local hires in his or her home country.

§ 25.6 How does OWCP adjudicate claims of non-citizen residents of possessions?

An employee who is a *bona fide* permanent resident of any United States possession, territory, commonwealth or trust territory will receive the full benefits of the FECA, as amended, except that the application of the minimum benefit provisions provided therein shall be governed by the restrictions set forth in 5 U.S.C. 8138.

Subpart B—The Special Schedule of Compensation

§ 25.100 How is compensation for disability paid?

Compensation for disability shall be paid to the employee as follows:

(a) *Permanent total disability.* In cases of permanent total disability, 66⅔ percent of the monthly pay during the period of such disability.

(b) *Temporary total disability.* In cases of temporary total disability, 66⅔ percent of the monthly pay during the period of such disability.

(c) *Permanent partial disability.* In cases of permanent partial disability, 66⅔ percent of the monthly pay, for the following losses and periods:

(1) Arm lost: 280 weeks' compensation.

(2) Leg lost: 248 weeks' compensation.

(3) Hand lost: 212 weeks' compensation.

(4) Foot lost: 173 weeks' compensation.

(5) Eye lost: 140 weeks' compensation.

(6) Thumb lost: 51 weeks' compensation.

(7) First finger lost: 28 weeks' compensation.

(8) Great toe lost: 26 weeks' compensation.

(9) Second finger lost: 18 weeks' compensation.

(10) Third finger lost: 17 weeks' compensation.

(11) Toe, other than great toe, lost: 8 weeks' compensation.

(12) Fourth finger lost: 7 weeks' compensation.

(13) Loss of hearing: One ear, 52 weeks' compensation; both ears, 200 weeks' compensation.

(14) Phalanges: Compensation for loss of more than one phalanx of a digit shall be the same as for the loss of the entire digit. Compensation for loss of the first phalanx shall be one-half of the compensation for the loss of the entire digit.

(15) Amputated arm or leg: Compensation for an arm or a leg, if amputated at or above the elbow or the knee, shall be the same as for the loss of the arm or leg; but, if amputated between the elbow and the wrist, or between the knee and the ankle, the compensation shall be the same as for the loss of the hand or the foot.

(16) Binocular vision or percent of vision: Compensation for loss of binocular vision, or for 80 percent or more of the vision of an eye shall be the same as for the loss of the eye.

(17) Two or more digits: Compensation for loss of two or more digits, one or more phalanges of two or more digits of a hand or foot may be proportioned to the loss of use of the hand or foot occasioned thereby, but shall not exceed the compensation for the loss of a hand or a foot.

(18) Total loss of use: Compensation for a permanent total loss of use of a member shall be the same as for loss of the member.

(19) Partial loss or partial loss of use: Compensation for permanent partial loss or loss of use of a member may be for proportionate loss of use of the member.

(20) Consecutive awards: In any case in which there shall be a loss or loss of use of more than one member or parts of more than one member set forth in paragraphs (c)(1) through (19) of this section, but not amounting to permanent total disability, the award of compensation shall be for the loss or loss of use of each such member or part thereof, which awards shall run consecutively, except that where the injury affects only two or more digits of the same hand or foot, paragraph (c)(17) of this section shall apply.

(21) Other cases: In all other cases within this class of disability the compensation during the continuance of disability shall be that proportion of compensation for permanent total disability, as determined under paragraph (a) of this section, which is equal in percentage to the degree or percentage of physical impairment caused by the disability.

(22) Compensation under paragraphs (c)(1) through (21) of this section for permanent partial disability shall be in addition to any compensation for temporary total or temporary partial disability under this section, and awards for temporary total, temporary partial, and permanent partial disability shall run consecutively.

(d) *Temporary partial disability.* In cases of temporary partial disability, during the period of disability, that proportion of compensation for temporary total disability, as determined under paragraph (b) of this section, which is equal in percentage to the degree or percentage of physical impairment caused by the disability.

§ 25.101 How is compensation for death paid?

If the disability causes death, the compensation shall be payable in the amount and to or for the benefit of the following persons:

(a) To the undertaker or person entitled to reimbursement, reasonable funeral expenses not exceeding $200.

(b) To the surviving spouse, if there is no child, 35 percent of the monthly pay until his or her death or remarriage.

(c) To the surviving spouse, if there is a child, the compensation payable under paragraph (b) of this section, and in addition thereto 10 percent of the monthly wage for each child, not to exceed a total of 66⅔ percent for such surviving spouse and children. If a child has a guardian other than the surviving spouse, the compensation payable on account of such child shall be paid to such guardian. The compensation of any child shall cease when he or she dies, marries or reaches the age of 18 years, or if over such age and incapable of self-support, becomes capable of self-support.

(d) To the children, if there is no surviving spouse, 25 percent of the monthly pay for one child and 10 percent thereof for each additional child, not to exceed a total of 66⅔ percent thereof, divided among such children share and share alike. The compensation of each child shall be paid until he or she dies, marries or reaches the age of 18, or if over such age and incapable of self-support, becomes capable of self-support. The compensation of a child under legal age shall be paid to its guardian, if there is one, otherwise to the person having the custody or care of such child, for such child, as the Director in his or her discretion shall determine.

(e) To the parents, if one is wholly dependent for support upon the deceased employee at the time of his or her death and the other is not dependent to any extent, 25 percent of the monthly pay; if both are wholly dependent, 20 percent thereof to each; if one is or both are partly dependent, a proportionate amount in the discretion of the Director. The compensation to a parent or parents in the percentages specified shall be paid if there is no surviving spouse or child, but if there is a surviving spouse or child, there shall be paid so much of such percentages for a parent or parents as, when added to the total of the percentages of the surviving spouse and children, will not exceed a total of 66⅔ percent of the monthly pay.

(f) To the brothers, sisters, grandparents and grandchildren, if one is wholly dependent upon the deceased employee for support at the time of his or her death, 20 percent of the monthly pay to such dependent; if more than one are wholly dependent, 30 percent of such pay, divided among such dependents share and share alike; if there is no one of them wholly dependent, but one or more are partly dependent, 10 percent of such pay divided among such dependents share and share alike. The compensation to such beneficiaries shall be paid if there

is no surviving spouse, child or dependent parent. If there is a surviving spouse, child or dependent parent, there shall be paid so much of the above percentages as, when added to the total of the percentages payable to the surviving spouse, children and dependent parents, will not exceed a total of 66⅔ percent of such pay.

(g) The compensation of each beneficiary under paragraphs (e) and (f) of this section shall be paid until he or she, if a parent or grandparent, dies, marries or ceases to be dependent, or, if a brother, sister or grandchild, dies, marries or reaches the age of 18 years, or if over such age and incapable of self-support, becomes capable of self-support. The compensation of a brother, sister or grandchild under legal age shall be paid to his or her guardian, if there is one, otherwise to the person having the custody or care of such person, for such person, as the Director in his or her discretion shall determine.

(h) Upon the cessation of any person's compensation for death under this subpart, the compensation of any remaining person entitled to continuing compensation in the same case shall be adjusted, so that the continuing compensation shall be at the same rate such person would have received had no award been made to the person whose compensation ceased.

(i) In cases where there are two or more classes of persons entitled to compensation for death under this subpart, and the apportionment of such compensation as provided in this section would result in injustice, the Director may in his or her discretion modify the apportionments to meet the requirements of the case.

§ 25.102 What general provisions does OWCP apply to the Special Schedule?

(a) The definitions of terms in the FECA, as amended, shall apply to terms used in this subpart.

(b) The provisions of the FECA, unless modified by this subpart or otherwise inapplicable, shall be applied whenever possible in the application of this subpart.

(c) The provisions of the regulations for the administration of the FECA, as amended or supplemented from time to time by instructions applicable to this subpart, shall apply in the administration of compensation under this subpart, whenever they can reasonably be applied.

Subpart C—Extensions of the Special Schedule of Compensation

§ 25.200 How is the Special Schedule applied for employees in the Republic of the Philippines?

(a) *Modified special schedule of compensation.* Except for injury or death of direct-hire employees of the U.S. Military Forces covered by the Philippine Medical Care Program and the Employees' Compensation Program pursuant to the agreement signed by the United States and the Republic of the Philippines on March 10, 1982 who are also members of the Philippine Social Security System, the special schedule of compensation established in subpart B of this part shall apply, with the modifications or additions specified in paragraphs (b) through (k) of this section, in the Republic of the Philippines, to injury or death occurring on or after July 1, 1968, with the following limitations:

(1) *Temporary disability.* Benefits for payments accruing on and after July 1, 1969, for injuries causing temporary disability and which occurred on and after July 1, 1968, shall be payable at the rates in the special schedule as modified in this section.

(2) *Permanent disability and death.* Benefits for injuries occurring on and after July 1, 1968, which cause permanent disability or death, shall be payable at the rates specified in the special schedule as modified in this section for all awards not paid in full before July 1, 1969, and any award paid in full prior to July 1, 1969: Provided, that application for adjustment is made, and the adjustment will result in additional benefits of at least $10. In the case of injuries or death occurring on or after December 8, 1941 and prior to July 1, 1968, the special schedule as modified in this section may be applied to prospective awards for permanent disability or death, provided that the monthly and aggregate maximum provisions in effect at the time of injury or death shall prevail. These maxima are $50 and $4,000, respectively.

(b) *Death benefits.* 400 weeks' compensation at two-thirds of the weekly wage rate, shared equally by the eligible survivors in the same class.

(c) *Death beneficiaries.* Benefits are payable to the survivors in the following order of priority (all beneficiaries in the highest applicable classes are entitled to share equally):

(1) Surviving spouse and unmarried children under 18, or over 18 and totally incapable of self-support.

(2) Dependent parents.

(3) Dependent grandparents.

(4) Dependent grandchildren, brothers and sisters who are unmarried and under 18, or over 18 and totally incapable of self-support.

(d) *Burial allowance.* 14 weeks' wages or $400, whichever is less, payable to the eligible survivor(s), regardless of the actual expense. If there is no eligible survivor, actual burial expenses may be paid or reimbursed, in an amount not to exceed what would be paid to an eligible survivor.

(e) *Permanent total disability.* 400 weeks' compensation at two-thirds of the weekly wage rate.

(f) *Permanent partial disability.* Where applicable, the compensation provided in paragraphs (c)(1) through (19) of § 25.100, subject to an aggregate limitation of 400 weeks' compensation. In all other cases, provided for permanent total disability that proportion of the compensation (paragraph (e) of this section) which is equivalent to the degree or percentage of physical impairment caused by the disability.

(g) *Temporary partial disability.* Two-thirds of the weekly loss of wage-earning capacity.

(h) *Compensation period for temporary disability.* Compensation for temporary disability is payable for a maximum period of 80 weeks.

(i) *Maximum compensation.* The total aggregate compensation payable in any case, for injury or death or both, shall not exceed $8,000, exclusive of medical costs and burial allowance. The weekly rate of compensation for disability or death shall not exceed $35.

(j) *Method of payment.* Only compensation for temporary disability shall be payable periodically. Compensation for permanent disability and death shall be payable in full at the time the extent of entitlement is established.

(k) *Exceptions.* The Director in his or her discretion may make exceptions to the regulations in this section by:

(1) Reapportioning death benefits, for the sake of equity.

(2) Excluding from consideration potential death beneficiaries who are not available to receive payment.

(3) Paying compensation for permanent disability or death on a periodic basis, where this method of payment is considered to be in the best interest of the beneficiary.

§ 25.201 How is the Special Schedule applied for employees in Australia?

(a) The special schedule of compensation established by subpart B of this part shall apply in Australia with the modifications or additions specified in paragraph (b) of this section, as of

December 8, 1941, in all cases of injury (or death from injury) which occurred between December 8, 1941 and December 31, 1961, inclusive, and shall be applied retrospectively in all such cases of injury (or death from injury). Compensation in all such cases pending as of July 15, 1946, shall be readjusted accordingly, with credit taken in the amount of compensation paid prior to such date. Refund of compensation shall not be required if the amount of compensation paid in any such case, otherwise than through fraud, misrepresentation or mistake, and prior to July 15, 1946, exceeds the amount provided for under this paragraph, and such case shall be deemed compromised and paid under 5 U.S.C. 8137.

(b) The total aggregate compensation payable in any case under paragraph (a) of this section, for injury or death or both, shall not exceed the sum of $4,000, exclusive of medical costs. The maximum monthly rate of compensation in any such case shall not exceed the sum of $50.

(c) The benefit amounts payable under the provisions of the Commonwealth Employees' Compensation Act of 1930–1964, Australia, shall apply as of January 1, 1962, in Australia, as the exclusive measure of compensation in cases of injury (or death from injury) according on and after January 1, 1962, and shall be applied retrospectively in all such cases, occurring on and after such date: Provided, that the compensation payable under the provisions of this paragraph shall in no event exceed that payable under the FECA.

§ 25.202 How is the Special Schedule applied for Japanese seamen?

(a) The special schedule of compensation established by subpart B of this part shall apply as of November 1, 1971, with the modifications or additions specified in paragraphs (b) through (i) of this section, to injuries sustained outside the continental United States or Canada by direct-hire Japanese seamen who are neither citizens nor residents of the United States or Canada and who are employed by the Military Sealift Command in Japan.

(b) Temporary total disability. Weekly compensation shall be paid at 75 percent of the weekly wage rate.

(c) Temporary partial disability. Weekly compensation shall be paid at 75 percent of the weekly loss of wage-earning capacity.

(d) Permanent total disability. Compensation shall be paid in a lump sum equivalent to 360 weeks' wages.

(e) Permanent partial disability.

(1) The provisions of § 25.100 shall apply to the types of permanent partial disability listed in paragraphs (c)(1) through (19) of that section: Provided that weekly compensation shall be paid at 75 percent of the weekly wage rate and that the number of weeks allowed for specified losses shall be changed as follows:

(i) Arm lost: 312 weeks.
(ii) Leg lost: 288 weeks.
(iii) Hand lost: 244 weeks.
(iv) Foot lost: 205 weeks.
(v) Eye lost: 160 weeks.
(vi) Thumb lost: 75 weeks.
(vii) First finger lost: 46 weeks.
(viii) Second finger lost: 30 weeks.
(ix) Third finger lost: 25 weeks.
(x) Fourth finger lost: 15 weeks.
(xi) Great toe lost: 38 weeks.
(xii) Toe, other than great toe lost: 16 weeks.

(2) In all other cases, that proportion of the compensation provided for permanent total disability in paragraph (d) of this section which is equivalent to the degree or percentage of physical impairment caused by the injury.

(f) Death. If there are two or more eligible survivors, compensation equivalent to 360 weeks' wages shall be paid to the survivors, share and share alike. If there is only one eligible survivor, compensation equivalent to 300 weeks' wages shall be paid. The following survivors are eligible for death benefits:

(1) Spouse who lived with or was dependent upon the employee.

(2) Unmarried children under 21 who lived with or were dependent upon the employee.

(3) Adult children who were dependent upon the employee by reason of physical or mental disability.

(4) Dependent parents, grandparents and grandchildren.

(g) Burial allowance. $1,000 payable to the eligible survivor(s), regardless of actual expenses. If there are no eligible survivors, actual expenses may be paid or reimbursed, up to $1,000.

(h) Method of payment. Only compensation for temporary disability shall be payable periodically, as entitlement accrues. Compensation for permanent disability and death shall be payable in a lump sum.

(i) Maxima. In all cases, the maximum weekly benefit shall be $130. Also, except in cases of permanent total disability and death, the aggregate maximum compensation payable for any injury shall be $40,000.

(j) Prior injury. In cases where injury or death occurred prior to November 1, 1971, benefits will be paid in accordance with regulations promulgated, contained in 20 CFR parts 1–399, edition revised as of January 1, 1971.

§ 25.203 How is the Special Schedule applied to non-resident aliens in the Territory of Guam?

(a) The special schedule of compensation established by subpart B of this part shall apply, with the modifications or additions specified in paragraphs (b) through (k) of this section, to injury or death occurring on or after July 1, 1971 in the Territory of Guam to non-resident alien employees recruited in foreign countries for employment by the military departments in the Territory of Guam. However, the Director may, in his or her discretion, adopt the benefit features and provisions of local workers' compensation law as provided in subpart A of this part, or substitute the special schedule in subpart B of this part or other modifications of the special schedule in this subpart C, if such adoption or substitution would be to the advantage of the employee or his or her beneficiary. This schedule shall not apply to any employee who becomes a permanent resident in the Territory of Guam prior to the date of his or her injury or death.

(b) Death benefits. 400 weeks' compensation at two-thirds of the weekly wage rate, shared equally by the eligible survivors in the same class.

(c) Death beneficiaries. Beneficiaries of death benefits shall be determined in accordance with the laws or customs of the country of recruitment.

(d) Burial allowance. 14 weeks' wages or $400, whichever is less, payable to the eligible survivor(s), regardless of the actual expense. If there is no eligible survivor, actual burial expenses may be paid or reimbursed, in an amount not to exceed what would be paid to an eligible survivor.

(e) Permanent total disability. 400 weeks' compensation at two-thirds of the weekly wage rate.

(f) Permanent partial disability. Where applicable, the compensation provided in paragraphs (c)(1) through (19) of § 25.100, subject to an aggregate limitation of 400 weeks' compensation. In all other cases, that proportion of the compensation provided for permanent total disability (paragraph (e) of this section) which is equivalent to the degree or percentage of physical impairment caused by the disability.

(g) Temporary partial disability. Two-thirds of the weekly loss of wage-earning capacity.

(h) Compensation period for temporary disability. Compensation for temporary disability is payable for a maximum period of 80 weeks.

(i) Maximum compensation. The total aggregate compensation payable in any case, for injury or death or both, shall not exceed $24,000, exclusive of medical costs and burial allowance. The weekly rate of compensation for disability or death shall not exceed $70.

(j) Method of payment. Compensation for temporary disability shall be payable periodically. Compensation for permanent disability and death shall be payable in full at the time the extent of entitlement is established.

(k) Exceptions. The Director may in his or her discretion make exception to the regulations in this section by:

(1) Reapportioning death benefits for the sake of equity.

(2) Excluding from consideration potential beneficiaries of a deceased employee who are not available to receive payment.

(3) Paying compensation for permanent disability or death on a periodic basis, where this method of payment is considered to be in the best interest of the employee or his or her beneficiary(ies).

Signed at Washington, D.C., this 17th day of November, 1998.

Alexis M. Herman,

Secretary of Labor.

Bernard E. Anderson,

Assistant Secretary for Employment Standards Administration.

[FR Doc. 98–31190 Filed 11–24–98; 8:45 am]

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November 25, 1998

Part III

Department of Commerce

International Trade Administration

19 CFR Part 351
Countervailing Duties; Final Rule

DEPARTMENT OF COMMERCE

International Trade Administration

19 CFR Part 351

[Docket No. 950306068–8205–05]

RIN 0625–AA45

Countervailing Duties

AGENCY: International Trade Administration, Department of Commerce.

ACTION: Final rule.

SUMMARY: The Department of Commerce (''the Department'') hereby issues final countervailing duty regulations to conform to the Uruguay Round Agreements Act, which implemented the results of the Uruguay Round multilateral trade negotiations. The Department has sought to issue regulations that: Where appropriate and feasible, translate the principles of the implementing legislation into specific and predictable rules, thereby facilitating the administration of these laws and providing greater predictability for private parties affected by these laws; simplify and streamline the Department's administration of countervailing duty proceedings in a manner consistent with the purpose of the statute and the President's regulatory principles; and codify certain administrative practices determined to be appropriate under the new statute and under the President's Regulatory Reform Initiative.

DATES: The effective date of this final rule is December 28, 1998, except that § 351.301(d) is effective on November 25, 1998. *See* § 351.702 for applicability dates.

FOR FURTHER INFORMATION CONTACT: Jennifer A. Yeske at (202) 482–1032 or Jeffrey May at (202) 482–4412.

SUPPLEMENTARY INFORMATION:

Background

The publication of this notice of final rules, which deals with countervailing duty (''CVD'') methodology, completes a significant portion of the process of developing regulations under the Uruguay Round Agreements Act (''URAA''). The process began when the Department took the unusual step of requesting advance public comments in order to ensure that, at the earliest possible stage, we could consider and take into account the views of the private sector entities that are affected by the antidumping (''AD'') and CVD laws. On February 26, 1997, the Department published proposed rules dealing with CVD methodology (''1997 Proposed Regulations''). The Department received over 200 written public comments regarding the 1997 Proposed Regulations. On October 17, 1997, the Department held a public hearing, and thereafter, received over 50 additional post-hearing written public comments on the 1997 Proposed Regulations.[1]

In drafting these final rules, the Department has carefully reviewed and considered each of the comments it received. While we have not always adopted suggestions made by commenters, we found the comments to be very useful in helping us to work our way through the many legal and policy issues addressed in the regulation. Therefore, we are extremely grateful to those who took the time and trouble to express their views regarding how the Department should administer the CVD laws in the future.

In addition, in these final rules, the Department has continued to be guided by the objectives described in the 1997 Proposed Regulations. Specifically, these objectives are: (1) Conformity with the statutory amendments made by the URAA; (2) the elaboration through regulation of certain statements contained in the Statement of Administrative Action (''SAA''); [2] and (3) consistency with President Clinton's Regulatory Reform Initiative and his directive to identify and eliminate obsolete and burdensome regulations.

In the case of CVD methodology, the Department previously issued proposed regulations in 1989 (''1989 Proposed Regulations'').[3] Because the Department never issued final rules, the 1989 Proposed Regulations were not binding on the Department or private parties. Nevertheless, to some extent both the Department and private parties relied on the 1989 Proposed Regulations as a restatement of the Department's CVD methodology as it existed at the time. Thus, notwithstanding statutory amendments made by the URAA and subsequent developments in the Department's administrative practice, the 1989 Proposed Regulations still serve as a point of departure for any new regulations dealing with CVD methodology.

In an earlier rulemaking (see item 9 in note 1), we consolidated the AD and CVD regulations into a single part 351. For the most part, the regulations contained in this notice constitute subpart E of part 351.

Explanation of the Final Rules

In drafting these Final Regulations, the Department carefully considered each of the comments received. In addition, we conducted our own independent review of those provisions of the 1997 Proposed Regulations that were not the subject of public comments. The following sections contain a summary of the comments we received and the Department's responses to those comments. In addition, these sections contain an explanation of changes the Department has made to the 1997 Proposed Regulations either in response to

[1] The prior notices published by the Department as part of its URAA rulemaking activity are: (1) Advance Notice of Proposed Rulemaking and Request for Public Comments (*Antidumping Duties; Countervailing Duties; Article 1904 of the North American Free Trade Agreement*), 60 FR 80 (January 3, 1995); (2) Advance Notice of Proposed Rulemaking; Extension of Comment Period (*Antidumping Duties; Countervailing Duties; Article 1904 of the North American Free Trade Agreement*), 60 FR 9802 (February 22, 1995); (3) Interim Regulations; Request for Comments (*Antidumping and Countervailing Duties*), 60 FR 25130 (May 11, 1995); (4) Proposed Rule; Request for Comments (*Antidumping and Countervailing Duty Proceedings; Administrative Protective Order Procedures; Procedures for Imposing Sanctions for Violation of a Protective Order*), 61 FR 4826 (February 8, 1996); (5) Notice of Proposed Rulemaking and Request for Public Comments (*Antidumping Duties; Countervailing Duties*), 61 FR 7308 (February 27, 1996); (6) Extension of Deadline to File Public Comments on Proposed Antidumping and Countervailing Duty Regulations and Announcement of Public Hearing (*Antidumping Duties; Countervailing Duties*), 61 FR 18122 (April 24, 1996); (7) Announcement of Opportunity to File Public Comments on the Public Hearing of Proposed Antidumping and Countervailing Duty Regulations (*Antidumping Duties; Countervailing Duties*), 61 FR 28821 (June 6, 1996); (8) Notice of Proposed Rulemaking and Request for Public Comment (*Countervailing Duties*), 62 FR 8818 (February 26, 1997); (9) Final Rules (*Antidumping Duties; Countervailing Duties*), 62 FR 27295 (May 19, 1997); (10) Extension of Deadline to File Public Comments on Proposed Countervailing Duty Regulations, (*Countervailing Duties*), 62 FR 19719 (April 23, 1997); (11) Extension of Deadline to File Public Comments on Proposed Countervailing Duty Regulations, (*Countervailing Duties*), 62 FR 25874 (May 12, 1997); (12) Notice of Public Hearing on Proposed Countervailing Duty Regulations and Announcement of Opportunity to File Post-Hearing Comments, (*Countervailing Duties*), 62 FR 38948 (July 21, 1997); (13) Notice of Public Hearing on Proposed Countervailing Duty Regulations and Announcement of Opportunity to File Post-Hearing Comments; Correction, (*Countervailing Duties*), 62 FR 41322 (August 1, 1997); (14) Notice of Postponement of Public Hearing on Proposed Countervailing Duty Regulations and of Opportunity to File Post-Hearing Comments, (*Countervailing Duties*), 62 FR 46451 (September 3, 1997); (15) Interim Final Rules; Request for Comments (*Procedures for Conducting Five-Year (''Sunset'') Reviews of Antidumping and Countervailing Duty Orders*), 63 FR 13516 (March 20, 1998); and (16) Final Rule; Administrative Protective Order Procedures; Procedures for Imposing Sanctions for Violation of a Protective Order, (*Antidumping and Countervailing Duty Proceedings*), 63 FR 24391 (May 4, 1998).

[2] *See Statement of Administrative Action accompanying H.R. 5110*, H.R. Doc. No. 316, Vol. 1, 103d Cong., 2d Sess. 911–955 (1994).

[3] *See Notice of Proposed Rulemaking and Request for Public Comments (Countervailing Duties)*, 54 FR 23366 (May 31, 1989).

comments or on its own initiative. Finally, these sections contain a restatement of principles that remain unchanged from the 1997 Proposed Regulations and that were not the subject of any public comments.

The Department is also hereby issuing interim final rules to set forth certain procedures for establishing the non-countervailable status of alleged subsidies or subsidy programs pursuant to section 771(5B) of the Tariff Act of 1930, as amended (''the Act''). Pursuant to authority at 5 U.S.C. 553(b)(A), the Assistant Secretary for Import Administration waives the requirement to provide prior notice and an opportunity for public comment because this action is a rule of agency procedure. This interim final rule is not subject to the 30-day delay in its effective date under 5 U.S.C. 553(d) because it is not a substantive rule. The analytical requirements of the Regulatory Flexibility Act (5 U.S.C. 601 note) are inapplicable to this rulemaking because it is not one for which a Notice of Proposed Rulemaking is required under 5 U.S.C. 553 or any other statute.

Section 351.102

These regulations add several definitions to § 351.102. Many of these definitions are identical (or virtually identical) to definitions contained in § 355.41 of the 1989 Proposed Regulations, and some are based on definitions contained in the Illustrative List of Export Subsidies (''Illustrative List'') annexed to the Agreement on Subsidies and Countervailing Measures (''SCM Agreement''). We have made some changes to the definitions contained in the 1997 Proposed Regulations.

While we have not changed the definition of *consumed in the production process,* we are clarifying that the definition is not to be used as a way to expand significantly the rights of countries to apply border adjustments for a broad range of taxes on energy, particularly in the developed world. *See* SAA at 915.

The definition of *firm* is based on § 355.41(a) of the 1989 Proposed Regulations, but an additional clause has been added to clarify that the purpose of this term is to serve as a shorthand expression for the recipient of an alleged subsidy. While other terms could be used, the use of the term ''firm'' in this manner has become an accepted part of CVD nomenclature. For clarification, we have added ''company'' and ''joint venture'' to the entities listed in the definition in the 1997 Proposed Regulations.

Similarly, the term *government-provided* is used as a shorthand adjective to distinguish the act or practice being analyzed as a possible countervailable subsidy from the act or practice being used as a benchmark. As made clear in the regulation, the use of ''government-provided'' does not mean that a subsidy must be directly provided by a government. This definition is unchanged from our 1997 Proposed Regulations.

As in our 1997 Proposed Regulations, *loan* is defined to include forms of debt financing other than what one normally considers to be a ''loan,'' such as bonds or overdrafts. Again, this definition is intended as a shorthand expression in order to avoid repetitive use of more cumbersome phrases, such as ''loans or other debt instruments.''

In this regard, the Department considered codifying its approach with respect to so-called ''hybrid instruments,'' financial instruments that do not readily fall into the basic categories of grant, loan, or equity. In the 1993 steel determinations (*see Certain Steel Products from Austria (General Issues Appendix),* 58 FR 37062, 37254 (July 9, 1993) (''GIA'')), the Department developed a hierarchical approach for categorizing hybrid instruments, an approach that was sustained in *Geneva Steel* v. *United States,* 914 F. Supp. 563 (CIT 1996). However, notwithstanding this judicial imprimatur, the Department has relatively little experience with hybrid instruments. Therefore, although the Department has no present intention of deviating from the approach set forth in the GIA, the codification of this approach in the form of a regulation would be premature at this time.

Many commenters proposed definitions of the phrase ''entrusts or directs'' as it is used in section 771(5)(B)(iii) of the Act, which deals with ''indirect subsidies.'' Indirect subsidies generally involve situations where a government provides a financial contribution through a private body. Under section 771(5)(B)(iii) of the Act, a subsidy exists when, *inter alia,* a government ''makes a payment to a funding mechanism to provide a financial contribution, or *entrusts or directs* a private entity to make a financial contribution * * *'' (emphasis added). In our 1997 Proposed Regulations, we did not address indirect subsidies in detail. Instead, we noted that the SAA directs the Department to proceed on a case-by-case basis (*see* SAA at 925–26), and we requested comments on the factors we should consider in making our case-by-case determinations.

One commenter suggested that an indirect subsidy need only be linked to a government action or program to satisfy the ''entrusts or directs'' standard. This same commenter asked the Department to include an illustrative list of situations that would meet the ''entrusts or directs'' standard. A second commenter believed that the standard is met when a government takes an action that causes a private party to confer a benefit. This same commenter asked the Department to clarify that the term ''private body'' is not limited to a single entity, but also includes a group of entities or persons. A third commenter proposed that the ''entrusts or directs'' standard be considered satisfied whenever a government takes an action that proximately results in a private entity providing a financial contribution. Certain commenters also asked the Department to confirm that the standard is no narrower than the prior U.S. standard for finding an indirect subsidy.

The issue of what ''entrusts or directs'' means was debated extensively at the Department's hearing on its 1997 Proposed Regulations. This debate prompted the submission of additional proposed definitions. Two commenters argued that an indirect subsidy occurs whenever a government action has the inevitable result of compelling a private party to provide a benefit. A second commenter proposed a ''but for'' test, *i.e.,* if the government did not act, the subsidy would not exist.

As the extensive comments on this issue indicate, the phrase ''entrusts or directs'' could encompass a broad range of meanings. As such, we do not believe it is appropriate to develop a precise definition of the phrase for purposes of these regulations. Rather, we believe that we should follow the guidance provided in the SAA to examine indirect subsidies on a case-by-case basis. We will, however, enforce this provision vigorously.

We agree with those commenters who urged the Department to confirm that the current standard is no narrower than the prior U.S. standard for finding an indirect subsidy as described in *Certain Steel Products from Korea,* 58 FR 37338 (July 9, 1993) and *Certain Softwood Lumber Products from Canada,* 57 FR 22570 (May 28, 1992). Also, we believe that the phrase ''entrusts or directs'' subsumes many elements of the definitions proposed by commenters. With respect to the suggestion that we include an illustrative list of situations that would fall under the ''entrusts or directs'' standard, we do not believe this is necessary. The SAA at 926 lists a number of cases where the Department

has found indirect subsidies in the past, and these cases serve to provide examples of situations where we believe the statute would permit the Department to reach the same result. Similarly, regarding the request that we define the phrase ''private entity'' to include groups of entities or persons, the SAA is clear that groups are included (*see* SAA at 926). Therefore, we have not promulgated a regulation with this definition.

Although the indirect subsidies that we have countervailed in the past have normally taken the form of a foreign government requiring an intermediate party to provide a benefit to the industry producing the subject merchandise, often to the detriment of the intermediate party, indirect subsidies could also take the form of a foreign government causing an intermediate party to provide a benefit to the industry producing the subject merchandise in a way that is also in the interest of the intermediate party. We believe the phrase ''entrusts or directs'' could encompass government actions that provide inducements, other than upstream subsidies, to a private party to provide a benefit to another party.

One commenter argued that the Final Regulations should include a definition of consultations. Consistent with Article 13 of the SCM Agreement, section 702(b)(4)(A)(ii) of the Act requires the Department to provide the government of the exporting country named in a petition an opportunity for consultations with respect to the petition. This commenter suggested that the definition of consultations should include a statement of purpose as articulated in the SCM Agreement (*i.e.*, clarifying the allegations in the petition and arriving at a mutually agreed solution). Furthermore, the commenter argued, in the Final Regulations the Department should commit to consult with the foreign government both prior to initiating and during the course of the investigation. Finally, the commenter proposed that the definition contain a requirement that all government-to-government exchanges (oral and written) be placed on the record of the proceeding.

We do not believe that a regulation is required to define ''consultations.'' We agree that, in accordance with Article 13 of the SCM Agreement, the purpose of consultations is to clarify the allegations presented in a petition and arrive at a mutually agreed solution. Section 351.202(h)(2)(i)(2) of *Antidumping Duties; Countervailing Duties; Final rule*, 62 FR 27295, 27384 (May 19, 1997) clearly states that the Department will invite the government of any exporting country named in a CVD petition to hold consultations with respect to the petition. Further, consistent with Article 13.2 of the SCM Agreement, the Department affords foreign governments reasonable opportunities to consult throughout the period of investigation. In regard to communications, it is the Department's longstanding practice that all *ex parte* communications with Department decisionmakers be placed on the record of a proceeding through memoranda to the file.

Section 351.501

Section 351.501 restates very generally the subject matter of subpart E. To be more specific, the arrangement of subpart E is as follows. After dealing with the specificity of domestic subsidies in § 351.502 and the concept of ''benefit'' in § 351.503, §§ 351.504 through 351.513 deal with the identification and measurement of various general types of subsidy practices. Sections 351.514 through 351.520 focus on export subsidies, incorporating the appropriate standards from the Illustrative List of Export Subsidies contained in Annex I of the SCM Agreement. Sections 351.521 through 351.523 deal with import substitution subsidies (currently designated as ''Reserved''), green light and green box subsidies, and upstream subsidies, respectively. Section 351.524 addresses the allocation of benefits to a particular time period. Section 351.525 sets forth rules regarding the calculation of an *ad valorem* subsidy rate and the attribution of a subsidy to the appropriate sales value of a product. Finally, §§ 351.526 and 351.527 contain rules regarding program-wide changes and transnational subsidies, respectively. The section numbering in these Final Regulations reflects minor changes from the 1997 Proposed Regulations. As discussed below, we have decided to codify a final rule on the concept of ''benefit.'' This rule is now § 351.503. We have also moved the rules regarding the allocation of benefits, which were included in the section on grants in the 1997 Proposed Regulations to a separate section, § 351.524. Finally, we have moved § 351.520 of the 1997 Proposed Regulations to § 351.514(b) because general export promotion activities are more appropriately addressed as an exception to export subsidies.

The last sentence of § 351.501 acknowledges that subpart E does not address every possible type of subsidy practice. However, the same sentence provides that in dealing with alleged subsidies that are not expressly covered by these regulations, the Secretary will be guided by the underlying principles of the Act and subpart E.

In this regard, the Act and the SCM Agreement serve to eliminate much of the confusion and controversy surrounding the necessary elements of a countervailable subsidy. First, under section 771(5)(B) of the Act and Article 1.1(a)(1) and (2) of the SCM Agreement, there must be a financial contribution that a government provides either directly or indirectly, or an income or price support in the sense of Article XVI of the General Agreement on Tariffs and Trade 1994 (''GATT 1994''). Although the precise parameters will have to be determined on a case-by-case basis, this element provides a framework for analysis that previously was not directly addressed.

Second, under section 771(5)(B) of the Act and Article 1.1(b) of the SCM Agreement, the financial contribution (or income or price support) must confer a benefit. Section 351.503 sets out the principles we will generally follow in determining whether a benefit has been conferred.

Finally, under section 771(5)(A) of the Act and Article 1.2 of the SCM Agreement, a subsidy must be specific in order to be countervailable. The ''specificity test'' is addressed in § 351.502, but we note here that by clarifying the purpose of the specificity test and the manner in which it is to be applied, the URAA, the SAA and the SCM Agreement should serve to reduce the controversies and volume of litigation concerning this issue.

In the preamble to our 1997 Proposed Regulations we discussed our decision not to include two topics in our proposed changes to subpart E: Indirect subsidies (with the exception of upstream subsidies) and privatization. The numerous comments regarding our decision not to promulgate regulations on these two topics are addressed below.

Indirect Subsidies

In our 1997 Proposed Regulations, we discussed only briefly the topic of indirect subsidies. We received several comments on this issue. Comments concerning the adoption of a definition of the phrase ''entrusts or directs'' have been addressed previously (*see* § 351.102). The remaining comments relating to indirect subsidies are addressed here.

One commenter asked the Department to codify a rule stating that indirect subsidies are countervailable. In this commenter's view, this would eliminate any uncertainty that could become the cause of litigation. Another commenter requested that the Department include a

broad definition of indirect subsidies in our regulations.

We have not adopted either suggestion. We believe that section 771(5)(B)(iii) of the Act clearly states that subsidies provided by governments through private parties are covered by the CVD law. Additionally, section 771(5)(C) of the Act states that the determination of whether a subsidy exists shall be made ''without regard to whether the subsidy is provided *directly or indirectly* * * *'' (emphasis added). Therefore, no regulation is needed on this point. Regarding the second comment, as discussed previously, the phrase ''entrusts or directs'' as used in section 771(5)(B)(iii) of the Act could encompass a broad range of meanings. As such, we do not believe it is appropriate to develop a precise definition of the phrase for purposes of these regulations.

One commenter singled out subsidies involving the provision of goods and services for less than adequate remuneration and asked the Department to confirm that indirect subsidies can be conferred through the provision of goods or services by private parties. This same commenter also asked the Department to state in the preamble to the Final Regulations that the new statute will not alter the Department's practice of finding export restraints to be countervailable. Other commenters objected to this position. They argued that: (1) The practices constituting financial contributions under the Act are payments of cash or cash equivalents, while government regulatory measures do not entail any financial contribution; (2) export restraints do not direct private parties to make any type of payment; they simply limit the parties' ability to export; (3) regulatory measures that distort trade are separately covered by other World Trade Organization (''WTO'') Agreements (*e.g.*, GATT 1994 Articles I–V, VII–IX, Agreement on Sanitary and Phytosanitary Measures, Agreement on Technical Barriers to Trade, and Agreement on Trade-Related Investment Measures); and (4) expanding the definition of subsidy to include regulatory measures would extend that term to absurd dimensions far beyond the limited scope intended by the SCM Agreement and the Act. These same commenters urged the Department to issue a regulation which clarifies what they see as a conflict between the clear language in the statute (regulatory measures are not financial contributions within the meaning of the Act and, hence, cannot confer subsidies) and the language in the SAA at 926 (suggesting that regulatory measures can be countervailed as indirect subsidies).

Regarding the issue of whether indirect subsidies can arise through the provision of goods and services, we believe this is clearly answered by the Act. Section 771(5)(D)(iii) states that financial contributions include the provision of goods or services. Hence, if a private entity is entrusted or directed to provide a good or service to producers of the merchandise under investigation, a financial contribution exists. With regard to export restraints, while they may be imposed to limit parties' ability to export, they can also, in certain circumstances, lead those parties to provide the restrained good to domestic purchasers for less than adequate remuneration. This was recognized by the Department in *Certain Softwood Lumber Products from Canada*, 57 FR 22570 (May 28, 1992) (''*Lumber*'') and *Leather from Argentina*, 55 FR 40212 (October 2, 1990) (''*Leather*''). Further, as indicated by the SAA (at 926), and as we confirm in these Final Regulations, if the Department were to investigate situations and facts similar to those examined in *Lumber* and *Leather* in the future, the new statute would permit the Department to reach the same result.

We agree that regulatory measures that distort trade normally may be subject to the provisions of other WTO Agreements. We do not believe, however, that this negates our ability to address them through the application of our CVD law when such measures meet the definition of a countervailable subsidy. We disagree that countervailing such measures goes beyond the ambit of the SCM Agreement and the Act. As discussed above in response to an earlier comment, the SCM Agreement clearly permits, and the Act clearly requires, that we countervail subsidies provided through private parties. Also, Article VI of GATT 1994 continues to refer to subsidies provided ''directly or indirectly'' by a government.

Change in Ownership

The SAA and the House and Senate Reports emphasize the importance of considering the facts of individual cases to determine whether, and to what extent, change-in-ownership transactions eliminate previously conferred countervailable subsidies. In the 1997 Proposed Regulations, we did not include a provision dealing with change in ownership. Rather, we invited comment on a broad array of factors concerning this topic and whether we should promulgate a final rule that integrates some or all of the factors identified in the preamble.

The comments we received on this issue largely fell along two lines. On the one hand, several commenters argued that the Department should promulgate a regulation stating that change-in-ownership transactions, even if conducted at arm's-length and at fair market value, have no effect on non-recurring subsidies bestowed prior to the sale of a firm, and that non-recurring subsidies, in most instances, pass through in their entirety to the sold or privatized entity. Conversely, other commenters contended that a change-in-ownership regulation should establish a rebuttable presumption that, in general, the sale or change in ownership of a firm at fair market value eliminates the benefit conferred by prior non-recurring subsidies.

According to the first group of commenters, under section 771(5)(F) of the Act, the change in ownership of a firm has no effect on the Department's ability to countervail fully subsidies bestowed prior to the change in ownership. In fact, in these commenters' view, Congress expected the Department to continue countervailing prior subsidies, unless something serves to eliminate those subsidies. The sale of a firm at fair market value does not serve to eliminate prior subsidies; thus, after such a sale, prior subsidies would continue to be countervailed until fully amortized. The only instance where partial repayment of prior subsidies can exist is where economic resources have been returned to the government, *i.e.*, where the investor has paid more than fair market value for a productive unit. The Department should specify this in its regulations.

These same commenters argued that recent court decisions support the conclusion that subsidies continue to be countervailable after the privatization of a firm at fair market value. *See, e.g., Saarstahl AG* v. *United States*, 78 F.3d 1539 (Fed. Cir. 1996); *British Steel plc* v. *United States*, 127 F.3d 1471 (Fed. Cir. 1997). In light of these decisions, one commenter stated that it would be ironic for the Department now to conclude under the URAA that subsidies are no longer countervailable after the sale of a firm at fair market value. This commenter also claimed that such a conclusion would result in anti-subsidy practices weaker than those of the European Union (''EU''), because EU Guidelines on State Aid recognize that the sale of a company does not extinguish previously bestowed subsidies. Rather, according to this commenter, the EU requires subsidy recipients to repay illegal subsidies, including principal and interest, from the time the aid was disbursed, without

regard to whether the recipient is later sold or privatized.[4]

These commenters opposed the Department's attempt to develop a ''flexible'' approach toward privatization. They expressed concern that ascribing any significance to the broad array of factors listed in the 1997 Proposed Regulations may lead to all or some pre-privatization subsidies being extinguished in a fair market privatization, which would involve reevaluating the amount, and possibly the existence, of prior subsidies based on post-bestowal events and conditions. This would violate the statute's prohibition against considering the effects of subsidies and the Department's practice of not examining subsequent events to determine whether the subject merchandise continues to benefit from subsidies. *See* section 771(5)(C) of the Act and GIA at 37261. For example, one commenter stated that taking account of current market conditions, such as global overcapacity, in determining the extent to which pre-privatization subsidies pass through, is tantamount to considering effects. Similarly, another commenter rejected the suggestion that subsidies that reduce excess capacity are not countervailable because this too depends on an impermissible ''use'' analysis. Whatever the use of the subsidy, these commenters argued, the benefit from the subsidy continues unabated after privatization.

Finally, this first group of commenters asserted that the privatization or sale of a productive unit, even at fair market value, does not result in any partial or full repayment of prior subsidies. To conclude otherwise would conflict with Congress' mandate that the Department's privatization methodology be ''consistent with the principles of the countervailing duty statute.'' S. Rep. No. 103–412, at 92 (1994). Those principles include prohibitions against (1) focusing on subsequent events, (2) analyzing alleged effects of subsidies, (3) granting offsets not included in the exclusive statutory list, and (4) valuing subsidies based on the cost-to-government standard. Some in this first group of commenters asserted that the logical reading of Congress' instruction to evaluate change-in-ownership transactions on a case-by-case basis is to determine whether a privatization or sale involving a productive unit elicits some non-commercial activity, *i.e.*, whether under- or overpayment for the productive unit has occurred. In the case of underpayment, the Department should find that additional subsidies have been bestowed; in the case of overpayment, the Department should find that certain prior subsidies have been repaid.

In contrast to these arguments, the second group of commenters asserted that the Department should issue regulations establishing a rebuttable presumption that the arm's-length sale of a firm, including a government-owned enterprise, at a price that reflects the current market value of its assets, in most cases extinguishes any previously received subsidies. This group argued that Congress' instruction to examine change-in-ownership transactions on a case-by-case basis indicates that the URAA contemplates extinguishment of prior subsidies, at least in certain circumstances. In these commenters' view, the arm's-length sale of a company at full market value is such a circumstance, because the market price takes into account prior subsidies, and the benefit is, therefore, eliminated. However, if the price paid for the firm does not reflect full market value, the question of a continuing benefit can reasonably be raised. According to several of these commenters, any other approach would be counterproductive, because it would discourage potential buyers from bidding on subsidized government-owned enterprises about to be privatized. One commenter further stressed that restructuring of, and foreign investment in, countries such as those in Eastern Europe, may be inhibited, which is a concern for U.S. investors and the United States' wider economic and political interests.

One member of this group of commenters found support for the proposition that an arm's-length sale at fair market value must extinguish prior subsidies with the following statutory analysis. The commenter claimed that the URAA requires the Department to determine whether and to what extent government financial contributions confer a benefit on the production or sale of the investigated merchandise in each CVD proceeding. Such a determination is based on the nature of the subsidy benefit, which is the artificially reduced cost of an input used in the production of the merchandise. Thus, where the subsidy is provided for a specific use, *e.g.*, the acquisition of capital assets, the continuing subsidy benefit is the reduced cost of that asset allocated over the useful life of the asset. Where government financial contributions are not tied to specific applications, as in the case of an equity infusion, the Department should normally view the money itself as the continuing subsidy benefit.

In light of this, the commenter contended that the Department's privatization analysis must first examine what inputs were acquired by the subsidy recipient at an artificially reduced cost. Then, the Department must determine whether the cost for those inputs was artificially reduced for the privatized company as well. According to this commenter, where the privatization transaction occurs at arm's-length and at fair market value, the privatized company would not continue to benefit from the past subsidies. Similarly, where government financial contributions are not tied to specific applications, meaning that the money itself is the continuing subsidy benefit, the Department's focus should be on the price and terms of the privatization transaction. If the privatization of the company, including all its physical and financial assets, was at fair market value, the Department would not find any benefit to have passed through, because the privatized company would not be operating with any capital for which it paid less than market value. According to this commenter, if the privatization of a firm were at full market value, the new owners of the company have paid for all of the inputs at market value. Therefore, the privatized firm no longer operates with inputs acquired at a cost that is less than what would have been paid without a government financial contribution.

This commenter stressed that there are several possible exceptions to this rule. For example, where an asset would not have been created or acquired absent the government financial contribution, and where the creation or acquisition of the asset was not economically viable, the Department may conclude that the very existence of the asset is the continuing benefit and not the reduced costs of the asset. In such an instance, the benefit could be deemed to continue, even after a full market privatization. However, this commenter asserted that this would represent an exception to the general rule.

This commenter rejected the argument that this analysis is tantamount to an ''effects'' test. If a subsequent event does in fact eliminate subsidization, limited Departmental resources should not prevent examination of that event. The commenter stated that, in the case of

[4] In support of this proposition, the commenter cites *Community Guidelines on State Aid for Rescuing and Restructuring Firms in Difficulty*, O.J. Eur. Comm. No. C283/2 at 283/4 (September 19, 1997) (''The assessment of rescue or restructuring aid is not affected by changes in the ownership of the business aided. Thus, it will not be possible to evade control by transferring the business to another legal entity or owner.'')

subsidies not tied to any particular use, the only event that the Department would need to consider is one which would eliminate the artificially reduced cost of the company's inputs as a whole. The sale of an entire company for market value is such an event, in the commenter's view. Where a subsidy is tied to a particular use, the only event that the Department would need to consider is one that would affect or eliminate the benefit arising from that specific use. Moreover, according to the commenter, in numerous contexts the Department traces the use of a subsidy. These include instances where subsidies are provided for certain uses that may be greenlighted or that may benefit a company over time, *i.e.*, non-recurring subsidies.

Most commenters also found fault with the Department's existing repayment or reallocation methodology, under which pre-sale subsidies are partially repaid to the seller as part of the purchase price. Several commenters argued that the repayment/reallocation methodology should be abandoned, because it is not defensible, economically or legally. According to these commenters, the repayment/reallocation methodology violates the offset provision of the statute (section 771(6) of the Act), because this provision does not include repayment or reallocation of subsidies in the context of a privatization at fair market value. Moreover, a fair-market-value privatization does not offset the distortion caused by government subsidies, a fact recognized by EU law, according to which subsidy repayment can occur only if the illegal aid is returned.[5] According to these commenters, the repayment/reallocation methodology is also inconsistent with the Department's and the Court's ''conceptual model of subsidies,'' which presumes that subsidies distort market processes and result in a misallocation of resources (*citing Carbon Steel Wire Rod from Poland*, 49 FR 19374, 19375 (May 7, 1984), and *Georgetown Steel Corp.* v. *United States*, 801 F.2d 1308, 1315–16 (Fed. Cir. 1986) (''*Georgetown Steel*''). Under this model, repayment or reallocation can only occur if an equivalent ''distortion'' takes place, that is, a return of the illegally provided resources from the subsidized entity. This does not occur, the commenters emphasized, in a fair-market privatization. Further, the repayment/reallocation methodology is inconsistent with the benefit-to-recipient standard because it is based on the assumption that the government was paid more money upon privatization than it would have received absent the subsidy, a fact that is only relevant under a cost-to-government standard. These commenters stated that while the cost of the subsidy to the government may be diminished in a fair-market privatization, the value of the subsidy to the recipient is unchanged. According to these commenters, by finding that repayment/reallocation occurs in a fair-market-value transaction, the Department is encouraging subsidization. This violates the basic purpose of the CVD law, which is intended to deter subsidization. These commenters also argued that the Court of International Trade's (''CIT'') decision in *British Steel plc* vs. *United States*, 879 F. Supp. 1254, 1277 (CIT 1995), *aff'd in part and rev'd in part*, 127 F.3d 1471 (Fed. Cir. 1997), casts doubt on the permissibility of finding repayment in the context of a privatization at fair market value. One commenter also argued that the repayment/reallocation methodology is inconsistent with the URAA and the SAA's instruction to examine carefully the facts of each case in determining the effects of privatization on prior subsidies, because it is an automatic rule that always assumes a portion of the purchase price represents repayment or reallocation of prior subsidies.

Another commenter asserted that the repayment/reallocation methodology does not capture the full extent of the benefit bestowed upon a company because it does not capture the benefit from the government's assumption of risk. According to this commenter, to encourage investment in risky industry sectors, governments can assume some of the risk, for example by providing start-up capital. If the government privatizes the company, the trade-distorting effect of the government action continues, and the production of the company continues to enjoy the benefit of the government subsidy. This commenter argued that if the Department maintains the repayment/reallocation methodology, it should also consider whether the industry could attract private capital at the time the subsidies were provided. Where an industry could not attract private capital, the Department should find that all subsidies passed through after privatization. Alternatively, if the Department finds that privatization can extinguish or repay a subsidy, this should only be permitted when the price paid for the privatized company is equal to the net worth of the firm without the subsidy, plus the residual value of the subsidy. For example, a firm receives a $1 million countervailable subsidy, which the Department allocates over 10 years. In year two, the residual value of the subsidy (for countervailing duty purposes) is $900,000. In that year, the firm is privatized and its pre-subsidy assets are valued at $18 million. If the firm is sold for $18.9 million, the subsidy would be repaid. If it is sold for $18 million, the subsidy would pass through in its entirety. According to this commenter, this approach recognizes that the buyer of a firm is paying for the assets as well as the residual value of the subsidy, while the current repayment/reallocation approach fails to do this.

Another modification suggested by some commenters to the repayment/reallocation methodology is to alter the calculation of ''gamma,'' which measures the proportion of the purchase price that the Department considers to be repaid to the government in a privatization transaction, or reallocated to the previous owner in a private-to-private sale. This commenter stated that the gamma ratio should be calculated using the total remaining value of the subsidies at the time of the privatization to the company's total net worth in the same year, rather than using the average of the historical values of the subsidies to the firm's net worth starting in the years the subsidies were received. This approach would give more weight to subsidies received immediately preceding privatization.

Finally, several commenters addressed the issue of whether subsidies provided in anticipation, or in the process, of privatization should be given special consideration. On the one hand, one commenter argued that subsidies provided shortly before, and in preparation for, the sale, such as debt forgiveness, asset revaluations, tax breaks, and other measures to ''clean up'' balance sheets, should be considered new subsidies and not ''pre-privatization'' subsidies. According to this commenter, under no circumstance should these subsidies be eliminated as part of the privatization transaction. On the other hand, another commenter suggested that steps taken by a government just prior to privatization to make a company more ''saleable,'' such as closing inefficient operations, should not by themselves be considered

[5] *Citing Commission notice pursuant to Article 93(2) of the EC Treaty to other Member States and interested parties concerning aid which Germany has granted to Fritz Egger Spanplattenindustrie GmbH & Co. KG at Brilon*, O.J. Eur. Comm. No. C369/6, 369/8–369/9 (1994), and *Agreement Respecting Normal Competitive Conditions in the Commercial Shipbuilding and Repair Industry*, opened for signature December 21, 1994, art. 8, ¶ 5.

subsidies that pass through to the privatized company.

Except for the comments on our current repayment/reallocation methodology and the comments on subsidies given in the process of privatization, which we address below, the commenters have presented two general positions with respect to the impact of changes in ownership on subsidies bestowed prior to the sale: (1) That the arm's-length sale of a company at fair market value has no effect on the countervailability of prior subsidies; and (2) that the fair-market sale of a firm, in general, excuses the purchaser from any CVD liability for prior subsidies. While the commenters suggest possible exceptions to these general positions that theoretically would give effect to the statutory direction to consider the facts of each case, the exceptions are narrowly defined to fit improbable circumstances. In most cases, the proposals, with their narrowly defined exceptions, would lead to either total pass-through or total extinguishment of pre-sale subsidies.

Although we see merit in some of the arguments presented, we believe that adopting either of these extreme positions would require a strained interpretation of the statute. The statute, SAA, and legislative history plainly state that the arm's-length sale of a firm does not by itself require a determination that prior subsidies have been extinguished. *See* section 771(5)(F), SAA at 928, and S. Rep. No. 103–412, at 92 (1994); *see also* the discussion in the 1997 Proposed Regulations at 8821. Moreover, we continue to disagree with the claim that in order to impose countervailing duties on a privatized or post-sale firm, the Department must affirmatively demonstrate *how* subsidies continue to benefit the subject merchandise after the fair-market sale of a company. *See* GIA at 37263. Our refusal to read a continuing competitive benefit test (sometimes called an ''effects test'') into the CVD law was upheld by the Federal Circuit in *Saarstahl* v. *United States*, 78 F.3d 1539 (Fed. Cir. 1996) (''*Saarstahl*'') and *British Steel plc* v. *United States*, 879 F. Supp. 1254 (CIT 1995), *aff'd in part and rev'd in part* 127 F.3d 1471 (Fed. Cir. 1997) (''*British Steel*''). As the CIT explained in *British Steel plc* v. *United States*, ''Commerce has consistently maintained that it does not measure the effects of subsidies once they have been determined by Commerce. In other words, whether subsequent events mitigate these effects is irrelevant. This Court, for the purposes of this proceeding, has no quarrel with that practice.'' 879 F. Supp. at 1273. Further, section 771(5)(C) of the Act specifically states that the Department ''* * * is not required to consider the effect of the subsidy in determining whether a subsidy exists * * *'' *See also Certain Hot-Rolled Lead and Bismuth Carbon Steel Products from the United Kingdom*, 61 FR 58377, 58379 (November 14, 1996) (*1994 Administrative Review UK Lead Bar*).

In this regard, it is useful to clarify what we mean in saying that we would not attempt to determine whether a subsidy had any ''effect'' on the recipient, or whether ''subsequent events'' might have mitigated or eliminated any potential effects from the subsidy. The term ''effect,'' as used in the statute and SAA, and the term ''subsequent events,'' as used by the Courts, refer to the question of whether a subsidy confers a competitive benefit upon the subsidy recipient or its successor. There is no requirement that the Department determine whether there is a competitive benefit, as is made clear in the SAA (at 926):

> * * * the new definition of subsidy does not require that Commerce consider or analyze the effect (including whether there is any effect at all) of a government action on the price or output of the class or kind of merchandise under investigation or review.

In the course of the 1993 steel investigations, certain respondents argued that: (1) A subsidy cannot be countervailed unless it bestows a ''competitive benefit'' on merchandise exported to the United States; (2) the arm's-length sale of a subsidized company eliminates any competitive benefit from prior subsidies (because the price paid for the company includes payment for any continuing value the subsidies might have); and (3) therefore, the arm's-length sale of a subsidized company frees the new owner from any countervailing duty liability for prior subsidies to that company. We rejected this argument (*see* GIA at 37260–61), explaining that the statute did not require that a subsidy bestow a competitive benefit on imports to the United States as a condition of liability for countervailing duties. Just as we would not attempt to determine whether a subsidy conferred a competitive benefit on the original recipient in the first place (that is, whether the subsidy had any effect on the original recipient's subsequent performance (usually an effect upon its output or prices)), we would not attempt to determine whether any potential competitive benefit continued with respect to the new owner in light of a subsequent event such as a change in ownership. The Federal Circuit upheld this position in *Saarstahl* and *British Steel*. As one commenter noted, the law is concerned with the benefit originally received, not with what the recipient does with it.

When we say we do not consider ''subsequent events'' in the calculation of a subsidy, we generally are referring to events that arguably affect the subsequent performance (normally in terms of output or prices) of the subsidy recipient or its successor. We have never implied, however, that no subsequent event could ever affect the allocation of a subsidy. The Department may consider whether government or private actions occurring after the receipt of a subsidy should result in the reallocation of a subsidy as long as there is no tracing of the uses of the subsidy or the effect of the subsidy on the output or price of subject merchandise. Clearly, a post-subsidy change in ownership is an event that occurs subsequent to the receipt of the subsidy, and we have reallocated subsidies based on changes in ownership. It is entirely appropriate and consistent with the statute to consider whether a change in ownership is an appropriate occasion to reallocate countervailing duty liability for prior subsidies to the company that is sold. Section 771(5)(F) of the Act implies that such an exercise is warranted and, as explained above, a post-subsidy change in ownership is not the type of subsequent event or effect that is envisioned in section 771(5)(C).

The language of section 771(5)(F) of the Act purposely leaves much discretion to the Department with regard to the impact of a change in ownership on the countervailability of past subsidies. Specifically, a change in ownership neither requires nor prohibits a determination that prior subsidies are no longer countervailable. Rather, the Department is left with the discretion to determine, on a case-by-case basis, the impact of a change in ownership on the countervailability of past subsidies. The SAA at 928 specifically states that ''Commerce retain[s] the discretion to determine whether, and to what extent, the privatization of a government-owned firm eliminates any previously conferred countervailable subsidies. . . .''

The repayment/reallocation methodology that we currently use achieves this objective. *See 1994 Administrative Review UK Lead Bar* at 58379–80. Depending on the amount of prior subsidies in relation to the company's net worth and the amount paid for the company, we might find that a considerable amount of prior subsidies passes through or that a

significant amount of subsidies has been repaid to the government or reallocated to the previous owner. Nonetheless, we are not codifying the current repayment/reallocation methodology. This methodology has been heavily criticized by various parties, and we recognize that it may not provide sufficient flexibility to deal with the ''extremely complex and multifaceted'' nature of changes in ownership. *See* SAA at 928. We will address comments related to the calculation of gamma in the context of specific cases.

While we have developed some expertise on the issue of changes in ownership over the past five years, and the comments submitted in response to the 1997 Proposed Regulations have provided us with additional ideas to consider, we do not think it is appropriate to promulgate a regulation on this issue at this time. As noted above, many of the ideas presented by the commenters would move us in the direction of adopting extreme positions. Another factor weighing against codification of any privatization methodology at this time is that the Courts may, in the course of their review of the current methodology, adopt an interpretation of the law that would either validate or overturn some of the options that we have considered, including those proposed by the commenters. Finally, given the rapidly changing economic conditions around the world, particularly with respect to the issue of state ownership, we believe we should continue to develop our policy in this area through the resolution of individual cases. These changing economic conditions pose additional challenges in developing a unified framework in which to analyze change-in-ownership transactions. In the 1997 Proposed Regulations, we identified many of these additional issues and new challenges that may warrant consideration in this context and raised questions about them. However, it is our view that the comments we received did not sufficiently address many of these concerns.

An additional issue that merits further discussion concerns subsidies received just prior to, or in conjunction with, the privatization of a firm. While we have not developed guidelines on how to treat this category of subsidies, we note a special concern because this class of subsidies can, in our experience, be considerable and can have a significant influence on the transaction value, particularly when a significant amount of debt is forgiven in order to make the company attractive to prospective buyers. As our thinking on changes in ownership continues to evolve, we will give careful consideration to the issue of whether subsidies granted in conjunction with planned changes in ownership should be given special treatment.

Our decision not to include a provision on changes in ownership in these Final Regulations does not preclude us from issuing such a regulation at a later date. We will continue to examine this issue and consider whether an alternative analytical framework can be developed that addresses the variety of change-in-ownership scenarios we have encountered and that, like the present methodology, satisfies Congressional intent that we examine changes in ownership on a case-by-case basis. In the interim, we will continue to apply our current methodology for ongoing CVD cases and carefully examine the facts of each case. However, we will consider whether modifications to the methodology may be appropriate.

Section 351.502

Section 351.502 deals with the ''specificity'' of domestic subsidies. Unlike its predecessor, § 355.43 of the 1989 Proposed Regulations, § 351.502 does not contain a ''general'' specificity test. As we noted in the preamble to the 1997 Proposed Regulations, section 771(5A) of the Act and the SAA provide much more detail and clarity regarding the application of the ''specificity test'' than did the prior statute and its legislative history. Thus, on the subject of specificity, there are far fewer interpretative gaps for the Department to fill than there were in 1989 and, thus, less need for regulations.

We received numerous comments arguing that we should codify the policies articulated in the preamble to the 1997 Proposed Regulations, especially those dealing with sequential analysis, purposeful government action, characteristics of a ''group,'' and integral linkage. These commenters claimed that even where the SAA is clear on a particular point, it is unclear how the Courts will view the SAA. In their opinion, detailed specificity regulations would prevent costly litigation of these issues.

We have continued to limit § 351.502 to those aspects of the specificity test that are not addressed explicitly in the statute or the SAA. Section 102(d) of the URAA provides that the SAA ''shall be regarded as an authoritative expression by the United States concerning the interpretation and application of (the Agreements and the URAA) in any judicial proceeding in which a question arises concerning such interpretation or application.'' 19 U.S.C. § 3512(d). Therefore, we see no need to repeat this principle. However, in reviewing the comments and the relevant provisions of the statute and the SAA, we have identified particular issues on which the SAA may usefully be clarified. In particular, we found that the statute and the SAA do not fully address sequential analysis and the characteristics of a group. Accordingly, we have included final regulations on these topics.

Sequential analysis: Paragraph (a) is a new paragraph which addresses the ''sequential approach'' to specificity. We received several requests that we codify the sequential approach. Under this approach, if a subsidy is *de jure* specific or meets any one of the enumerated *de facto* specificity factors, in order of their appearance in section 771(5A)(D)(iii) of the Act, further analysis is unnecessary and is not undertaken. In support of their position, these commenters emphasized the language contained both in section 771(5A)(D)(iii) of the Act and the SAA that a subsidy will be considered specific ''if one or more'' of the factors exists. *See* SAA at 931. Furthermore, these commenters contended, the SAA and the legislative history of the URAA make clear that the specificity test was intended to be generally consistent with the Department's previous practice, a practice that included this sequential approach. SAA at 929–31; S. Rep. No. 103–412, at 93–94 (1994).

In opposition to this view, other commenters maintained that the sequential approach contradicts the SAA, because the SAA states that the Department will ''seek and consider information relevant'' to all four of the *de facto* specificity factors. SAA at 931. Moreover, these commenters maintained, the language in the SCM Agreement requires that all of the *de facto* specificity factors be considered and that any specificity determination ''shall be clearly substantiated on the basis of positive evidence.'' Articles 2.1(c) and 2.4 of the SCM Agreement.

The apparent disagreement over the interpretation of the SAA regarding the use of a sequential approach indicates that it is necessary to clarify our position in a regulation. Therefore, § 351.502(a) provides that the *de facto* specificity factors will be examined in sequence, in order of their appearance in section 771(5A)(D)(iii) of the Act, and that the Department may find a domestic subsidy to be specific based on the presence of a single *de facto* specificity factor. For example, the Department will first look to see if there is a limited number of users. If the number of users is limited, we will look

no further. In accordance with the SAA, the Department will continue its practice of collecting information regarding each of the four *de facto* specificity factors; however, our analysis of the issue will stop if we determine that a single factor justifies a finding of specificity. As for the SCM Agreement, none of the provisions cited precludes a finding of specificity based on the presence of a single factor. Moreover, a finding that a certain industry receives disproportionate amounts under a particular government program, for example, constitutes positive evidence of specificity even if there are numerous users of the program and there is little discretion in awarding benefits.

Discretion: In endorsing the use of a sequential approach in the preamble to the 1997 Proposed Regulations, we stated, ''with the exception of the government discretion factor, the Department may find a domestic subsidy to be specific based on the presence of a single *de facto* specificity factor.'' (1997 Proposed Regulations at 8824.) Certain commenters objected to the exception of the discretion factor, arguing that the statute accords the exercise of government discretion equal status with the other *de facto* specificity factors. They asked the Department to clarify that the Department may find a subsidy to be specific solely based on the degree of discretion exercised in the administration of a subsidy program.

There appears to be a great deal of confusion and controversy over the role of the fourth factor, discretion, in the finding of *de facto* specificity. Based on the comments received and a review of the statute and SAA, we are elaborating on the statements we made in the preamble to the 1997 Proposed Regulations. As stated in the 1997 Proposed Regulations, we do not believe that a finding of specificity may be based solely on the fact that some measure of discretion may have been exercised in the administration of a subsidy program. This position is consistent with the SAA, which states that if a subsidy program is broadly available and widely used and there is no evidence of dominant or disproportionate use, the mere fact that government officials may have exercised discretion in administering the program is insufficient to justify a finding of specificity. SAA at 931.

Based on our experience in administering the CVD law, some measure of administrative discretion exists in the operation of almost every alleged subsidy program. At the most basic level, an administrator of a program typically must exercise judgment or discretion in evaluating the facts and merits of an application for a subsidy to determine whether the applicant qualifies for the subsidy. If we were to find specificity based simply on the exercise of this type of discretion, the other *de facto* factors would be rendered meaningless, because virtually every subsidy program in the world could be declared specific on the basis of the discretion factor alone. This is clearly an absurd result and could not have been the intent of Congress.

Instead, section 771(5A)(D)(iii)(IV) of the Act provides that a subsidy is specific if:

> The manner in which the authority providing the subsidy has exercised discretion in the decision to grant the subsidy indicates that *an enterprise or industry is favored over others.* (Emphasis added.)

This language does not focus on discretion alone. Rather, it states that discretion is relevant only to the extent that it is exercised in a manner that favors one enterprise or industry over others. This distinction is important because it supports the statements made in the SAA and the position we are taking in these regulations. Haphazard, random, or purposeless discretion cannot by itself indicate specificity. Only discretion that shows favoritism toward some enterprises or industries over others can inform the question of specificity. In the Department's experience, favoritism generally will manifest itself as one of the first three *de facto* factors: A limited number of users, dominant users, or one or a few users receiving a disproportionate amount of the subsidy. For example, administrators of a program could exercise discretion in selecting some industries instead of others as beneficiaries. If the selected industries constituted a limited number of industries, there would be specificity. Similarly, if benefits were distributed such that there was a predominant user or such that certain users received disproportionate benefits, there would be specificity. However, if the selected industries constituted more than a limited number of industries, if there were no dominant users or disproportionate benefits to certain users, or if there were no other indication that one or a group of enterprises or industries was favored over others, the program would not be specific.

As indicated in the SAA at 931, the discretion factor is generally more valuable as an analytical tool that enhances the analysis of the other *de facto* specificity factors and criteria. The example given in the SAA is the case of a new subsidy program for which there have been few applicants and few recipients. In accordance with section 771(5A)(D)(iii) of the Act, in evaluating the four *de facto* factors, the Department must take into account ''* * * the length of time during which the subsidy program has been in operation.'' In the case of a new program, the first three factors—limited number of users, dominant user, or disproportionately large user—may provide little or misleading indication regarding whether the program is *de facto* specific. Therefore, the manner in which authorities have exercised their discretion in the early days of a new program (*e.g.,* by excluding certain applicants and limiting the benefit to a particular industry) might be more useful for the Department in making a specificity determination. *See* SAA at 931.

Discretion can also come into play where evidence relating to the first three factors is inconclusive. As an example, where the number of users is borderline, discretion may help to inform whether there is specificity. In this situation, the factors we might consider in analyzing the relevance of discretion include the number of applicants that are turned down, the reasons they are turned down, and the reasons successful applicants are chosen.

Characteristics of a ''group'': New paragraph (b) clarifies the Department's position regarding whether the Department must examine the ''actual make-up'' of a group of beneficiaries when performing a specificity analysis. Citing *PPG Industries, Inc.* v. *United States,* 978 F.2d 1232, 1240–41 (Fed. Cir. 1992) (''*PPG II*''), one group of commenters argued that, to be consistent with judicial precedent, the Department must undertake such an analysis. According to these commenters, if a group of recipients does not share similar characteristics but, instead, consists of companies in a variety of industries, the Department cannot conclude that the subsidy in question is limited to a ''group of industries.'' Moreover, they argued, nothing in the Act or the SAA requires the Department to ignore the characteristics of the group receiving the benefits from an alleged subsidy program.

Other commenters argued that the Department can identify a ''group'' of subsidy recipients without regard to any shared characteristics of the individual group members. According to these commenters, a proper understanding of what may constitute a specific ''group of industries'' flows directly from the

purpose of the specificity test as articulated in *Carlisle Tire & Rubber Co.* v. *United States*, 564 F. Supp. 834 (CIT 1983) (''*Carlisle*''); namely, that subsidy recipients should be considered a specific group unless the recipient industries are numerous and distributed very broadly throughout the economy. Moreover, these commenters maintained that the Department has on several occasions found subsidy programs specific even when the ''group'' of recipients has not shared common characteristics. *See, e.g., Steel Wheels from Brazil*, 54 FR 15523, 15526 (April 18, 1989) and *Cold-Rolled Carbon Steel Flat-Rolled Products from Korea*, 49 FR 47284, 47287 (December 3, 1984).

As noted in the preamble to the 1997 Proposed Regulations, we disagree with the first set of comments. Section 771(5A)(D) of the Act provides that a subsidy may be found to be specific if it is limited to a ''group'' of enterprises or industries. There is no requirement that the members of a group share similar characteristics. The purpose of the specificity test is simply to ensure that subsidies that are distributed very widely throughout an economy are not countervailed. There is no basis for adding the further requirement that subsidies that are not widely distributed are also confined to a group of enterprises or industries that share similar characteristics. *See, e.g., Certain Refrigeration Compressors from the Republic of Singapore*, 61 FR 10315 (March 13, 1996).

Assuming, *arguendo*, that *PPG II* is relevant under the new law, this decision upheld the Department's determination that the program in question was not specific. To put *PPG II* in its proper context, it is necessary to understand the facts presented in the underlying CVD case. In that case, there were numerous enterprises that used the program under investigation. Therefore, when looked at in terms of the number of enterprises, the actual recipient enterprises did not appear to be limited. However, this conclusion says nothing about whether the number of industries that received benefits under the program was limited. To answer this question, the Department (and the Court) correctly focused on the makeup of the users. If the numerous enterprises that received benefits had comprised a limited number of industries, then the program would have been specific. However, because the users represented numerous and diverse industries, the program was found not to be specific. There is no basis in *PPG II* or in the language of section 771(5A)(D) of the Act for concluding that there is a requirement that the limited users also share similar characteristics. Moreover, such a requirement would undermine the purpose of the specificity test as articulated in the SAA.

Several commenters have urged the Department to codify our position with respect to this issue. Because this issue is not addressed in the statute or the SAA, we have adopted this suggestion. Accordingly, § 351.502(b) provides that the Secretary is not required to determine whether there are shared characteristics among enterprises or industries that are eligible for, or actually receive, a subsidy in determining whether that subsidy is specific.

Integral linkage: Paragraph (c) is a new paragraph which sets out our revised test for considering two or more subsidy programs to be ''integrally linked.'' Section 355.43(b)(6) of the 1989 Proposed Regulations provided that, for purposes of applying the specificity test, the Department would consider two or more subsidy programs as a single program if the Secretary determined that the programs were ''integrally linked.'' Section 355.43(b)(6) also set forth factors to be considered in making this determination.

In the 1997 Proposed Regulations, we opted not to incorporate § 355.43(b)(6) into these regulations. We noted that claims of integral linkage were relatively rare, and that when they did arise, we did not find the factors set forth in § 355.43(b)(6) particularly helpful. We did not, however, rule out the possibility of considering two or more ostensibly separate subsidy programs as constituting a single program for specificity purposes, and we outlined circumstances that might lead us to do so.

We received a number of comments requesting that we promulgate a regulation which allows for integral linkage. Two commenters argued that, in addition to the factors discussed in the preamble, the regulation should re-codify certain of the factors found in the 1989 Proposed Regulations. These commenters also suggested that programs should not be considered to be integrally linked unless they were linked ''at their inception.'' These commenters asked the Department to clarify that it will view claims of integral linkage narrowly and that respondents will be required to establish that the programs are linked by clear and convincing evidence. Other commenters argued that the factors enumerated in both the 1989 Proposed Regulations and in the preamble to the 1997 Proposed Regulations are too restrictive and that any integral linkage test should not be applied narrowly.

We have given further consideration to our earlier decision not to codify an integral linkage test. In light of the interest in this issue, and the fact that we have had experience with a regulation on this topic, we have concluded that it would be beneficial to parties to promulgate a rule describing when two or more separate programs may be integrally linked and treated as one program for specificity purposes. We have not codified the 1989 rule because, as we stated in the preamble to our 1997 Proposed Regulations, we did not find the factors enumerated in that provision to be particularly useful. Instead, § 351.502(c) provides that integral linkage is possible in situations where the subsidy programs have the same purpose (*e.g.*, to promote technological innovation), bestow the same type of benefit (*e.g.*, long-term loans or tax credits), confer similar levels of benefits on similarly situated firms, and were linked at their inception.

We believe these factors are more useful for finding integral linkage than those contained in the 1989 Proposed Regulations because they require evidence of similarities in the purposes and administration of the programs which are more than coincidental. For example, where a government claims that a program is integrally linked with another program, § 351.502(c)(4), which calls for the programs to be linked at inception, requires evidence that, in establishing the most recent program, the government's clear and express purpose was to complement the other program.

As stated in the preamble to the 1997 Proposed Regulations, when an interested party believes that two or more programs should be considered in combination for purposes of the Department's specificity analysis, that party will have the burden of identifying the relevant programs and supporting its contention that the programs are integrally linked by providing information and documentation regarding the purpose, type and levels of benefit associated with the programs.

Agricultural subsidies: Paragraph (d) is based on § 355.43(b)(8) of the 1989 Proposed Regulations and is the same as § 351.502(a) of the 1997 Proposed Regulations. It provides that the Secretary will not consider a domestic subsidy to be specific solely because it is limited to the agricultural sector. Instead, as under prior practice, the Secretary will find an agricultural subsidy to be countervailable only if it is specific within the agricultural sector, *e.g.*, a subsidy is limited to livestock, or

livestock receive disproportionately large amounts of the subsidy. See, *e.g., Lamb Meat from New Zealand,* 50 FR 37708, 37711 (September 17, 1985).

One commenter suggested that the Department should abandon the special specificity rule for agricultural subsidies, citing the fact that under section 771(5B)(F) of the Act and Article 13(a) of the WTO Agreement on Agriculture, so-called ''green box'' agricultural subsidies are non-countervailable. With respect to this comment, we note that the Department's application of the specificity test to agricultural subsidies was upheld in *Roses, Inc.* v. *United States,* 774 F. Supp. 1376 (CIT 1991) (''*Roses*''). Given the absence of any indication that Congress intended the ''green box'' rules to change the Department's practice or to overturn *Roses,* we are retaining the special specificity rule for agricultural subsidies.

Subsidies to small- and medium-sized businesses: Paragraph (e) is based on § 355.43(b)(7) of the 1989 Proposed Regulations, and continues to provide that the Secretary will not consider a subsidy to be specific merely because it is limited to small or small- and medium-sized firms. Instead, as under prior practice, the Secretary will find such a subsidy to be countervailable if, either on a *de jure* or a *de facto* basis, the subsidy is limited to certain small or small- and medium-sized firms. As in the case of the special specificity rule for agricultural subsidies, there is no indication that Congress intended to alter this aspect of the Department's specificity practice. We received no comments regarding this rule.

Disaster relief: Paragraph (f) provides that the Secretary will not regard disaster relief as a specific subsidy if the relief constitutes general assistance available to anyone in the affected area. Although paragraph (f) has no counterpart in the 1989 Proposed Regulations, the rule contained in paragraph (f) has been part of the Department's specificity practice since *Certain Steel Products from Italy,* 47 FR 39356, 39360 (September 7, 1982), in which the Department stated that ''[d]isaster relief is not selective in the same manner as other regional programs since there is no predetermination of eligible areas and no part of the country, and no industry, is excluded from eligibility in principle.'' However, before declaring a subsidy to be non-specific under paragraph (f), the Department would have to be satisfied that the subsidy in question was, in fact, *bona fide* disaster relief. *See Certain Steel Products from Italy,* 58 FR 37327, 37332 (July 9, 1993). We received no comments regarding this rule.

Purpose of the specificity test: Some commenters requested that the Department restate in the regulations the policy rationale behind the specificity test. According to these commenters, the underlying purpose of the specificity test is to identify those domestic subsidies that confer a competitive advantage and thereby distort international trade. Other commenters pointed out that the new statute expressly states that the Department is not required to examine the effects of a subsidy or establish that the subsidy has any effect at all. These commenters, citing the reference to the *Carlisle* decision in the SAA, maintain that the sole purpose of the specificity test is to ''winnow out only those foreign subsidies which truly are broadly available and widely used throughout an economy.'' SAA at 929–30.

In our view, the language from the SAA cited above makes the purpose of the specificity test abundantly clear. Given the clarity of the SAA on this point, the authoritative nature of the SAA (*see* 19 U.S.C. 3512(d)), and our general reluctance to issue regulations that merely repeat the statute or the SAA, we do not consider it appropriate to issue a regulation that restates the purpose of the specificity test.

Use of presumptions: Some commenters suggested that in applying the specificity test, the Department should employ certain presumptions. These commenters maintained that, when investigating a domestic subsidy program (and when considering whether to initiate an investigation of such a program), the Department should presume that the foreign government in question exercises discretion in the administration of the program, and that the program is specific. These commenters maintained that, because information regarding applications and approvals generally is not available to petitioners prior to the filing of a petition, the burden should be on respondent interested parties to provide such information and to rebut the presumption of specificity. One commenter also suggested that the Final Regulations should state that a previous finding that a subsidy was *de facto* non-specific should have no relevance when the same subsidy program is alleged in a new investigation involving different merchandise and different facts.

Other commenters argued that there is no legal basis for making presumptions regarding specificity. With respect to *de facto* specificity, the SAA states that the Department is obligated to ''seek and consider'' information relevant to each of the four factors listed in section 771(5A)(D)(iii) of the Act. SAA at 931. One of these commenters also asserted that a petitioner alleging that a subsidy is specific should be required to provide a reasonable amount of information supporting the allegation.

As was true under the law prior to the URAA, we note that a petition to initiate an investigation of alleged domestic subsidies must provide reasonably available information supporting the allegation that the subsidy is specific. *See* section 702(b) of the Act. On the other hand, we recognize that because detailed information regarding the distribution of program benefits usually either is not published or is not widely available, information supporting specificity often is not reasonably available to a petitioner at the time a petition is filed. Therefore, in deciding whether to include alleged domestic subsidies in our investigation, we carefully consider the information the petitioner has put forward, the reasons that more information may not be available, and any arguments the petitioner makes regarding the specificity of the program. Because the types of allegations and information available will vary from case to case, it is not possible to state a general rule for accepting or rejecting specificity allegations. However, we believe that the threshold we have used in the past for including alleged subsidies in CVD investigations has been sufficient to ensure that all potentially countervailable subsidies are investigated. We intend to continue employing this initiation threshold.

In this regard, we note that when a subsidy program has been previously investigated and found to be non-specific, it would be a waste of administrative resources to re-investigate that program without a reasonable basis to believe that the facts supporting the previous finding have changed. In situations where a previous finding may be pertinent to one industry, *e.g.,* that the paper clip industry did not receive dominant or disproportionate benefits under a particular program, petitioners seeking investigation of benefits under that program to the staple industry should allege that the program has changed or that the situation of the staple industry differs, and they should support their allegation with reasonably available information.

Where domestic subsidy programs are included in an investigation, we will not presume such programs are specific. Instead, we will seek in our questionnaire all of the information

necessary to apply the specificity test according to section 771(5A)(D) of the Act. Based on our analysis of the information provided in the questionnaire responses, verification, and other information that may be collected, we will make the necessary specificity determination. If a respondent refuses to provide the information requested by the Department to conduct its specificity analysis, we may draw adverse inferences in the application of ''facts available.'' *See* section 776(b) of the Act. However, the use of an adverse inference in these situations is not the same thing as relying on a rebuttable presumption of specificity.

Purposeful government action: In our 1997 Proposed Regulations, we noted that certain commenters, citing such cases as *Saudi Iron and Steel Co. (Hadeed)* v. *United States*, 675 F. Supp. 1362, 1367 (CIT 1987), maintained that a finding of specificity does not require a finding of targeting or some other sort of purposeful government action that limits the number of subsidy program beneficiaries. They cited the statute and its legislative history for the proposition that the Department should deem irrelevant the fact that program usage may be limited by the ''inherent characteristics'' of the thing being provided by the government. SAA at 932; S. Rep. No. 103–412 at 94 (1994).

In the preamble to the 1997 Proposed Regulations, we agreed with these commenters, stating:

> [e]xcept in the special circumstances described in section 771(5A), *i.e.*, where respondents request the Department to take into account the extent of economic diversification in the jurisdiction of the granting authority or the length of time during which the program has been in operation, the Department is not required to explain why the users of a subsidy may be limited in number.

Several of the same commenters objected to this statement, arguing that it could be misinterpreted to mean that evidence of purposeful action is required in some instances. These commenters requested that the Department clarify, in a regulation, that purposeful government action is *never* required.

As we stated in the 1997 Proposed Regulations, the SAA and other legislative history are clear on this point. The SAA clearly indicates that the Department does not need to find ''targeting'' or ''purposeful government action'' to conclude that a domestic subsidy is specific. *See* SAA at 932 (''(E)vidence of government intent to target or otherwise limit benefits would be irrelevant in *de facto* specificity analysis''). Thus, for example, the fact that users may be limited due to the inherent characteristics of what is being offered would not be a basis for finding the subsidy non-specific. SAA at 932; S. Rep. No. 103–412 at 94 (1994). Regarding situations where the Department is asked to consider the economic diversification in the jurisdiction or the length of time during which the program has been in operation, neither purposeful government action nor targeting is required to find specificity. However, evidence indicating that the government has taken or will take actions to limit benefits to certain industries would be sufficient to find specificity.

Universe: One commenter argued that, in determining whether subsidies are specific, the Department generally should focus on the level of benefits provided to recipients, rather than the number of recipients to whom subsidies are provided. This commenter also argued that, in analyzing the level of benefits provided, the Department's point of reference should be the economy as a whole, as it was for the preferential loan programs used by the Korean steel industry in *Certain Steel Products from Korea*, 58 FR 37338 (July 9, 1993) (''*Korean Steel*''), rather than those enterprises or industries that were eligible to receive the subsidy.

For the most part, we disagree. The starting point of the Department's analysis of specificity will always be the number of users. We normally will not analyze the level of benefits provided (that is, whether the recipients were dominant or disproportionate users of the program) unless the subsidy in question was provided to numerous and diverse industries. Even in that situation, it may be impracticable or impossible to determine the relative level of benefits.

Once we have decided to analyze the level of benefits provided, our point of reference normally will be the enterprises or industries that received benefits under the program. In other words, we will attempt to determine whether one or a limited number of the recipient enterprises or industries were, in fact, dominant or disproportionate users. In certain limited circumstances, however, it may be appropriate to determine whether the benefits received by a particular enterprise or industry or group thereof were disproportionate in relation to the economy as a whole. The Department employed this approach in *Korean Steel*, because the type of subsidy under investigation—governmental use of the economy-wide banking system to direct credit to steel producers—required the broader analysis. We consider the Korean situation to be unusual compared with the majority of cases in which we have analyzed specificity. In addition, we agree that the analysis of whether an enterprise or industry or group thereof is a dominant user of, or has received disproportionate benefits under, a subsidy program should normally focus on the level of benefits provided rather than on the number of subsidies given to different industries.

Section 351.503

Section 351.503 deals with the concept of benefit. Under section 771(5)(B) of the Act and Article 1.1(b) of the SCM Agreement, a government action must confer a benefit in order to be considered a countervailable subsidy. Hence, the notion of benefit is central to the administration of the CVD law. In the preamble to the 1997 Proposed Regulations, we included a lengthy discussion of this topic. We described a benefit as being conferred when a firm pays less for an input than it otherwise would pay or receives more revenue than it otherwise would earn. Given the crucial role that benefit plays in our analysis of whether a government action confers a countervailable subsidy, we have decided to codify a final rule regarding benefit that reflects the principles outlined in the 1997 Proposed Regulations.

Paragraph (a) states that, where a specific rule for the measurement of a benefit is contained in these regulations, we will determine the benefit as provided in that rule. Where a government program is covered by a specific rule contained in these regulations, such as a program providing grants, loans, equity, direct tax exemptions, or worker-related subsidies, we will not seek to establish, nor entertain arguments related to, whether or how that program comports with the definition of benefit contained in this section.

Paragraph (b) outlines the principles we will follow when dealing with alleged subsidies for which these regulations do not establish a specific rule. In such instances, we will normally consider a benefit to be conferred where a firm pays less for its inputs (*e.g.*, money, a good, or a service) than it otherwise would pay in the absence of the government program, or receives more revenues than it otherwise would earn.

We have adopted this definition because it captures an underlying theme behind the definition of benefit contained in section 771(5)(E) of the Act and, in our estimation, reflects the fundamental principles that we have

articulated over the years with respect to programs and practices that we have determined confer either direct or indirect countervailable subsidies. One common element the four illustrative examples set forth in the statute share is that, in the overwhelming majority of cases, the recipient of a government financial contribution, income or price support, or indirect subsidy, enjoys a reduction in input costs or revenue enhancement that it would not otherwise have enjoyed absent the government action. As explained below, we are using the terms ''input'' and ''cost'' broadly.

While we believe that this definition will provide useful guidance, we recognize that there may be programs or practices not fitting the input cost reduction or revenue enhancement definition in some economic or accounting senses that may still give rise to a benefit in the sense that the program or practice is similar to the illustrative examples listed in section 771(5)(E) of the Act. For example, without attempting to create a hypothetical program or practice not yet encountered in our experience, we would argue that a program that is similar to a countervailable equity infusion constitutes a reduction in a firm's cost of capital, or that a program that is similar to a countervailable provision of a freight forwarding service constitutes a reduction in a firm's input costs. Since both practices constitute a reduction in the cost of an input, there would be a benefit. We recognize that some might take issue with whether equity or a freight forwarding service is in fact an input into subject merchandise, or whether equity or freight forwarding constitutes a cost of producing subject merchandise. Nonetheless, in these and other instances in which a program or practice contains elements similar to those in the illustrative examples in the statute, a benefit would still exist. As explained further below, when we talk about input costs in the context of the definition of benefit, we are not referring to cost of production in a strict accounting sense. Nor are we referring exclusively to inputs into subject merchandise. Instead, we intend the term ''input'' to extend broadly to any input into a firm that produces subject merchandise.

When we talk about a firm paying less for its inputs than it otherwise would pay (or receiving more revenues than it otherwise would earn), we are referring to the lower price it pays to acquire the thing provided by the government (*e.g.*, money, a good, or a service), or the increased revenue it receives as a result of a government action. We believe that the definition of benefit outlined here is consistent with the various standards (or ''benchmarks'') used to identify and measure the benefit from different subsidy programs that are contained in section 771(5)(E) of the Act and Article 14 of the SCM Agreement. For example, when the amount that a firm pays on a government-provided loan is less than what the firm ''would pay on a comparable commercial loan that the (firm) could actually obtain on the market,'' the firm's cost of borrowing money is reduced. *See* section 771(5)(E)(ii) of the Act. Similarly, when a firm sells its goods to the government and ''such goods are purchased for more than adequate remuneration,'' the firm's revenues are increased beyond what it would otherwise earn. *See* section 771(5)(E)(iv) of the Act. In neither instance need the Department do more than apply the test enumerated by the statute in order to find that a benefit has been conferred.

Paragraph (b)(2) cautions that the definition of benefit as an input cost reduction or revenue enhancement does not limit our ability to impose countervailing duties when the facts of a particular case indicate that a financial contribution has conferred a benefit, even if that benefit does not take the form of a reduction in input costs or an enhancement of revenues. We will examine the concept of benefit in this broader sense by looking to see whether the alleged program or practice contains elements similar to the examples listed in sections 771(5)(E)(i) through (iv) of the Act. We cannot possibly foresee all the types of government actions we will encounter in administering the CVD law and, hence, cannot write a definition of benefit that would be sufficiently broad to capture all possible countervailable subsidies.

In this regard, it is important to note here our practice of not applying the CVD law to non-market economies. The CAFC upheld this practice in *Georgetown Steel Corp.* v. *United States*, 801 F.2d 1308 (Fed. Cir. 1986). See also GIA at 37261. We intend to continue to follow this practice. Where the Department determines that a change in status from non-market to market is warranted, subsidies bestowed by that country after the change in status would become subject to the CVD law.

We received several comments regarding the proposed definition of benefit. Two commenters expressed the opinion that the definition is too restrictive. These parties identified examples of benefits which they believed would not be captured under the proposed definition. The first example is where a domestic purchaser is the *only* customer for an input provided by a government entity or where non-domestic purchasers are not allowed to purchase an input. In these situations, the commenter maintains that there could be a benefit even though the price paid is not less than any other domestic price. The second example is where a transaction is structured so that the firm pays market value for the input but receives other perquisites, such as a higher-quality input or additional services or goods as part of a package.

We disagree that our definition of a benefit is not comprehensive enough to include these types of scenarios. The definition of a benefit (in the absence of a specific rule for the measurement of the benefit) does not call for comparisons only to other domestic prices. Rather, it calls for a determination of whether the input costs were reduced relative to what they would be in the absence of the financial contribution. In the first example, a benefit exists to the extent that the domestic purchaser would have paid more for the input absent the government provision or absent the restrictions placed on foreign purchasers. Likewise, in the second example, if the firm would have had to pay more in order to receive the additional perquisites without the government assistance, a benefit exists. Section 351.511, governing the provision of goods and services, contains more detailed guidance on how such subsidies would be valued.

Another commenter supported the proposed definition, but urged the Department to leave itself enough flexibility so that we could find a benefit when government action enables a firm to sell a product that would not have been created but for the government assistance. For example, if the government assists in the development of a new product, this commenter asserted that the benefit is not the reduced development cost of the new product, but the continuing existence of the product.

We believe that in situations such as that described by the commenter, the existence of a benefit is directly dependent upon the nature of the financial contribution. If a financial contribution has been provided, either directly or indirectly, in a form which is specifically identified in the statute or regulations (*e.g.*, a loan, a grant, an equity infusion, etc.), we will identify and measure the resulting benefit in accordance with the rules contained in the statute and regulations. If the financial contribution takes a form

which has not been specifically dealt with in these regulations, we will identify and measure the benefit in accordance with the definition of benefit contained in paragraph (b). Moreover, as noted above, paragraph (b) provides sufficient flexibility to accommodate circumstances in which the facts of a particular case indicate that a financial contribution has conferred a benefit, even if the benefit does not take the form of a reduction in input costs or an enhancement of revenues.

Finally, one commenter objected to the following statement which was included in the preamble to the 1997 Proposed Regulations: ''By the same token, where a firm does not pay less for an input than it otherwise would pay (or its revenues are not increased) as a result of a financial contribution, it would be very difficult to contend that a benefit exists.'' This commenter argued that we should not define the types of practices which do not confer benefits as this would invite the creation and exploitation of loopholes.

We agree that we need only provide a definition of what constitutes a benefit. We believe we have given ourselves the flexibility to apply the concept of benefit in such a way that we will be able to find a benefit in situations in which the regulations do *not* contain specific rules for identifying and measuring the benefit from a particular government program or practice.

We received several comments regarding the extent to which the Department should consider the overall ''effect'' a government program has on a firm's behavior in determining whether a benefit exists. One group of commenters requested an affirmative statement preserving the Department's discretion to consider ''effects'' in appropriate circumstances. Another group of commenters urged us to renounce any use of our discretion and to state that the effects of government actions are irrelevant to the existence of a countervailable subsidy.

As we explained in the preamble to the 1997 Proposed Regulations, the determination of whether a benefit is conferred is completely separate and distinct from an examination of the ''effect'' of a subsidy. In other words, a determination of whether a firm's costs have been reduced or revenues have been enhanced bears no relation to the effect of those cost reductions or revenue enhancements on the firm's subsequent performance, such as its prices or output. In analyzing whether a benefit exists, we are concerned with what goes into a company, such as enhanced revenues and reduced-cost inputs in the broad sense that we have used the term, not with what the company does with the subsidy. Our emphasis on reduced-cost inputs and enhanced revenues is derived from elements contained in the examples of benefits in section 771(5)(E) of the Act and in Article 14 of the SCM Agreement. In contrast, the effect of government actions on a firm's subsequent performance, such as its prices or output, cannot be derived from any elements common to the examples in section 771(5)(E) of the Act or Article 14 of the SCM Agreement.

For example, assume that a government puts in place new environmental restrictions that require a firm to purchase new equipment to adapt its facilities. Assume also that the government provides the firm with subsidies to purchase that new equipment, but the subsidies do not fully offset the total increase in the firm's costs—that is, the net effect of the new environmental requirements and the subsidies leaves the firm with costs that are higher than they previously were.

In this situation, section 771(5B)(D) of the Act, which deals with one form of non-countervailable subsidy, makes clear that a subsidy exists. Section 771(5B)(D) of the Act treats the imposition of new environmental requirements and the subsidization of compliance with those requirements as two separate actions. A subsidy that reduces a firm's cost of compliance remains a subsidy (subject, of course, to the statute's remaining tests for countervailability), even though the overall effect of the two government actions, taken together, may leave the firm with higher costs. As another example, if a government promulgated safety regulations requiring auto makers to install seat belts in back seats, and then gave the auto makers a subsidy to install the seat belts, we would draw the same conclusion. In the two examples, the government action that constitutes the benefit is the subsidy to install the equipment, because this action represents an input cost reduction. The government action represented by the requirement to install the equipment cannot be construed as an offset to the subsidy provided to reduce the costs of installing the equipment.

Thus, if there is a financial contribution and a firm pays less for an input than it otherwise would pay in the absence of that financial contribution (or receives revenues beyond the amount it otherwise would earn), that is the end of the inquiry insofar as the benefit element is concerned. The Department need not consider how a firm's behavior is altered when it receives a financial contribution that lowers its input costs or increases its revenues.

If there were any doubt on this score, section 771(5)(C) of the Act eliminates it by clarifying that the ''benefit'' and the ''effect'' of a subsidy are two different things. While, as stated above, there must be a benefit in order for a subsidy to exist, section 771(5)(C) of the Act expressly provides that the Department ''is not required to consider the effect of the subsidy in determining whether a subsidy exists.'' This message is reinforced by the SAA at 926, which states that ''the new definition of subsidy does not require that Commerce consider or analyze the effect (including whether there is any effect at all) of a government action on the price or output of the class or kind of merchandise under investigation or review.''

Paragraph (c) of the new regulation further reinforces this principle by stating affirmatively that, in determining whether a benefit is conferred, the Department is not required to consider the effect of the government action on the firm's performance, including its prices or output, or how the firm's behavior otherwise is altered.

When we examine indirect subsidies, we are inquiring into whether a government is entrusting or directing a private entity to provide a reduced-cost input or enhanced revenue to a firm that produces the subject merchandise. For example, we have investigated whether below-market loans or reduced-cost goods have been provided by means of indirect subsidies. This analysis in no way implies that we are examining whether the indirect subsidy has an effect on the price or output of the subject merchandise. It merely means that we are investigating, in fulfillment of other statutory requirements, whether loans were provided on non-commercial terms or whether goods were provided for less than adequate remuneration.

In addition to those comments relating specifically to our proposed definition of a benefit, we received comments on other topics which we believe are appropriately addressed in the context of a discussion on benefits. First, one commenter objected to the absence of a regulation regarding so-called ''tiered'' programs. Tiered programs are those programs which provide varying levels of government assistance based upon differing eligibility criteria. Our longstanding practice regarding such programs has been to countervail only the difference between the assistance provided at a

non-specific level (within the meaning of section 771(5A) of the Act) and the assistance provided to a specific enterprise or industry (or group thereof). This practice was reflected in § 355.44(n) of the 1989 Proposed Regulations.

Our omission of a similar rule in this round of regulations was an oversight. To correct for this, we have added paragraph (d), which provides that where varying levels of financial contributions are provided, a benefit will be conferred to the extent that a specific enterprise or industry or group thereof receives a greater level of financial contribution than that provided at the non-specific level. The varying financial contribution levels must be set forth in a statute, decree, regulation, or other official act, and they must be clearly delineated and identifiable (*e.g.,* the investment tax credit program in *Certain Fresh Atlantic Groundfish from Canada,* 51 FR 10041 (March 24, 1986)). We note, however, that this exception cannot apply where the statute specifies a commercial test for determining the benefit, such as with respect to loans and loan guarantees.

Another related topic involves the treatment of taxes on subsidies. Typically, we have referred to this issue as the ''secondary tax consequences'' of subsidies. Section 351.527 of the 1997 Proposed Regulations stated that we would not take account of secondary tax consequences. For example, if receipt of a grant increases the amount of income tax paid by a firm, we do not reduce the amount of the benefit from the grant to reflect the higher taxes paid. In these Final Regulations, we have retained this rule and have relocated it to § 351.503(e).

We received two comments expressing support for the 1997 Proposed Regulations. One of these commenters requested that we include in the regulation the following corollary, which flows from the same basic principle: where a subsidy is exempt from income tax, we will treat the tax exemption as a separate benefit in addition to the benefit from the original subsidy. An additional commenter requested that the regulation be expanded to clarify that we will not consider any secondary consequences or effects of the granting of the subsidy outside the exclusive list of subsidy offsets designated by the statute. To this end, this commenter advocated including the list of allowable offsets in the regulations and stating that we will not consider secondary consequences of the benefit. We have not added the requested language because the statute is clear regarding what is considered to be an allowable offset. Nor have we broadened the regulation as requested by either commenter. We believe that the impact of the benefit under one subsidy program should not be considered in calculating the benefit under a separate program. However, in our experience, this question has only arisen with respect to the impact of tax programs on other programs. Therefore, a broader regulation is not necessary.

Section 351.504

Section 351.504 deals with the benefit attributable to the most basic type of subsidy, a grant. In the 1997 Proposed Regulations, paragraph (c) of this section (which was then numbered § 351.503) included our methodology for allocating over time the benefit from a grant, or the benefit from a subsidy that the Department treated as a grant. In these Final Regulations, we have broken out the allocation issues from the grant section and created a separate section (§ 351.524) which deals with the allocation of benefits to a particular time period. Therefore, § 351.504 now pertains only to grants.

As in our 1997 Proposed Regulations, paragraph (a) provides that in the case of a grant, a benefit exists in the amount of the grant. Paragraph (b) sets forth the rule for determining when a firm is considered to have received a subsidy provided in the form of a grant. This paragraph provides that the Secretary will normally consider the benefit as having been received on the date on which the firm received the grant. In these Final Regulations, we have added the word ''normally'' for reasons explained in the preamble discussion of § 351.524. Finally, paragraph (c) provides that the benefit from a grant will be allocated to a particular time period pursuant to the methodology set forth in § 351.524.

All the comments that we received regarding grants dealt with the allocation of benefits. These comments are, therefore, discussed in the preamble to § 351.524.

Section 351.505

Section 351.505 deals with loans and other forms of debt financing. Paragraph (a) deals with the identification and measurement of the benefit attributable to a loan. Paragraph (a)(1) tracks the general standard set forth in section 771(5)(E)(ii) of the Act, which directs the Department to use a ''comparable commercial loan that the recipient could actually obtain on the market'' as the benchmark in determining whether a government-provided loan confers a benefit.

Use of Effective Interest Rates: Paragraph (a)(1) restates the Department's current practice of normally seeking to compare effective interest rates rather than nominal rates in making this comparison. ''Effective interest rates'' are intended to take account of the actual cost of the loan, including the amount of any fees, commissions, compensating balances, government charges (such as stamp taxes) or penalties paid in addition to the ''nominal'' interest. However, where effective rates are not available, we will compare nominal rates or, as a last resort, nominal to effective rates, as under current practice. If the ''loan'' is a bond (*see* definition of ''loan'' in § 351.102), we normally will treat the yield on the bond as the effective interest rate.

One commenter asked that the regulations clarify that only payments legitimately made on a loan will be used when calculating the effective interest rate. The commenter urged the Department to exclude other, unrelated payments to the government which the borrower might make along with the loan payments.

We agree with this commenter that payments unrelated to the loan should not be included when we calculate the effective interest rate, but we do not believe that the regulation needs to be modified to address this concern. The preamble clearly describes the types of payments that would be included in calculating an effective interest rate. However, we will examine whether there are requirements placed on either the government loan or the benchmark loan affecting the cost of borrowing that should be factored into the calculation of the benefit amount.

Selection of Benchmark Loans and Interest Rates

Paragraphs (a)(2) and (a)(3) elaborate on the criteria for selecting the benchmark. The criteria contained in these two paragraphs are much more general (and, thus, much more flexible) than the detailed hierarchies contained in § 355.44(b) of the 1989 Proposed Regulations. The Department seldom used these hierarchies because, in practice, the information required in the 1989 Proposed Regulations was seldom available.

''Comparable commercial loan'' defined: Paragraph (a)(2) sets forth the criteria the Department normally will consider in selecting a comparable commercial loan. First, paragraph (a)(2)(i) defines the term ''comparable.'' In the preamble to the 1997 Proposed Regulations, we stated that in order to be used as a benchmark, a comparable

commercial loan should represent a financial instrument that is similar to the government-provided loan and that was taken out (or could have been taken out) at the same time. To identify a loan that is comparable to the government-provided loan, the 1997 Proposed Regulations called for primary emphasis to be placed on the structure of the loans (*e.g.*, fixed interest rate v. variable interest rate), the maturities of the loans (*e.g.*, short-term v. long-term), and the currencies in which the loans are denominated.

Several commenters maintained that it is not enough to look at the structure, maturity, and currency denomination to identify a benchmark loan that is comparable to the government-provided loan. These commenters argued that the Department should also consider the level of risk associated with the loans by comparing the security or collateral that the borrower is required to provide for each loan. One of the commenters observed that this approach would be consistent with the Department's practice in *Laminated Hardwood Trailer Flooring from Canada*, 62 FR 5201 (February 4, 1997). This commenter also noted that, while the risk element was discussed in the preamble of the 1997 Proposed Regulations, it did not appear in the regulation.

In opposition, another commenter argued that a commercial loan should be considered sufficiently comparable to a government loan when the structures and maturities of the two loans are identical or similar and the loans are provided in the same currency. This commenter argued that in the interest of predictability and uniformity, no further analysis, particularly with regard to the level of security of a loan, should be necessary. This commenter asserted that, where these three criteria are met, the loans would generally require the same level of security. Comparing the value of different assets securing different loans would create an unworkable test, according to the commenter, who suggested that the Department at least make it a rebuttable presumption that a commercial and a government-provided loan are comparable if the three criteria listed above match.

We have not adopted the proposals put forward by either set of commenters. As in the 1997 Proposed Regulations, § 351.505(a)(2)(i) states that we intend to place primary emphasis on three basic characteristics in determining whether particular loans are comparable to a government-provided loan: The structure, maturity, and currency denomination of the loans. This does not mean, however, that a loan in the same currency with a similar structure and maturity will always be found comparable to the government-provided loan. Nor should our decision to place primary emphasis on these three characteristics be seen as a rebuttable presumption.

Instead, we recognize that many characteristics could factor into a decision of whether a loan should be considered comparable to the government-provided loan. Certainly, as the first set of commenters has pointed out, the levels of security or collateral on the two loans could be relevant in determining comparability. Similarly, the amounts of principal might differ so greatly that the two loans should not be compared. However, rather than identifying numerous characteristics for finding loans to be comparable, and thereby limiting our ability to find benchmarks, we have continued to place primary emphasis on what we believe to be the three most important characteristics. Regarding other characteristics that might render particular loans not comparable to the government-provided loan, such as collateral and size, we will consider arguments made by the parties based on the facts presented in their cases.

Paragraph (a)(2)(ii) provides a definition of the term ''commercial.'' The 1997 Proposed Regulations stated that we would normally treat a loan as ''commercial'' if it were taken out from a commercial lending institution or if it were a bond issued by the firm in commercial markets. We also stated that a loan provided under a government program, even if the program is not specific to an enterprise or industry, would not be considered a ''commercial'' loan for benchmark purposes. Finally, the 1997 Proposed Regulations stated that the Department would treat a loan from a government-owned bank as a commercial loan, unless there was evidence that the loan was provided at the direction of the government or with government funds.

We received several comments on this issue, all of which urged us not to use loans from government-owned banks for benchmark purposes. One commenter asserted that a loan from a government-owned bank is the same as a loan from the government, regardless of whether the loan is provided under a government program, because the actions of a government-owned bank are presumably consistent with the policies of its owner, the government. A second commenter maintained that the distinction between ''a government program'' and ''government control'' is blurred and pointed to the Department's determination in *Certain Steel Products from Korea*, 58 FR 37338 (July 9, 1993), where the Department found that a countervailable benefit was conferred by government-directed, preferential access to specific sources of credit offered at favorable terms. Because of the availability of ''directed credit'' such as that found in the Korean case, this commenter argued that the Department should not use rates from loans provided by government-owned banks as benchmark rates. A third commenter argued that the Department should not use loans from government-owned banks for benchmark purposes unless the respondent can demonstrate the commercial nature of such loans. This and other commenters objected to the burden that the 1997 Proposed Regulations allegedly placed upon a petitioner to show that a loan from a government-owned bank is provided at the direction of the government or with government funds. Noting that the 1989 Proposed Regulations directed the Department to use financing provided or directed by the government as a benchmark only under certain exceptional circumstances, several commenters urged the Department to continue to apply this narrow standard.

We have traditionally recognized that government-owned banks may operate as commercial banks in some countries. It is not appropriate to maintain that loans from government-owned banks *per se* are not commercial. Therefore, we continue to take the positions that: (1) We will not consider loans provided under government programs to be commercial loans, and (2) we will not automatically disqualify loans from government-owned commercial banks as benchmarks. However, we will not use loans from government-owned special purpose banks, such as development banks, as benchmarks because such loans are similar to loans provided under a government program or at the direction of the government. Regarding loans from government-owned commercial banks, we will treat such loans as being commercial and use them as benchmarks unless they are made on non-commercial terms or are provided at the direction of the government. We do not believe that this standard imposes an unreasonable burden on petitioners because this is the type of information they would routinely provide when alleging that government-provided loans are countervailable.

Further, regarding the definition of ''commercial,'' where a firm receives a financing package including loans from both commercial banks and from the government, we intend to examine the package closely to determine whether

the commercial bank loans should in fact be viewed as ''commercial'' for benchmark purposes. In particular, we will look to whether there are any special features of the package that would lead the commercial lender to offer lower, more favorable terms than would be offered absent the government/commercial bank package.

Paragraphs (a)(2)(iii) and (iv) specify the time period from which the Department will select comparable financing. Paragraph (a)(2)(iii) addresses long-term loans and is unchanged from the 1997 Proposed Regulations. This regulation directs us to use a loan whose terms were established during or immediately before the year in which the terms of the government-provided loan were established. Paragraph (a)(2)(iv) addresses short-term loans. In the 1997 Proposed Regulations, we stated that we would use as the benchmark rate an annual average of the interest rates on comparable commercial loans taken out during the period of investigation or review. However, in cases with significantly fluctuating interest rates, the 1997 Proposed Regulations allowed us to use ''the most appropriate'' interest rate as the benchmark rate.

We received two comments regarding the benchmark interest rate for short-term loans. Both commenters argued against using a simple average of the interest rates on comparable commercial short-term loans obtained by the respondent. Instead, they asked the Department to weight the rates by the associated principal amount of each loan in order to prevent small, one-time loans from distorting the benchmark calculation. According to the commenters, this change would also address the Department's concern about significantly fluctuating interest rates.

We have adopted the commenters' proposal in part and have amended paragraph (a)(2)(iv) to provide that we will calculate a weighted rather than a simple average benchmark interest rate for short-term loans. However, we do not share the commenters' view that this change addresses situations where the interest rate fluctuates significantly over the year, *e.g.*, in economies with a high inflation rate. We are, therefore, retaining the provision that allows us to use benchmarks other than annual weighted averages in these situations.

We also wish to clarify that we intend to follow our practice of calculating short-term benchmarks on a calendar year basis. In most instances, the period of investigation or review is a calendar year, so the short-term benchmark will be calculated using commercial loans that were obtained (or could have been obtained) during the period of investigation or review. In situations where the loans under investigation span two calendar years, we will calculate two annual benchmarks corresponding to the two years.

Finally, we received one comment on the selection of benchmark interest rates to be used in administrative reviews of suspension agreements. In the preamble to the 1997 Proposed Regulations, we stated that in administering a suspended investigation, we would monitor developments in commercial benchmarks outside of the normal administrative review process and that this monitoring activity should serve to ensure that the commercial benchmarks used were timely. The commenter, however, claimed that a special regulation requiring the Department to monitor commercial benchmark rates is needed because otherwise there is no guarantee that the Department will do so. In the commenter's experience, the Department has not always undertaken this type of monitoring activity. Specifically, pointing to *Miniature Carnations and Roses and Other Fresh Cut Flowers from Colombia,* 59 FR 52514 (October 18, 1994), the commenter alleged that the Department set new benchmarks at the conclusion of each administrative review, with the result that the interest rates used for purposes of the suspension agreement always lagged behind the contemporaneous commercial rates. For short-term loans, the commenter argued, the Department should monitor commercial interest rates on at least a quarterly basis in order to keep the suspension agreement current.

We do not agree with the commenter's view that a regulation is needed on this issue. In the case of suspension agreements, we will revise the benchmarks for long- and short-term loans whenever appropriate, regardless of whether we are conducting an administrative review of the suspension agreement. To ensure that the benchmarks are kept as current as possible, we intend to review them once a year or more frequently, if information available to the Department indicates that a change is necessary.

''Could actually obtain on the market'' defined: In accordance with section 771(5)(E)(ii) of the Act, paragraph (a)(3) addresses the requirement that the comparable loan be one that the firm ''could actually obtain on the market,'' and reflects a change in our practice with respect to short-term loans. In the past, we have used national average interest rates to determine the benefit from government-provided short-term loans. This practice was codified in § 355.44(b)(3) of the 1989 Proposed Regulations. However, as early as 1989, we announced that we would consider using company-specific benchmarks for short-term loans. Based upon our experience in the interim, and especially because of the ability to computerize our loan calculations, we have concluded that we have the capability to use company-specific benchmarks. Moreover, we believe that company-specific benchmarks provide a more accurate measure of the benefit, if any, to a recipient of a government-provided short-term loan. Therefore, paragraph (a)(3)(i) states a preference for using company-specific benchmarks for both short- and long-term loans. Under paragraph (a)(3)(ii), we normally would use national averages only in the event that the firm did not take out any comparable commercial loans during the relevant period. Except for a minor clarification (adding ''for both short- and long-term loans'' to paragraph (a)(3)(i)), these paragraphs are unchanged from the 1997 Proposed Regulations.

Two commenters warned against using the interest rates on hypothetical loan offers as benchmark rates. One of the commenters pointed to a perceived loophole in the preamble to the 1997 Proposed Regulations, which stated that ''a comparable commercial loan used as a benchmark should represent a financial instrument * * * that was taken out (or could have been taken out) at the same point in time.'' Another commenter suggested that the acceptance of hypothetical loan offers for benchmark purposes might tempt respondents to manipulate the benchmark rate by soliciting offers of loans that they do not intend to take. Both commenters asserted that the interest rates on such hypothetical loan offers would be very low and that they would, thus, distort the benchmark rate.

We agree that respondents should not be permitted to submit hypothetical loans for use as benchmarks. The language in the preamble cited by the commenter was meant to address another situation: Where the respondent did not actually take out any commercial loans during the relevant period and where we, therefore, would use an appropriate alternative benchmark interest rate * * * such as a national average interest rate. The national average interest rate is representative of a loan that ''could have been taken out.''

Benchmark for uncreditworthy companies: Paragraph (a)(3)(iii), which deals with long-term loans provided to firms considered to be uncreditworthy, describes our methodology for

calculating the benchmark that we will use in identifying and measuring the benefit attributable to a government-provided, long-term loan received by an uncreditworthy firm. One important aspect of this methodology has changed from the 1997 Proposed Regulations.

Our methodology is based explicitly on the notion that, when a lender makes a loan to a company that is considered to be uncreditworthy (as opposed to a safer, creditworthy company), the lender faces a higher probability that the borrower will default on repayment of the loan. As a consequence of this higher probability of default, the lender will charge a higher interest rate. The calculation described in paragraph (a)(3)(iii) addresses the increased probability of default for an uncreditworthy company by adjusting upward the interest rate for a creditworthy company in the country in question.

As stated in the 1997 Proposed Regulations, in making this adjustment, we are not proposing to calculate the probability that a particular uncreditworthy firm will default on a particular loan. Such a calculation would require extensive data and analysis, and any conclusion would be highly speculative. Instead, similar to the method we have used since 1984, we will rely on information regarding the U.S. debt market. In the 1997 Proposed Regulations, we stated that we would use the weighted average one-year default rate for speculative grade bonds, as reported by Moody's Investor Service. This weighted average default rate would be reflected indirectly in our formula for calculating the benchmark interest rate for uncreditworthy companies, which is based on the probability that these risky loans will be repaid.

We received numerous comments on our new methodology. One commenter expressed support for the methodology, stating that it seemed to calculate accurately the full benefit of a loan subsidy. Certain other commenters supported the new methodology as long as it resulted in a ''substantial spread'' between the observed commercial interest rates in the country under investigation and the benchmark interest rate used for uncreditworthy companies.

One commenter did not object to the new methodology but argued that, in calculating the risk premium, the Department should use data pertaining to the country under investigation, not U.S. data, which should only be used as facts available.

Another commenter criticized the reliance upon default rates in the U.S. ''junk'' bond market, arguing that U.S. data do not reflect the risk of lending to uncreditworthy companies in foreign countries, especially developing countries where the default rate is likely to be much higher. This commenter also criticized the use of a one-year default rate in the calculation of the risk premium, arguing that this significantly understates the overall default rate because default is more likely after the first year of the life of a loan. Should the Department decide to rely on U.S. market data, the commenter asked that the Department, at a minimum, examine the default rate over 10 years.

Another commenter stated that the Department's new methodology implies a serious departure from the statutory mandate to determine an interest rate that the borrower could actually obtain on the market. First, the commenter argued, a default-based premium does not take into account all the costs associated with lending to an uncreditworthy company, *e.g.*, collection costs and lost opportunity costs and, as a result, the premium is understated. Second, the commenter asserted, the new methodology treats all uncreditworthy borrowers as if they were large corporate borrowers able to issue junk bonds of the kind reported by Moody's. According to this commenter, many companies cannot obtain long-term loans even at junk bond rates and are forced to rely on borrowing from the venture capital market at substantially higher interest rates. In reality, the commenter argued, a private lender would assess a company's creditworthiness on a case-by-case basis using the same financial indicators that the Department has relied upon in the past (*see* § 355.44(b)(6)(i) of the 1989 Proposed Regulations). The regulations, therefore, should reflect such private lender behavior by directing the Department to determine the risk premium on a case-by-case basis.

Finally, two commenters noted that the European Union (''EU'') takes a tougher stance on government loans to uncreditworthy borrowers by treating the entire loan as a grant when the recipient company's financial position is so weak that it could not have obtained a commercial loan, and implied that the Department should follow the EU's example.

As stated in the 1997 Proposed Regulations, we are changing our methodology because we believe that the new methodology more appropriately reflects the risk involved in lending to firms with little or no access to commercial bank loans from conventional sources. By adjusting upward the interest rate that an average, creditworthy company would pay to account for the greater likelihood of default by an uncreditworthy company, we recognize the speculative nature of loans to uncreditworthy borrowers and the premium they would have to pay the lender to assume that risk.

We have continued to rely on default information pertaining to the United States in our formula because we believe it would be difficult to locate detailed and comprehensive default information for many of the countries that we investigate. However, if such data do exist and are brought to our attention in the course of an investigation or review, and the data indicate that the default experience in the country in question differs significantly from that in the United States, we would consider using the default rate from the country under investigation. Therefore, we have amended the 1997 Proposed Regulation to say that the Secretary ''normally'' will calculate the benchmark for uncreditworthy companies using U.S. data.

We have not adopted the suggestion that we follow the EU's practice of treating loans to uncreditworthy firms as grants. Under our definition, uncreditworthy firms are those that cannot obtain long-term loans from conventional commercial sources. This does not mean, however, that they cannot borrow funds from other sources. Hence, we would not equate loans to these companies with grants. Instead, the purpose of our methodology is to capture the increased risk of lending to these companies.

Regarding the new calculation methodology, we agree that using a one-year default rate would not accurately reflect the risk that an uncreditworthy borrower will default on a long-term loan. We have, therefore, changed this aspect of our methodology and will use the average cumulative default rate for the number of years corresponding to the length of the loan, as reported in Moody's study of historical corporate bond default rates. In other words, we would use a five-year default rate for a five-year loan, a 15-year default rate for a 15-year loan, and so forth. We believe that using a default rate that is directly linked to the term of the loan is a better reflection of the risk associated with long-term lending to uncreditworthy borrowers.

Our formula for calculating the benchmark interest rate for an uncreditworthy company is based upon the assumption that a lender's expected return on all loans should be equal. Under this assumption, the interest rate differential on loans charged to

creditworthy and uncreditworthy companies is such that the lender's expected (total) return on a loan to an uncreditworthy company equals the expected (total) return on a loan to a creditworthy company, after accounting for differences in the risk of default. A second assumption is that, in the event of default, no portion of the principal or interest is recovered by the lender. The following equation relates the loan rate to a creditworthy company and the loan rate to an uncreditworthy company:

$(1 - q_n)(1+i_f)^n = (1 - p_n)(1 + i_b)^n$,

Where:

n = the term of the loan;

i_b = the benchmark interest rate for uncreditworthy companies;

i_f = the long-term interest rate that would be paid by a creditworthy company;

p_n = the probability of default by an uncreditworthy company within n years; and

q_n = the probability of default by a creditworthy company within n years.

Default means any missed or delayed payment of interest and/or principal, bankruptcy, receivership, or distressed exchange. For values of p_n, we will normally rely on the average cumulative default rates reported for the Caa to C-rated categories of companies in Moody's study of historical default rates of corporate bond issuers. For values of q_n, we will normally rely on the average cumulative default rates reported for the Aaa to Baa-rated categories of companies in Moody's study of historical default rates of corporate bond issuers.

Solving for i_b in the above equation yields a formula for the benchmark interest rate that should be paid by an uncreditworthy borrower:

$i_b = [(1 - q_n)(1+i_f)^n/(1 - p_n)]^{1/n} - 1$.

One commenter urged the Department to apply a risk premium also to short-term loans taken out by uncreditworthy borrowers. Another commenter supported this idea, arguing that even though long-term financing is riskier, a bank's decision on short-term loans is also based on the overall financial health of the borrower.

The fact that we are using a company-specific benchmark means that the risk associated with providing a short-term loan to a company will be reflected without any special adjustment. However, even where a company-specific benchmark is not available, we do not believe it would be appropriate to include a risk premium in the short-term benchmark calculation. Short-term lending is less risky than long-term lending and the inclusion of a risk premium in the short-term benchmark would overcompensate for the commercial default risk. The risk of default in short-term lending is minimal because short-term lending is usually associated with specific transactions, and these transactions provide security for the lender (albeit by means of a wide variety of legal modalities). Thus, we have not adopted this suggestion.

We note that we have identified one situation where it would be appropriate to include a risk premium in a short-term benchmark. This would arise if we were forced to use a short-term interest rate as a benchmark for long-term loans to an uncreditworthy company or as a discount rate for allocating benefits received by an uncreditworthy company.

Creditworthiness Analysis

Paragraph (a)(4) sets forth the standard for determining whether a firm is uncreditworthy. In the 1997 Proposed Regulations, we made certain modifications to § 355.44(b)(6)(i) of the 1989 Proposed Regulations to clarify the analysis we intended to undertake in determining whether a company is creditworthy. Specifically, we adopted a broader definition of ''uncreditworthiness'' where we would find a company to be uncreditworthy if information available at the time the terms of the government-provided loan were agreed upon indicated that the firm could not have obtained long-term financing from conventional commercial sources. In this context, the term ''conventional commercial sources'' referred to bank loans and non-speculative grade bond issues. Hence, uncreditworthy companies were those that would be forced to resort to other sources, such as junk bonds, to raise funds. We also listed factors we would consider in making a creditworthiness determination. These factors focused on the financial position of the firm receiving the government financing, without any consideration of the purpose of the financing or whether different levels of risk might be associated with different types of projects undertaken by the firm.

We received several comments on our definition of ''uncreditworthiness.'' Certain commenters urged the Department to retain the definition of uncreditworthiness from the 1989 Proposed Regulations, arguing that this standard was objective, uncontroversial, and easy to administer. These commenters maintained that this standard provided important guidance for petitioners who may have difficulties obtaining information on the loan options available to respondents. The commenters also argued that the new regulation would place a nearly impossible burden of proof on petitioners to demonstrate that a respondent is uncreditworthy.

We have not adopted this suggestion. As we stated in the preamble to our 1997 Proposed Regulations, we changed the definition from the 1989 Proposed Regulations because we found that the old definition did not contain a general principle to guide our determinations of uncreditworthiness. Instead, the 1989 Proposed Regulation relied on a formulaic approach to determining creditworthiness that was too restrictive. We believe that the general principle adopted in these regulations (*i.e.*, an uncreditworthy firm is one which could not have obtained long-term financing from conventional sources) will give us the flexibility to address situations that would not have met the formulaic approach for finding a company uncreditworthy.

However, although we changed the definition of uncreditworthiness, we did not intend to change the standard for initiating an investigation of a company's creditworthiness. Therefore, petitioners may continue to provide the same type of information we have typically relied upon.

Another commenter argued that the Department should not limit itself to examining the creditworthiness of firms as a whole, but should also give itself the flexibility to examine the creditworthiness of individual projects. This commenter argued that some foreign manufacturers, though creditworthy *per se*, are able to carry out new development projects only because they obtain government financing. The commenter argued that these manufacturers would not have been able to secure financing from commercial sources for their huge development projects because these projects are not commercially viable and would be impossible to finance without government subsidies. The commenter noted that, under the Department's traditional approach, the Department would analyze the creditworthiness of the company as a whole, not the creditworthiness of the specific project. Hence, the Department would be likely to find the foreign manufacturer creditworthy, regardless of the commercial viability of the project. The commenter argued that, in this type of situation, the Department should focus on the creditworthiness of the project, not the firm.

We share this commenter's concern and have amended the 1997 Proposed Regulations to allow for a project-specific analysis in determining

creditworthiness. For example, for loans that are provided to fund a large investment project into new products, processes, or capacity (*e.g.*, a plant expansion or new model or product line, where repayment of a loan is contingent upon the success of the particular project being funded), our traditional analysis focusing primarily on the creditworthiness of the company as a whole may be inappropriate because the risk associated with a new project may be much higher or lower than the average risk of the company's existing operations. In these situations, we would expect commercial lenders to place greater emphasis on the expected return and risk of the project because the success or failure of the project would be the most important indicator of the borrowing firm's ability to repay the loan. This is not to say that the financial position of the firm as a whole would be irrelevant to the lender's decision, only that the primary focus would be on the project itself. Therefore, paragraph (a)(4) now allows for the possibility of focusing the creditworthiness analysis on the project being financed rather than the company as a whole.

Significance of long-term commercial loans: In the 1997 Proposed Regulations, paragraph (a)(4)(ii) provided that, if a privately-owned company received long-term commercial loans without a government loan guarantee, we would consider the presence of such commercial loans as dispositive evidence that the company was not uncreditworthy.

Two commenters criticized the Department's proposed approach. These commenters maintained that the presence of a long-term, commercial loan does not prove that a company is creditworthy. Instead they urged the Department to examine all the criteria listed in paragraphs (a)(4)(i) (A), (B), (C), and (D) without treating one of these factors as dispositive. One of the commenters argued that giving one criterion dispositive status would constitute abuse of the Department's discretion to implement the statute. The other commenter argued that the Department's proposed approach would preclude an in-depth review of the company as envisioned by the regulations. Both commenters stated that making the presence of a commercial loan a dispositive indication of creditworthiness would be particularly inappropriate if the commercial loan had characteristics different from the government loan (*e.g.*, different requirements of security).

In general, we believe that if commercial banks are willing to provide loans to the firm, we should not substitute our judgment and find the firm to be uncreditworthy. This does not mean, however, that if the firm has taken out a single commercial bank loan we would find that loan to be dispositive evidence that the firm was creditworthy. Instead, the intent of this paragraph is to indicate that, where the firm has recourse to commercial sources for loans, as made evident by the receipt of such loans, and the commercial loans are comparable with the government loan, those loans will be dispositive of the firm's creditworthiness. However, if, for example, the firm has obtained a single commercial loan in the year in question for a relatively small amount, and the loan has a short repayment term (*e.g.*, less than two years), or has unusual aspects, receipt of that loan will not be dispositive of the firm's creditworthiness, and we will go on to examine the other factors listed in paragraph (a)(4)(i) B through D.

We have also made a change from the 1997 Proposed Regulations regarding the presence of guarantees and the firm's creditworthiness. We have added ''explicit or implicit'' to modify ''government guarantee.'' This serves to clarify our position that if either type of guarantee is present, the commercial loans will not be viewed as dispositive of the firm's creditworthiness. We may consider a commercial loan to be covered by an implicit government guarantee where the loan contributes to the financing of a project that is being undertaken in conjunction with government loan funds or other types of government participation such as development grants. In such a scenario, while no explicit government guarantee is present, we believe that banks are likely to assume that the government will stand behind the project and ensure that creditors are repaid.

Finally, we note our longstanding practice that creditworthiness determinations are made on a year-by-year basis. For example, if we are trying to determine whether a firm is creditworthy in 1998, we will look to whether the firm has negotiated commercial loans in 1998.

One commenter suggested that purchases of equity in a company by a commercial institution should also constitute dispositive evidence of creditworthiness. The commenter reasoned that a private entity willing to invest in a company would presumably also be willing to lend money to that company because investing is riskier than lending.

We have not adopted this suggestion. By its very terms, equity differs from loans and, hence, the presence of equity investments (even if made by private investors) is not necessarily indicative of whether the firm could obtain loans from commercial sources. As an extreme example, private owners may inject equity into their company because the debt-to-equity ratio is so high that it has become virtually impossible for the company to borrow funds. Clearly, in this situation, the presence of equity purchases by the owners would not be indicative of the firm's access to commercial loans.

We received two comments regarding the significance of the receipt of a commercial loan where we are examining the creditworthiness of a government-owned company. One commenter suggested that paragraph (a)(4)(ii) should apply also to government-owned firms. Another commenter took the opposite view, stating that it is not unusual to find commercial lenders providing loans to government-owned companies which are otherwise uncreditworthy.

We do not believe that the presence of commercial loans is dispositive of whether a government-owned firm could have obtained long-term financing from conventional commercial sources. This is because, in our view, in the case of a government-owned firm, a bank is likely to consider that the government will repay the loan in the event of default. Accordingly, paragraph (a)(4)(ii) provides that the presence of comparable commercial loans will be dispositive of creditworthiness only for privately owned companies. For government-owned firms, we will make our creditworthiness determination by examining this factor and the other factors listed in paragraph (a)(4)(i).

Significance of prior subsidies: Paragraph (a)(4)(iii) in the 1997 Proposed Regulations stated that we would ignore current and prior countervailable subsidies in determining whether a firm is uncreditworthy. In other words, we would not attempt to adjust a firm's financial data for current and prior subsidies in making a creditworthiness determination.

We received three comments on this issue, all of which urged the Department to change its approach and adjust for prior subsidies when examining a firm's creditworthiness. One of these commenters requested that the Department take prior subsidies into account to the same extent that a reasonable private lender would. This commenter argued that, by ignoring prior subsidies, the Department is not adhering to the standards of a reasonable private lender. The commenter maintained that, if a

company's financial health is due to government assistance, a private lender would examine the company's underlying performance independent of subsidies. The private lender, who would then discover that the company's financial health was superficial, might not lend money to the company unless the lender was convinced that the government would continue to provide subsidies in the future. A second commenter argued that failure to consider prior subsidies when making a creditworthiness determination underestimates the benefit received. This commenter urged the Department to estimate the recipient company's financial situation without subsidies and base its creditworthiness determination on this estimate.

We have not adopted this suggestion. Our longstanding practice has been not to take current or prior subsidies into account when determining a company's creditworthiness. We believe that trying to adjust a company's financial ratios for previously received subsidies would be an extremely difficult and highly speculative exercise.

We have made one small amendment to paragraph (a)(4)(iv) addressing the discount rate. We have changed ''non-recurring grant'' to ''non-recurring benefit'' to conform with the new nomenclature used in § 351.524.

Calculation of Benefit From Long Term Variable Rate Loans

Paragraph (a)(5) deals with long-term variable rate loans and codifies the methodology set forth in the GIA. Under paragraph (a)(5)(i), which is unchanged from the 1997 Proposed Regulations, the year in which the terms of the government-provided loan are set establishes the reference point for comparing the government-provided variable-rate loan with the comparable commercial variable-rate loan. If the interest rate on the government-provided loan is lower than the interest rate on the comparable commercial loan, a benefit exists. If the interest rate on the government-provided loan is the same or higher, no benefit exists. The rationale for basing the decision on the first-year interest rate differential is that the interest rate spread, if any, in that year generally will apply throughout the life of the loan.

Paragraph (a)(5)(ii) recognizes that there may be situations where the method described in paragraph (a)(5)(i) cannot be followed and provides the Department with the discretion to modify that method. For example, there may be no comparable commercial variable-rate loan to use for comparison purposes, or the repayment structure of the government-provided variable-rate loan may be such that the simple interest rate comparison described in paragraph (a)(5)(i) would not yield an accurate measure of the benefit.

Allegations

Paragraph (a)(6)(i) deals with the standard for initiating an investigation of a respondent company's creditworthiness. It is unchanged from the 1997 Proposed Regulations. In accordance with our past practice, this paragraph states that the Secretary will normally require a specific allegation before the Department will consider the creditworthiness of a firm.

One commenter argued that the Department should not employ a heightened initiation standard for investigating a company's creditworthiness. Specifically, this commenter suggested that the requirement that petitioners supply information ''establishing a reasonable basis to believe or suspect'' that a company is uncreditworthy be replaced with information ''reasonably available to petitioners.''

We have not adopted this suggestion. The requirement that petitioners establish ''a reasonable basis to believe or suspect'' uncreditworthiness rather than merely provide ''information reasonably available'' to them dates back to the 1989 Proposed Regulations. Because of the additional workload involved in investigating and determining whether a company is uncreditworthy, we continue to believe that it is appropriate to impose a higher standard for uncreditworthiness allegations. This does not involve any change in our past practice—the same types of allegations that we have accepted in the past will still suffice to start a creditworthiness inquiry.

Paragraph (a)(6)(ii) establishes the evidentiary standard for investigating loans extended by government-owned banks. In the 1997 Proposed Regulations, we made a distinction between government-owned banks that are operated to meet special financing needs and government-owned commercial banks. For special purpose banks (such as national development banks), we asked that petitioners provide information reasonably available to them indicating that loans provided by such banks were specific and that the interest charged was not at commercial rates. For government-owned commercial banks, we requested that petitioners also provide information establishing a reasonable basis to believe or suspect that the loans were something more than mere commercial loans. In particular, we requested information suggesting that such loans were provided at the direction of the government or with funds provided by the government.

Several commenters objected to the higher initiation standard for loans provided by government-owned commercial banks. They argued that the additional information required by the Department for initiating an investigation of loans from this category of banks is not reasonably available to petitioners. They contended that it should be sufficient for petitioners to demonstrate that a loan is specific and provided on terms inconsistent with commercial considerations. They suggested that the burden of proof be shifted to respondents to show that the loan involves no government funds or government direction. Another commenter asserted that the division of government-owned banks into two categories is a new approach and not part of the Department's past practice. The same commenter argued that the Department's 1997 Proposed Regulations would create a loophole because the Department's threshold for initiating an investigation of loans from government-owned commercial banks would be higher than for initiating an investigation of loans from privately-owned banks and government-owned special purpose banks.

Based on our consideration of these comments, we have decided that the distinction between government-owned special purpose banks and government-owned commercial banks may not be helpful in this context and that it is, therefore, not meaningful to retain different initiation standards for investigating loans from these two categories of banks. Paragraph (a)(6)(ii) has, thus, been changed and now provides that, for loans provided by any government-owned bank, the Secretary will require petitioners to present information reasonably available to them indicating that the loans: (1) Are specific in accordance with section 771(5A) of the Act, and (2) are provided on terms more favorable than those the recipient would pay on a comparable commercial loan that the recipient could actually obtain on the market. This initiation standard is consistent with the initiation standard for most subsidy allegations, *i.e.*, petitioner must allege (and provide reasonably available information in support of the allegation) that the subsidy is specific and that it confers a benefit. We believe that, for initiation purposes, government ownership is sufficient to indicate that funds have been provided at the direction of the government.

One commenter argued that loans provided by special purpose government-owned banks should be presumed to be specific for purposes of making a subsidy allegation because such banks promote specific and narrow objectives. This commenter stated that many petitioners cannot obtain the information needed to show that a loan is specific. In this commenter's view, the Department should instead require respondents to show that the loans are generally available.

We have not adopted this suggestion. With any presumption, there must be a factual basis for making the presumption, and none exists in this instance. The fact that special purpose banks may be set up to achieve certain objectives does not necessarily mean that they provide funds to a specific group of enterprises or industries. As with any other domestic program, petitioners must provide information reasonably available to them indicating that the bank's loans are specific and that they confer a benefit.

Timing of Receipt of Benefit

Paragraph (b) sets forth a rule regarding the point in time at which the benefit from a loan arises. The 1997 Proposed Regulations stated that we would consider the benefit as having been received on the date on which the firm is due to make a payment on the government-provided loan. In these Final Regulations, we have amended the regulation such that we will consider the benefit to have been received in the year in which the firm otherwise would have had to make a payment on the comparable commercial loan. The second sentence of paragraph (b) addresses loans with special characteristics, *e.g.*, loans with non-commercial grace periods. With these types of loans, we believe that the benefit stream starts upon the receipt of the loan. It would not be appropriate to wait until the end of the grace period to begin assigning the benefit from such loans because the firm would have had to make loan payments during this period if the loan were provided on commercial terms.

Allocation Over Time

Paragraph (c) deals with the allocation of the benefits of a government-provided loan to a particular time period and reflects one minor change from the 1997 Proposed Regulations.

Paragraph (c)(1) provides that the benefit of a short-term loan will be allocated (expensed) to the year(s) in which the firm is due to make interest payments on the loan. This approach, which essentially treats short-term loans as recurring subsidies, is consistent with longstanding Department practice. We have added to the paragraph the same condition that applies to long-term loans, *i.e.*, that the amount of the subsidy conferred by a government-provided loan can never exceed the amount that would have been calculated if the loan had been given as a grant.

Paragraph (c)(2) deals with situations in which the benefit of a government-provided long-term loan stems solely from the concessionary interest rate of the loan, not from any differences in repayment terms. Where this is the case, there is no need to engage in the complicated calculations called for by § 355.49(c) of the 1989 Proposed Regulations. Instead, as paragraph (c)(2) provides, the annual benefit can be determined by simply calculating, for each year in which the loan is outstanding, the difference in interest payments between the government-provided loan and the comparison loan. The last sentence of paragraph (c)(2) restates our long-held principle that the amount of the subsidy conferred by a government-provided loan never can exceed the amount that would have been calculated if the loan had been given as a grant.

Paragraph (c)(3) deals with situations where both the government-provided loan and the comparison loan are long-term, fixed-interest rate loans, but where the two loans have dissimilar grace periods or maturities, or where the repayment schedules have different shapes (*e.g.*, declining balance versus annuity style). Because a firm may derive a benefit from special repayment terms, in addition to any benefit derived from a concessional interest rate, we will calculate the benefit in a two-step process. First, paragraph (c)(3)(i) directs us to calculate the present value, in the year in which repayment would begin on the comparable commercial loan, of the difference between the amount that the firm is to pay on the government-provided loan and the amount that the firm would have paid on the benchmark loan (this difference is called ''the grant equivalent''). Second, paragraph (c)(3)(ii) provides that we allocate this grant equivalent over time by using the allocation formula in § 351.524(d)(1). We have decided to eliminate our old loan allocation formula described in the 1989 Proposed Regulations, as part of our effort to streamline methodologies, where possible. In determining that the benefit from these types of loans occurs in the year in which the government-provided loan was received (*see* § 351.505(b)), the old loan formula is unnecessary, because its primary purpose was to begin assigning annual benefit amounts in the year after the receipt of the loan.

We received two comments on this issue. Both commenters objected to our use of the number of years in the life of the government-provided loan when allocating the benefit of loans with concessionary grace or deferral periods. The commenters argued that, because of the concessionary grace/deferral period, the Department is diluting the annual benefit by including this period in the allocation period. Instead, the commenters urged the Department to allocate the benefit over the length of the benchmark loan. In addition, the commenters asked the Department to ''add an additional amount to reflect the present value of the benefit from reduced interest and principal payments'' due to a deferral of the repayment schedule.

We have not adopted these suggestions. With regard to the former comment, matching the allocation period with the life of the government-provided loan is a more predictable, transparent, and logical methodology. This is because we will be allocating subsidy benefits as long as the government-provided loan is on the firm's books. Using a different allocation period, such as the life of the benchmark loan, could mean that subsidy benefits would end even though the subsidized loan itself is still outstanding. Moreover, we do not share the commenters' view that our methodology dilutes the annual benefit. Although the amounts countervailed each year may be smaller under our methodology, the benefit stream will correspond to a period that matches the life of the subsidized loan.

Paragraph (c)(4) sets forth the method of calculating an annual benefit for government-provided variable-rate loans. No comments were received on this paragraph.

Contingent Liabilities

Paragraph (d) sets forth the method for calculating the annual benefit attributable to a long-term interest-free loan, for which the obligation for repayment is contingent upon the company taking some future action or achieving some goal in fulfillment of the loan's requirements, such as the achievement of a particular profit level by the firm. We have made changes to this paragraph so that our methodology for these loans conforms to the methodology for tax deferrals (*see, e.g.*, § 351.509). In the case of tax deferrals, we recognized that if the event that triggers repayment will not occur for several years, the deferral should be treated as a long-term loan and the

benefit measured using a long-term benchmark. Contingent liability loans are analogous to tax deferrals. Consequently, our regulation now states that where the event triggering repayment will occur at a point in time after one year from receipt of the contingent liability, we will treat the contingent liability as a long-term loan.

Additionally, paragraph (d)(2) now recognizes that it may be appropriate in certain circumstances to treat contingent liabilities as grants. This would occur, if at any point in time, we determine from record evidence that the event upon which repayment depends is not a viable contingency. In this instance, we will treat the outstanding balance of the loan as a grant received in the year in which this condition manifests itself.

One commenter asked that the regulations clarify that in the event of forgiveness of a contingent liability, a new subsidy arises whose benefit is equal to the unpaid principal of the loan.

We will continue our longstanding practice and treat the entire unpaid principal of a forgiven loan and any accumulated interest, regardless of whether it is a contingent liability loan or a regular loan, as a grant bestowed at the time of the forgiveness (*see, e.g., Certain Hot-Rolled Lead and Bismuth Carbon Steel Products from Germany*, 58 FR 6223, 6234–35 (January 27, 1993)).

Section 351.506

Section 351.506 deals with loan guarantees. Paragraph (a)(1) sets forth the general rule for identifying and measuring the benefit attributable to a government-provided loan guarantee, and conforms to the new standard contained in section 771(5)(E)(iii) of the Act. According to this general rule, a benefit exists to the extent that the total amount a firm pays for a loan with a government-provided loan guarantee is less than what the firm would have paid for a comparable commercial loan that the firm could actually obtain on the market absent the government guarantee. In this context, ''total amount'' includes both the loan guarantee fee and the effective interest paid on the loan. The terms ''comparable commercial loan'' and ''could actually obtain on the market'' are defined in § 351.505(a)(2) and (3), respectively.

One commenter asked the Department to recognize that the very existence of a government loan guarantee constitutes *prima facie* evidence that a countervailable benefit exists because a government loan guarantee is only necessary when a company cannot obtain a loan without a loan guarantee and when such a guarantee is not available from private sources.

We have not adopted this suggestion. As with other forms of financial contributions, the Department must determine that a benefit is conferred before we can find a subsidy program to be countervailable. However, we acknowledge that the presence of a government loan guarantee may affect other terms of the loan, such as the interest rate. Therefore, when we are dealing with a government-guaranteed loan, we will carefully examine all of the terms of both the government loan and the benchmark loan to ensure that we capture all of the benefit.

One commenter asked the Department to clarify that the term ''comparable loan'' includes both comparable size and risk level. Another commenter urged the Department to recognize that the risk to the lender would be higher without a loan guarantee and that the borrower, therefore, would have to pay a higher interest rate absent the guarantee.

We intend to interpret the term ''comparable commercial loan'' as it affects loan guarantees in the same manner as when we are addressing loans. The role of relative risk levels is discussed in the preamble to § 351.505. We agree with the second commenter that a lender faces greater risk if a loan is not guaranteed. We believe that this additional risk will be captured in the benefit methodology described in paragraph (a). This is because the interest rate on the guaranteed loan will be compared with either (1) the interest rate on a comparable unguaranteed (and, hence, riskier) loan that was obtained, or could have been obtained, by the firm; or (2) the interest rate on a comparable commercially guaranteed loan that was obtained, or could have been obtained, by the firm. In the latter case, we would expect that the two guaranteed loans would have similar risk levels and that the interest rates would be similar, assuming that the loans are comparable as defined above. Of course, we would also adjust for differences in guarantee fees as paragraph (a)(1) directs us to do.

Two commenters urged the Department to make sure that we capture the full benefit conferred by a government loan guarantee by measuring the difference in loan terms resulting from the government guarantee as well as the difference in the cost of the guarantees.

We believe that paragraph (a)(1) addresses the commenters' concerns. By measuring the difference between the total amount that a firm pays for a loan guaranteed by the government and the amount that the firm would have paid on a comparable commercial loan (including any difference in guarantee fees), we are capturing both elements brought up by the commenters.

Paragraph (a)(2) of the 1997 Proposed Regulations specified that a government loan guarantee that was given by the government in its capacity as owner (*i.e.*, not under a government guarantee program used by government-owned and privately owned companies) would not be considered countervailable if private owners normally provide guarantees in the same circumstances. In the preamble of the 1997 Proposed Regulations, we said that if the government directly guarantees the debt of a company it owns, it would fall upon the respondent to demonstrate that it is normal commercial practice for private shareholders in that country to guarantee the debt of the companies in which they own shares. The preamble further provided that in a situation where a government-owned holding company guarantees the debt of its subsidiaries, the respondent would need to show that it is normal commercial practice for non-government-owned corporations to guarantee the debt of their subsidiaries. In addition, the respondent would need to demonstrate that the holding company has sufficient internally-generated resources to serve as guarantor of the debt.

One commenter maintained that, because of their greater financial resources and also for social and political reasons, governments have a greater ability and interest in guaranteeing certain loans than private shareholders do. Therefore, the commenter argued, in a situation where a government provides a loan guarantee to a company it owns, the Department should presume that the guarantee constitutes a countervailable subsidy unless the respondent can show that the guarantee was provided on commercial terms. In addition, this commenter emphasized that the burden should be on the respondent, not on the Department, to show that it is normal commercial practice in the country under investigation to provide loan guarantees.

We have not adopted a presumption that government-provided loan guarantees to government-owned firms are countervailable subsidies. If the respondent cannot provide evidence showing that it is normal commercial practice for private owners to give comparable loan guarantees to firms they own, the Department will determine whether the government loan guarantee resulted in the borrower

receiving a loan on terms more favorable than the firm would have received on a comparable commercial loan. We have modified paragraph (a)(2) to reflect this burden.

In the preamble to the 1997 Proposed Regulations, we also stated that where the government or a government-owned holding company guarantees the debt of an ''uncredit worthy'' company it owns (*see* § 351.505(a)(4) regarding uncreditworthy companies), the respondent must provide evidence that private owners would also guarantee the debt of uncreditworthy companies they own.

Two commenters argued that in the case of uncreditworthy companies, the countervailable benefit is equal to the amount of the guaranteed loan because an uncreditworthy company would not have been able to obtain any loan at all without government loan guarantees. They urged the Department to treat the entire amount of a guaranteed loan provided to an uncreditworthy company as a grant. In addition, one of the commenters implied that the European Union follows this practice.

We have not adopted this suggestion. Subsidized loan guarantees are essentially treated as subsidized loans. Therefore, consistent with our methodology of constructing a benchmark for loans to uncreditworthy companies (*see* § 351.505(a)(3)(iii)), we would construct a benchmark when uncreditworthy companies are given loan guarantees.

Paragraph (b) sets forth a rule regarding the point in time at which the benefit from a loan guarantee arises. The 1997 Proposed Regulations stated that we would consider the benefit as having been received on the date on which the firm is due to make a payment on the government-guaranteed loan. In these Final Regulations, we have amended the regulation such that we will consider the benefit to have been received in the year in which the firm otherwise would have had to make a payment on the comparable commercial loan.

Paragraph (c) deals with the allocation of the benefit to a particular time period. It is unchanged from the 1997 Proposed Regulations.

Section 351.507

Section 351.507 pertains to equity infusions. The methodology reflected here has changed from that laid out in the 1997 Proposed Regulations. The changes stem from our consideration of the comments received and a reevaluation of certain fundamental assumptions regarding the nature of, and circumstances surrounding, a government's purchase of shares in a company.

The 1997 Proposed Regulations assigned all equity infusions to one of two main methodological tracks according to whether or not a market share price for the company receiving the infusion was available. Where a market share price was available, we intended to use that price as a benchmark against which to compare the government purchase price of the stock. Any premium paid by the government was to be considered a benefit. While we expressed a preference for the use of a market price for newly issued shares which were identical or similar to the shares purchased by the government, we stated that, where such a price was not available, we would resort to using a market price for similar, pre-existing shares (*i.e.*, a ''secondary market price'') as the benchmark. Where secondary market prices were to be used, we proposed using *post-infusion* prices to ensure that our analysis captured any ''dilution'' effects (*i.e.*, any effects from the issue of new shares on the value of existing shares).

Where a market price for the shares purchased by the government was not available, we explained that we would first conduct our conventional equityworthiness test. If the company was deemed equityworthy, *i.e.*, appeared capable of generating a ''reasonable rate of return within a reasonable period of time,'' and if there were no special conditions or restrictions attached to the government's shares rendering their purchase inconsistent with the usual investment practice of private investors, the equity infusion would not confer a benefit. A finding that the company was unequityworthy would equate to a finding that the investment was inconsistent with the usual investment practice of private investors. To measure the benefit, the Department would attempt to construct a price that a reasonable private investor would theoretically have been willing to pay for the shares (''constructed private investor price'' or ''CPIP''). Any difference between the government purchase price and the CPIP would be considered a subsidy. If the information necessary for calculating the CPIP was not available, the Department would allocate the entire infusion amount over time, but deduct from the portion allocated to a particular year the amount of actual returns achieved by the firm in question in that year.

We received numerous comments regarding many aspects of the proposed methodology. Several comments focused on the use of private prices: Some commenters suggested abandoning any reference to market prices in all cases; some suggested abandoning only any reference to secondary market prices; and some supported use of private market prices, but requested that a pre-infusion rather than a post-infusion price be used.

Some commenters argued that the fact that a company's previously issued shares are traded in the secondary market is not conclusive evidence of that company's ability to raise new capital from private investors. These commenters pointed to the case where an otherwise financially sound company is contemplating a new expansion project about which general sentiment among private investors is pessimistic given the increased risk or low value the expansion is expected to add to the company as a whole. In this case, private investors would not likely purchase new shares. These commenters argued that, rather than using the secondary market shares as a benchmark to measure the benefit, the Department should move straight to its equityworthiness analysis as it does when there is no benchmark.

If the Department relies on secondary market prices as a standard by which to evaluate the reasonableness of the government's equity investment, however, several commenters argued that post-infusion prices should not be used. These commenters argued that such prices are inappropriate because a reasonable private investor could not know at the time of the purchase of new shares what the subsequent market price of that stock would be. Pre-infusion, rather than post-infusion, prices are, therefore, a better standard by which to judge the reasonableness of a government equity infusion.

The vast majority of equity comments addressed the proposed methodology for measuring the benefit to unequityworthy companies. While a few commenters expressed support for the proposed methodology, many others objected, arguing that a change from the current methodology (*i.e.*, treating the entire infusion as a benefit) is not mandated by either the SCM Agreement or the URAA, and that such a change represents a troublesome weakening of the CVD law. According to these commenters, the Department's stated legal authorities for the proposed change are not relevant to this particular issue: the GATT Panel ruling in the *Lead and Bismuth* case was rejected by the United States as inconsistent with U.S. law and the international subsidy code, and the CIT ruling in *AIMCOR* dealt only with the case of an

equityworthy firm (*see United States—Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in France, Germany and the United Kingdom*, SCM/185 (November15, 1994) and *AIMCOR, Alabama Silicon, Inc.* v. *United States*, 912 F. Supp. 549, 552–55 (CIT 1995) (''*AIMCOR II*'')).

The central point of the commenters opposing our proposed methodology was that, once a company has been deemed unequityworthy, the full amount of any equity infusion by the government should be considered a benefit. In other words, because the company would not have received any new capital absent government involvement, the benefit to the recipient is equal to the amount of the infusion. In contrast, the proposed methodology of constructing a private investor price, and the alternative methodology of adjusting for returns, use a cost-to-government standard which has been explicitly rejected as unlawful by the CIT. *See British Steel Corp.* v. *United States*, 605 F. Supp. 286, 295–296 (CIT 1985). These commenters also provided further theoretical, practical and legal reasons why each of the proposed methodologies is inappropriate.

First, several commenters maintain that the proposed CPIP methodology is based on the erroneous assumption that prices of a new share issue in an unequityworthy firm could be priced low enough to yield an overall return (dividends plus capital appreciation) to the new investor comparable to a market return. If the investment in which the new capital is used is not expected to yield a market return (which is why the firm is unequityworthy), issuing new shares at a discounted price would lower the existing shareholders' expected returns by diluting their claim on the firm's total equity. The existing shareholders, from the view of a reasonable private investor, have no incentive to allow this to happen. Hence, there is no price—in theory or in practice—at which, simultaneously, private investors would be willing to buy, and current shareholders willing to sell, shares in an unequityworthy company.

Another problem with the CPIP approach, according to these commenters, is that it is subject to manipulation in the case of an equity infusion into a 100 percent government-owned firm. In such a case, the earnings per share could always be manipulated (by adjusting the number of shares purchased) to reflect a fabricated per share ''market return'' without any adverse consequences for the government, which, in any case, would retain its claim on all of the company's profits.

Finally, as a practical matter, these commenters argue that the analysis called for under the CPIP approach places a significant burden on the Department. They argue that calculating the theoretical price a private investor would have been willing to pay for a stock would require a considerable level of financial expertise, would prove an inordinate drain on the Department's resources, and would involve too much conjecture on the part of the Department in matters of financial forecasting.

Several commenters also objected to the proposed alternative methodology of treating the entire infusion as a benefit, but then adjusting that benefit by actual returns. These commenters likened this methodology to the rate-of-return-shortfall (''RORS'') approach rejected by the Department in 1993. In their opinion, the arguments proffered by the Department for rejecting the RORS approach are equally valid in this case.

One such argument is that dividends (or actual returns) cannot be considered a ''repayment'' of the benefit conferred by the government equity infusion because dividends are, in fact, generated from that benefit. Nor can the dividends be used to reduce the amount of the benefit because the CIT has ruled that dividends are not explicitly included in the statutory list of allowable offsets. *British Steel PLC.* v. *United States*, 879 F. Supp. 1254, 1309 (CIT 1995).

These commenters highlighted several additional arguments, originally identified by the Department with regard to the RORS methodology, that explain why it is inappropriate to adjust for actual returns. First, the actual returns method is a *post-hoc* valuation of an investment which measures events subsequent to the equity infusion. Second, the proposed approach fails to account for later subsidies which could improve the financial status of the company, improperly reducing the benefit associated with earlier subsidies. Third, a company that was performing poorly could have an anomalous profitable year, allowing it to escape countervailing duties for that year. Fourth, the proposed approach does not measure the rate of return on the government's original equity infusion, but rather the rate of return in the period of investigation or review on the firm's total equity. Finally, the approach engenders bias in the administration of the law in that investments in unequityworthy companies will escape countervailing duties when results are unexpectedly good, but investments in equityworthy companies will not be countervailed when the results are unexpectedly bad.

After considering all of the comments, we have decided to revise the methodology described in the 1997 Proposed Regulations for analyzing equity infusions. In large measure, we are codifying our current practice with a number of important modifications. We believe that the approach detailed below better reflects the principles set forth in the statute, SAA and the SCM Agreement, and addresses many commenters' concerns while maintaining, to the extent possible, continuity with past Department practice.

Consistent with section 771(5)(E)(i) of the Act, paragraph (a)(1) provides that a benefit is conferred by a government-provided equity infusion if the investment decision is inconsistent with the usual investment practice of private investors, including the practice regarding the provision of risk capital, in the country in which the equity infusion is made. As in the 1997 Proposed Regulations, our methodology for identifying and measuring the resulting benefit is divided into two methodological tracks, with the choice of methodology dependent upon whether or not actual private investor prices can serve as a benchmark for the shares purchased by the government. However, for reasons discussed in greater detail below, we have changed our proposed methodology for calculating the benefit where there are no private investor prices and we will not construct the theoretical price a private investor would pay. Therefore, we have deleted the second sentence that appeared in paragraph (a)(1) of the 1997 Proposed Regulations.

Actual Private Investor Prices Available

Paragraph (a)(2) contains rules for analyzing equity infusions when actual private investor prices (*i.e.*, market prices) are available—the first methodological track—and has retained only some portions of the language in the 1997 Proposed Regulations. Under § 351.507(a), the initial step in analyzing an equity infusion is to determine whether, at the time of the infusion, there was a market price for newly issued equity. If so, the Department would consider the equity infusion to have conferred a benefit if the price paid by the government for the newly issued equity was more than the price paid by private investors for the same new issue. For example, if a government pays $10 per share for newly issued shares in a firm, and private investors pay $8 per share for shares in the same share issue,

a benefit exists in the amount of $2 per share ($10 − $8=$2).

Paragraph (a)(2)(i) also provides for the use of a ''similar form'' of new, contemporaneously issued shares as the basis for the reasonable private investor benchmark. As noted in the preamble to the 1997 Proposed Regulations, in the *Certain Steel* determinations the Department determined that, in appropriate circumstances, shares with similar characteristics can be compared, as long as appropriate adjustments are made. *See* GIA at 37252. The CIT subsequently upheld the principle of relying on a similar form of equity where the same form of equity does not exist. *Geneva Steel* v. *United States*, 914 F. Supp. 563, 580 (CIT 1996).

Where similar new, contemporaneously issued shares are used as the benchmark, paragraph (a)(2)(iv) provides that the Department will make a price adjustment for differences in the types of shares when it is appropriate. *See, e.g., Certain Fresh Atlantic Groundfish from Canada*, 51 FR 10047 (March 24, 1986). Moreover, paragraph (a)(2)(iii) requires that, where the Department uses the private investor prices, the amount of shares purchased by private investors must be significant so as to provide an appropriate benchmark. *See, e.g., Small Diameter Circular Seamless Carbon and Alloy Steel Standard, Line and Pressure Pipe from Italy*, 60 FR 31992, 31994 (June 19, 1995).

An important change to paragraph (a)(2) from the 1997 Proposed Regulations is that we have eliminated any provision for the use of secondary-market share prices. As discussed in greater detail below, in cases where private investor prices for the newly issued shares are not available, we will proceed directly to an equityworthiness determination without any reference to secondary market prices. Although previous Department practice has been to prefer market-determined share prices (including secondary prices) when available and useable, we are persuaded that a revision of this practice is now warranted for the following reasons.

In our view, secondary market prices do not necessarily reflect the market value of new shares, regardless of the point in time the comparison is made. Use of secondary market prices before a government infusion does not account for the dilution of company ownership and does not take into consideration private investors' perceptions of the recipient company's intended use of the newly obtained equity capital. Use of post-infusion secondary market prices may also be problematic. For example, the fact that the government has made an infusion may cause investors to bid up the secondary market price of the stock to a higher level than that warranted by the improved capital position of the company. The Department cannot reasonably account for such secondary market phenomena. In sum, secondary market prices are not a reliable basis for measuring the market value of newly issued equity.

Actual Private Investor Prices Unavailable

One of the most difficult methodological problems confronted by the Department in its administration of the CVD law involves the analysis of government-provided equity infusions in situations where there is no market benchmark price. Since 1982, the Department has dealt with this problem by categorizing firms as either ''equityworthy'' or ''unequityworthy.'' As set forth in § 355.44(e)(2) of the 1989 Proposed Regulations, an equityworthy firm was one that showed ''an ability to generate a reasonable rate of return within a reasonable period of time.'' An unequityworthy firm did not show such an ability. If the Department found that a firm was equityworthy, the Department would declare a government-provided equity infusion in the firm to not be countervailable. The Department would not consider whether, notwithstanding the general financial health of a firm, an excessive price was paid for government-provided equity. Conversely, if the Department found a firm to be unequityworthy, the Department would declare a government-provided equity infusion in the firm to be countervailable without further analysis.

In these Final Regulations, we have retained the equityworthy/unequityworthy distinction. Thus, in paragraph (a)(3), if actual private investor prices are not available under paragraph (a)(2), the Secretary will determine whether the firm funded by the government-provided equity was equityworthy at the time of the equity infusion. Paragraph (a)(4) sets forth the standard the Secretary will apply in determining equityworthiness, and broadly follows § 355.44(e)(2) of the 1989 Proposed Regulations.

Several commenters have argued that, under certain circumstances, the equityworthiness of the project being financed, rather than the firm as a whole, should be the focus of the Department's equityworthiness analysis. This is especially true, according to these commenters, when the investment contemplated by a firm represents a significant departure, in terms of its riskiness or expected return, from the firm's existing operations. These commenters maintain that the riskiness of a firm's new investment can significantly impede the firm's ability to raise new capital on equity markets on commercially available terms.

We received a similar comment with respect to our creditworthiness determinations. Consistent with the position we have taken regarding loans and creditworthiness, in the case of equityworthiness determinations, we recognize the possibility that it may be appropriate, in certain circumstances, to focus on the risk and expected return of the project being financed rather than the firm as a whole. Therefore, we have included a provision that allows the Secretary to do a project analysis where appropriate, but we are maintaining the general principle that the focus of an equityworthiness determination will normally be on the firm as a whole. We will address issues relating to the appropriateness of a project-specific equityworthiness analysis in the context of specific cases.

Paragraph (a)(4)(ii) discusses the significance of the analysis performed prior to a government equity purchase. For every government equity infusion, we will analyze whether the government's decision to invest was consistent with ''the usual investment practice of private investors, including the practice regarding the provision of risk capital.'' Section 771(5)(E)(i). Obviously, to answer this question, the basis upon which the government infusion was made must be clear. In prior CVD proceedings, governments have often failed to provide the Department *any* commercial rationale for their investment. This has been true for even very large infusions. In contrast, prior to making a significant equity infusion, it is the usual investment practice of a private investor to evaluate the potential risk versus the expected return, using the most objective criteria and information available to the investor. This includes an analysis of information sufficient to determine the expected risk-adjusted return and how such a return compares to that of alternative investment opportunities of similar risk. Absent such an objective analysis—performed prior to the equity infusion—it is unlikely that we would find that the infusion was in accordance with the usual investment practice of a private investor, except where we are satisfied that the lack of such an analysis is consistent with the actions of a reasonable private investor in the country.

Certain commenters have specifically requested that independent studies commissioned by foreign governments be considered by the Department in making an equityworthiness determination.

We will closely examine such studies. In order to be considered in our equityworthiness analysis, any study must have been prepared prior to the government's approval of the infusion and must be sufficiently objective and comprehensive. We intend to review such studies carefully to determine whether the government acted like a reasonable private investor, subjecting both the assumptions and the analysis to scrutiny. This will enable us to decide whether the decision to invest was commercially sound given the information at the disposal of the government.

Some independent studies commissioned to analyze the merits of a given investment may present an assessment of the company's expected returns and risks that is predicated on certain future actions by the company in question. For instance, a study might conclude that the investment in a company planning to close one outmoded plant and construct a new one in a different location is commercially viable so long as the company also reduces its workforce by half. In this case, the Department would take into consideration whether the downsizing will actually occur. If the company has known for a long time that a reduction in its workforce was a necessary condition for improved financial performance, but has consistently shown itself unwilling or incapable of making that reduction, this may prove sufficient cause to believe that the projected return is unattainable.

Some commenters cautioned the Department about relying too heavily on independent studies given their inherently speculative and subjective nature. We are well aware of the potential difficulties in using independent analyses, not least of which is the fact that independent experts often fundamentally disagree about the prospects of a given investment. In other instances, the objectivity of some studies is called into question. However, private investors are likewise usually faced with a similar variety of competing views and must exercise their own judgement with respect to the objectivity of information before them. When considering the suitability of a submitted study, we will seek to ensure the study is accurate and reliable, and exercise our own judgement with respect to a study's objectivity. Specifically, we will take into consideration the extent to which the study's premises and conclusions differ from those of other independent studies, accepted financial analysis principles, or market sentiment in general (*e.g.*, industry-specific business publications or general industry market studies).

Paragraph (a)(4)(iii) discusses the significance of prior subsidies in our equityworthiness determination. As in the 1997 Proposed Regulations, it states that in determining whether a firm or project was equityworthy, we will ignore current and prior subsidies received by the firm. Several commenters objected to this rule, arguing that any reasonable investor would take into consideration the role that past subsidies have played in a company's financial performance. These commenters noted that, while a company might appear to be successful, a reasonable investor may deem the company unequityworthy if he or she believes that, when forced to stand on its own (*i.e.*, without subsidies), the company would not yield a market return.

While we recognize the potential for prior subsidies to affect the present financial performance of a company, we are continuing with our practice of not considering the impact of prior subsidies when conducting an equityworthiness test. We continue to believe that it would be too difficult and speculative a task to determine what the company's performance would have been had it not previously benefitted from a subsidy.

Paragraph (a)(5) pertains to those infusions in which the firm or project is determined to be equityworthy. In our 1997 Proposed Regulations, we stated our intent to conduct a further examination of equityworthy companies to determine whether the particular investment was consistent with usual investment practice. We adopted this policy in light of the CIT decision in *AIMCOR II*, 912 F. Supp. at 552–55, in which the Court ruled that, because of restrictions imposed on the shares bought by the government, the government's purchase of those shares was inconsistent with commercial considerations, notwithstanding the fact that the firm in question was equityworthy.

Certain commenters objected to this proposal, arguing that if a firm has been deemed to be equityworthy, any investment in that firm is *per se* consistent with usual private investment practices and should not be countervailed. However, we note that, as the Court pointed out in a previous determination, ''[w]here a company is equityworthy, as here, it does not necessarily follow that the purchase of stock from that company will be consistent with commercial considerations.'' *See AIMCOR* v. *United States*, 871 F. Supp. 447, 454 (CIT 1994) (''*AIMCOR I*''). Therefore, as provided in paragraph (a)(5), we will conduct a further analysis into whether the shares purchased by the government have special conditions or restrictions attached and, if so, whether those conditions render the investment inconsistent with usual private investment practices as stipulated in paragraph (a)(1). Any benefit found from these types of equity purchases will be determined on a case-by-case basis. In situations where the shares purchased by the government in an equityworthy firm are common shares, we will normally consider the infusion to have been consistent with usual private investment practice.

In cases where a government equity infusion has been made and the firm is unequityworthy, paragraph (a)(6) states that the amount of the benefit will be equal to the amount of the equity infusion. This is a codification of our current practice which has been in place since the 1993 steel determinations and has been upheld by the CIT in *British Steel plc* v. *United States*, 879 F. Supp. 1254, 1309 (CIT 1995), *aff'd in part and rev'd in part*, 127 F.3d 1471 (Fed. Cir. 1997). *See, also, Usinor Sacilor* v. *United States*, 893 F. Supp. 1112, 1125–26 (CIT 1995).

We believe this approach is most appropriate based mainly on the argument that, because a reasonable private investor could not expect a reasonable return on the invested capital, no such investor would provide the infusion. The CPIP approach, which we explored in the 1997 Proposed Regulations, attempted to measure the hypothetical price at which the investor would provide the funds. In the case of an unequityworthy firm or project, this hypothetical price would have to be lower than the price of existing shares. However, as explained in the summary of comments above, from the perspective of the existing shareholders of the company that received the infusion, such a lower price would be unacceptable. These shareholders would generally not allow the new shares to be issued at a reduced price because this would simultaneously lower the expected return on their existing investment. There is, therefore, no mutually acceptable price at which the transaction would take place between two private investors, and the investment would not occur.

Thus, the benefit to the operations of the recipient firm is the entire amount of the government infusion. That is not to say that the shares received by the government are worthless; they may have value. However, the comparison here is what the company actually received with what the company would have received absent the government intervention. In the case of an unequityworthy firm, the amount the company would have received is zero. Thus, although the government equity infusion is not *per se* a grant, it is appropriate to consider the full amount of the infusion as the benefit because the government provided a sum of money that would not have been provided by a private investor. This is the fundamental point overlooked by the GATT panel report. (*See United States—Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in France, Germany, and the United Kingdom*, SCM/185 (November 15, 1994) (unadopted).

Paragraph (a)(7) pertains to allegations regarding equity infusions and is based on § 355.44(e)(3) of the 1989 Proposed Regulations.

Paragraph (b) provides that the Secretary normally will consider the benefit from an equity infusion to have been received on the date on which the firm received the infusion. Paragraph (c) pertains to the allocation of the benefit to particular years and provides that the benefit conferred by an equity infusion will be allocated as if it were a non-recurring subsidy, using the methodology set forth in § 351.524(d).

Section 351.508

Section 351.508 deals with assumptions or forgiveness of debt. Paragraph (a), which deals with the identification and measurement of the benefit attributable to government-provided debt assumptions or forgiveness, is little changed from § 355.44(k) of the 1989 Proposed Regulations and from § 351.507 of the 1997 Proposed Regulations. Paragraph (b) describes when the benefit from debt assumption or forgiveness will be deemed to have been received. Paragraph (c) provides that the Secretary will normally treat the benefit from debt assumption or forgiveness as a non-recurring subsidy for allocation purposes. However, paragraph (c)(2) provides that, where the government is assuming interest under certain narrowly drawn circumstances, the interest assumption will be treated as a reduced-interest loan and allocated according to the loan allocation rules. Although it has undergone some refinement, this exception is consistent with the policy articulated by the Department in the 1993 *Certain Steel* determinations.

Section 351.509

Section 351.509 deals with subsidy programs that provide a benefit in the form of relief from direct taxes. (''Direct tax'' is defined in § 351.102.) Such relief includes exemptions, remissions, and deferrals of direct taxes. The most common form of a direct tax is an income tax, and the subsidy programs most frequently encountered are those that provide special income tax exemptions, deductions, or credits. With respect to the benefit provided by these types of programs, paragraph (a)(1) of § 351.509 retains the standard set forth in § 355.44(i)(1) of the 1989 Proposed Regulations, *i.e.*, a benefit exists to the extent that the taxes paid by a firm as the result of a program are less than the taxes the firm would have paid in the absence of the program. *See* 1989 Proposed Regulations at 23372 and related cases cited.

Paragraph (a)(2) deals with another type of direct tax program: the deferral of direct taxes owed. Although § 355.44(i)(1) of the 1989 Proposed Regulations included tax deferrals with exemptions and remissions of direct taxes, the Department has consistently used a different methodology for identifying and measuring the benefits of deferrals by treating deferrals as government-provided loans. We have normally treated deferrals of one year or less as short-term loans, while multi-year deferrals have been treated as short-term loans rolled over on the anniversary date(s) of the deferral.

We received two comments on the deferral of direct taxes. One commenter maintained that it would be more appropriate to treat multi-year tax deferrals as long-term loans rather than as a series of rolled-over short-term loans. The commenter observed that the Department had not explained why multi-year tax deferrals should be treated as a series of short-term loans, arguing that this approach enables the recipient company to receive long-term benefits that are countervailed using a short-term benchmark interest rate. The commenter stated that long-term interest rates are typically higher than short-term rates and that the Department, therefore, should use the long-term rate as the benchmark rate. The second commenter argued that multi-year tax deferrals should be treated as long-term loans because such deferrals are authorized only once for the entire period of deferral. However, the second commenter stated, even if a multi-year deferral were authorized annually on a routine basis, the benefit would resemble a long-term loan and, therefore, a long-term interest rate should be used as the benchmark rate.

We agree that, in certain circumstances, where it is reasonable to conclude from the record that a deferral will extend over more than one year, multi-year deferrals should be viewed as long-term loans. For example, if the firm knows at the time the taxes would normally be due that the firm would not become liable for the taxes until five years later, it would be appropriate to view the deferral as a five-year loan and to use the appropriate benchmark. Moreover, if it is known at the time of the deferral that the deferral will be longer than one year, but the term is indefinite, we will also use a long-term benchmark to calculate the benefit in each year. However, if the deferral has an uncertain endpoint, we will examine whether it is appropriate to view the deferral as a short-term or long-term loan.

As in the past, tax deferrals of one year or less will be treated as short-term loans, using a short-term interest rate as the benchmark rate in accordance with § 351.505(a). Similarly, if it is not known if a tax deferral will extend over more than one year (*e.g.*, if the firm's payment of taxes is made contingent upon some future event) and we have no reasonable basis to conclude that the deferral will extend over more than one year, such tax deferral will be treated as a short-term loan.

In the 1997 Proposed Regulations, we identified one aspect of direct tax subsidy programs that might warrant modification. We stated that, in the case of special accelerated depreciation allowances, a firm typically experiences tax savings in the early years of an asset's life and tax increases in the latter years of the asset's life. In the past, the Department has focused on the tax savings but has not acknowledged the later tax increases. In the 1997 Proposed Regulations, we discussed adopting a methodology that accounts for both the early tax savings and the later tax increases by calculating the net present value of the expected tax savings at the outset of the accelerated depreciation period. However, we stated that we wanted to obtain the views of the public before changing our methodology.

We received several comments on this issue, all of which contained objections to our proposed change of methodology. The comments focused on four areas. First, the commenters characterized our proposed methodology as speculative because the Department cannot be certain that the benefits of an

accelerated depreciation program will be offset by higher taxes in the future. The commenters pointed to factors such as changes in tax provisions and government tax policies, the provision of additional future tax benefits, and the possibility that the recipient company would incur losses in the future, all of which might prevent higher taxes from materializing in the future. One commenter pointed to the Department's findings in *Extruded Rubber Thread from Malaysia,* 57 FR 38472 (August 25, 1992) (''*Malaysian Rubber Thread*''), where a hypothetical tax burden in later years did not prevent the Department from countervailing tax benefits provided during the period of investigation. In sum, these commenters argued that the Department should not give a company credit for a contingent tax liability that we could not be sure the company ever would incur.

Second, some of the commenters maintained that the Department's proposed change would be contrary to the central purpose of the CVD law, *i.e.*, to discourage the provision of subsidies. According to these commenters, the proposed methodology would encourage foreign governments to modify their tax programs so that future tax payments would appear to offset current countervailable tax benefits.

Third, some commenters asserted that it would be unlawful for the Department to offset countervailable benefits with higher future tax payments. These commenters pointed to the statutory list of permissible offsets, which does not include future tax payments. They also argued that our proposed methodology would be akin to taking secondary tax effects into account, which would be contrary to § 351.527 of the 1997 Proposed Regulations (this section, which deals with the tax consequences of benefits, is included in § 351.503(e) of these Final Regulations).

Fourth, a few commenters pointed to the administrative burden that the Department would assume if it were to adopt the proposed methodology. One commenter stated that it would be difficult to track companies' future tax payments. Another commenter portrayed it as unlikely that the Department would verify that higher taxes were actually paid in future years. Finally, one commenter recommended that the Department adopt a regulation saying that benefits resulting from accelerated depreciation may *not* be offset by a potentially higher tax burden in the future.

Based on the comments we have received, we are not changing our methodology. We will, therefore, continue our current methodology for calculating the tax benefits from accelerated depreciation schemes on a year by year basis.

In the 1997 Proposed Regulations, we also sought public comment on how we should address tax subsidies when the recipient company is incurring losses, including loss carryforwards and losses under accelerated depreciation. We received only a few comments on these issues. All the commenters agreed that losses should be dealt with according to the same underlying principle that guides the rest of the Department's direct tax methodology, *i.e.*, the Department should treat as a countervailable benefit the difference between the amount of taxes actually paid and the amount of taxes that would have been paid in the absence of the countervailable tax benefit. With respect to loss carryforwards, the commenters outlined two scenarios under which such carryforwards can convey countervailable benefits: (1) When a company is allowed to carry forward a greater value of losses from one year to the next than other companies, and (2) when a company is allowed to carry forward losses for a longer period of time than other companies. In both cases, the commenters urged the Department to follow the underlying principle described above, *i.e.*, to countervail the difference between the actual taxes paid and the taxes that would have been paid under normal circumstances. Regarding losses associated with accelerated depreciation, the commenters requested the Department to countervail the accelerated depreciation allowance only to the extent that it results in a reduction of taxes paid.

We agree with the commenters that our guiding principle is to treat as a countervailable benefit the difference between the taxes a company actually pays and the taxes it would have paid if it had not incurred a loss or a diminished profit as a result of accelerated depreciation or a loss carryforward (provided that these tax benefits are specific). We intend to follow the approach used in *Malaysian Rubber Thread.* We do not see any need to change or to add to our regulations in this respect.

Paragraph (b) of § 351.509 deals with the question of when the benefit from a direct tax subsidy is considered to have been received by a firm. In our 1997 Proposed Regulations, we proposed to consider the benefit as having been received on the date the firm knew the amount of its tax liability. However, as stated in the 1989 Proposed Regulations, the date the firm knows its tax liability normally is the date on which it files its tax return. In these Final Regulations, we have decided that, with respect to a full or partial tax exemption or remission, we will consider the benefit as having been received on the date on which the recipient firm would otherwise have had to pay the taxes associated with the exemption or remission, which is usually the date it files its tax return. This conforms the regulations to our experience.

With respect to deferrals, under paragraph (b)(2), the Secretary normally will treat the deferral of a direct tax as a loan, and will treat the benefit as received, as follows. The Secretary normally will treat a tax deferral of one year or less as a short-term loan received on the date the tax originally was due and repaid when the tax was actually paid. The Secretary normally will consider the benefit from a multi-year deferral as having been received on the anniversary date(s) of the deferral.

Paragraph (c) deals with the allocation of the benefits of direct tax subsidies to particular time periods. As under the 1997 Proposed Regulations, the Department normally will allocate such benefits to the year in which the benefits are considered to have been received under paragraph (b).

Finally, the Department will apply § 351.509 consistently with WTO rules concerning direct tax measures. Thus, for example, in the case of a foreign tax measure that exempts from taxation (either in whole or in part) income attributable to economic processes (including transactions involving exported goods) located outside the territorial limits of the exporting country, the Department would not consider such a measure to be an export subsidy, provided that the measure complied with other relevant WTO rules.

Section 351.510

Section 351.510 deals with programs that provide full or partial exemptions from, and deferrals of, indirect taxes or import charges. (''Indirect tax'' and ''import charge'' are defined in § 351.102.) However, § 351.510 deals only with programs that potentially would be considered import substitution subsidies or domestic subsidies under section 771(5A)(C) or section 771(5A)(D) of the Act, respectively. Sections 351.517 through 519 deal with programs that potentially would be considered export subsidies under section 771(5A)(B) of the Act because separate guidelines must be applied when examining export subsidy programs that involve exemptions or rebates of indirect taxes or import charges.

Paragraph (a)(1) of § 351.510 is based on § 355.44(i)(2) of the 1989 Proposed Regulations, and continues to provide that a benefit exists to the extent that the taxes or import charges paid by a firm as the result of a program are less than the taxes the firm would have paid in the absence of the program. As in the case of direct taxes under § 351.509, deferrals of indirect taxes and import charges will be treated under paragraph (a)(2) as government-provided loans. Normally, we will use a short-term interest rate as the benchmark for deferrals of one year or less and a long-term interest rate as the benchmark for multi-year deferrals. The treatment of multi-year deferrals represents a change from the 1997 Proposed Regulations and is discussed in detail in the preamble to § 351.509.

Paragraph (b) of § 351.510 is based on § 355.48(b)(6) of the 1989 Proposed Regulations, and continues to provide that the Secretary will consider the benefit from a full or partial exemption of indirect taxes or import charges to have been received on the date when the recipient firm otherwise would have had to pay the tax or charge. In the case of deferrals of one year or less, the Secretary normally will consider the benefit to have been received when the deferred amount becomes due. For multi-year deferrals, the benefit is received on the anniversary date(s) of the deferral.

Paragraph (c) deals with allocation to a particular time period, and provides that the Secretary normally will expense the benefits attributable to the types of subsidy programs covered by § 351.510 in the year of receipt.

Section 351.511

Section 351.511 deals with the provision of goods and services. Prior to the URAA, section 771(5)(A)(ii)(II) of the Act provided that the provision of goods or services constituted a subsidy if such provision was ''at preferential rates.'' Now, under section 771(5)(E)(iv) of the Act, a subsidy exists if such provision is ''for less than adequate remuneration.'' Under section 771(5)(E) of the Act, the adequacy of remuneration is to be determined:

> ''in relation to prevailing market conditions for the good or service being provided * * * in the country which is subject to the investigation or review. Prevailing market conditions include price, quality, availability, marketability, transportation, and other conditions of purchase or sale.''

In our 1997 Proposed Regulations, we designated paragraph (a) as ''(reserved),'' stating that we wished to acquire some experience with the new statutory provision before codifying our methodology in the form of a regulation. We received several comments expressing disappointment in the lack of a regulation on this topic. While these parties recognized that our relative lack of experience with the new statutory provision made it difficult to promulgate a regulation, they requested guidance as to how we intend to identify and measure adequate remuneration.

Several commenters stressed the importance of basing the adequate remuneration benchmark on market prices that have not been distorted by the government's involvement in the market. According to these commenters, where government involvement has distorted prices, the Department should either adjust the price to account for the distortion or resort to the use of an alternative price. These commenters also argued that the benchmark used should include all delivery charges and, if necessary, import duties.

We also received several comments in response to our stated intention of continuing to employ a preferentiality type analysis where the government is the sole provider of goods or services such as electricity, water, or natural gas. One commenter supported such an approach and encouraged us to codify it. Other commenters argued that the preferentiality approach does not sufficiently capture the benefit mandated by the adequate remuneration standard. That is, it does not adequately measure the differential between the price paid for the input and the full market value of the input.

Since issuing the 1997 Proposed Regulations, the Department has gained some experience in applying the adequate remuneration standard. *See, e.g., Steel Wire Rod from Germany,* 62 FR 54990, 54994 (October 22, 1997), *Steel Wire Rod from Trinidad and Tobago,* 62 FR 55003, 55006–07 (October 22, 1997), and *Steel Wire Rod from Venezuela,* 62 FR 55014, 55021–22 (October 22, 1997) (*''Venezuelan Wire Rod''*). Based on our experience in these cases and on the comments received on this issue, we are providing guidance on how we intend to apply this new standard. Accordingly, paragraph (a) outlines the conceptual approach we will follow to measure the benefit from governmental provision of goods or services.

Paragraph (a)(1) states that a benefit exists to the extent that the good or service is provided for less than adequate remuneration. Paragraph (a)(2)(i) provides that our preference is to compare the government price to market-determined prices stemming from *actual* transactions within the country. Such market-determined prices include actual sales involving private sellers and actual imports. They may also include, in certain circumstances, actual sales from government-run competitive bidding. The circumstances where such prices would be appropriate are where the government sells a significant portion of the goods or services through competitive bid procedures that are open to everyone, that protect confidentiality, and that are based solely on price. In choosing actual transactions, the Secretary will consider product similarity, quantities sold or imported, and other factors affecting comparability.

We normally do not intend to adjust such prices to account for government distortion of the market. While we recognize that government involvement in a market may have some impact on the price of the good or service in that market, such distortion will normally be minimal unless the government provider constitutes a majority or, in certain circumstances, a substantial portion of the market. Where it is reasonable to conclude that actual transaction prices are significantly distorted as a result of the government's involvement in the market, we will resort to the next alternative in the hierarchy.

Paragraph (a)(2)(ii) provides that, if there are no useable market-determined prices stemming from *actual* transactions, we will turn to world market prices that *would be available* to the purchaser. We will consider whether the market conditions in the country are such that it is reasonable to conclude that the purchaser could obtain the good or service on the world market. For example, a European price for electricity normally would not be an acceptable comparison price for electricity provided by a Latin American government, because electricity from Europe in all likelihood would not be available to consumers in Latin America. However, as another example, the world market price for commodity products, such as certain metals and ores, or for certain industrial and electronic goods commonly traded across borders, could be an acceptable comparison price for a government-provided good, provided that it is reasonable to conclude from record evidence that the purchaser would have access to such internationally traded goods.

Where there is more than one commercially available world market price to be used as a benchmark, we intend to average these prices to the extent practicable, with due allowance for factors affecting comparability. If the

most appropriate benchmarks are for products that are dumped or subsidized in the country where the subject merchandise is produced, we will adjust the benchmarks to reflect the dumping or subsidization. However, we will only make an adjustment to reflect a determination of dumping or subsidization made by the importing country with respect to the input product imported from the country from which the world market price is derived.

Paragraph (a)(2)(iii) provides that, in situations where the government is clearly the only source available to consumers in the country, we normally will assess whether the government price was established in accordance with market principles. Where the government is the sole provider of a good or service, and there are no world market prices available or accessible to the purchaser, we will assess whether the government price was set in accordance with market principles through an analysis of such factors as the government's price-setting philosophy, costs (including rates of return sufficient to ensure future operations), or possible price discrimination. We are not putting these factors in any hierarchy, and we may rely on one or more of these factors in any particular case. In our experience, these types of analyses may be necessary for such goods or services as electricity, land leases, or water, and the circumstances of each case vary widely. *See, e.g., Pure Magnesium and Alloy Magnesium from Canada,* 57 FR 30946, 30954 (July 13, 1992) and *Venezuelan Wire Rod.*

We believe that this approach addresses the concerns raised by commenters about potentially continuing the use of the preferentiality standard by shifting the focus of our inquiry toward whether the government employed market principles in setting prices. Although we do not have enough experience with the adequate remuneration standard to state when a price discrimination analysis may be appropriate, we believe there may be instances where government prices are the most reasonable surrogate for market-determined prices. We would only rely on a price discrimination analysis if the government good or service is provided to more than a specific enterprise or industry, or group thereof.

Paragraph (a)(2)(iv) provides that, in determining the adequacy of remuneration, the Department will adjust comparison prices to reflect the price a company would pay if it imported the good or service. This adjustment will account for delivery charges and import duties. In addition, if the price of the imported good includes antidumping or countervailing duties imposed by the country in question, we would use the price inclusive of those duties for comparison purposes. Absent the imposition of antidumping or countervailing duties by the country in question, however, we would not adjust the import prices to reflect alleged dumping or subsidies.

Paragraph (b) is based on § 355.48(b)(2) of the 1989 Proposed Regulations, and continues to provide that the benefit from a government-provided good or service is considered received when the firm pays, or is due to pay, for the good or service. Paragraph (c), which also is consistent with existing practice, provides that the Secretary normally will expense the benefit of a government-provided good or service to the year of receipt. However, benefits conferred by the provision of non-general infrastructure normally will be allocated over time.

Paragraph (d) deals with the provision of general infrastructure. Section 355.43(b)(4) of the 1989 Proposed Regulations contained a special test for determining whether government-provided infrastructure was specific and, therefore, countervailable. In our 1997 Proposed Regulations, we explained that, unlike the pre-URAA statute, section 771(5) of the Act, as amended by the URAA, expressly mentions certain types of government-provided infrastructure. However, it does so not in the context of specificity, but in the context of ''financial contribution,'' one of the prerequisites for a subsidy. Section 771(5)(D)(iii) of the Act, which implements Article 1.1(a)(1)(iii) of the SCM Agreement, provides that the term ''financial contribution'' includes the provision of ''goods or services, other than general infrastructure.'' In other words, the provision of ''general infrastructure'' does not constitute a ''financial contribution,'' and, thus, does not constitute a subsidy.

We noted in our 1997 Proposed Regulations that, in light of the change in the statute, the countervailability of infrastructure depends on the definition of ''general infrastructure.'' However, because of our inexperience in applying this definition and our uncertainty regarding the extent to which the principles reflected in the 1989 Proposed Regulations remained useful analytical tools for distinguishing potentially countervailable infrastructure from non-countervailable general infrastructure, we opted not to issue a regulation on infrastructure.

We received several comments regarding the definition of general infrastructure. One commenter argued that the word ''general'' essentially describes *types* of infrastructure—such as roads, bridges, railroads, etc.—which would never be countervailable. This commenter maintained that the word ''general'' should not be interpreted as relating to the question of specificity and argued that to do so would be to ignore the plain language of the statute. Several other commenters argued that the language in the SCM Agreement regarding general infrastructure was meant to codify the U.S. practice of countervailing specific infrastructure.

We disagree with the proposition that certain *types* of infrastructure automatically constitute general infrastructure and, thus, are not countervailable. Roads, bridges, and railroads do not necessarily constitute ''general infrastructure'' and can provide benefits to particular industries, as in the case where a road or bridge is built in an industrial park or port facility that is used only by one industry, or a group of industries. *See, e.g., Certain Steel Products from Korea,* 58 FR 37338, (July 9, 1993) (''*Korean Steel*''). Therefore, the type of infrastructure *per se* is not dispositive of whether the government provision constitutes ''general infrastructure.'' Rather, the key issue is whether the infrastructure is developed for the benefit of society as a whole.

Paragraph (d) defines ''general infrastructure'' as infrastructure that is created for the broad societal welfare of a country, region, state, or municipality. For example, interstate highways, schools, health care facilities, sewage systems, or police protection would constitute general infrastructure if we found that they were provided for the good of the public and were available to all citizens or to all members of the public. Because we have no experience with the new concept of general infrastructure, we are not establishing more precise criteria at this time. However, we intend to follow these broad principles in future cases and we may develop more detailed criteria as we gain more experience.

Any infrastructure that satisfies this public welfare concept is general infrastructure and therefore, by definition, is not countervailable and not subject to any specificity analysis. Any infrastructure that does not satisfy this public welfare concept is not general infrastructure and is potentially countervailable. The provision of industrial parks and ports, special purpose roads, and railroad spur lines, to name some examples (some of which

we have encountered in our cases), that do not benefit society as a whole, does not constitute general infrastructure and will be found countervailable if the infrastructure is provided to a specific enterprise or industry and confers a benefit. *See, e.g., Korean Steel.*

Section 351.512

Section 351.512 deals with the purchase of goods. Section 771(5)(E)(iv) of the Act provides that the purchase of goods by a government can confer a benefit if the goods are purchased ''for more than adequate remuneration.'' As with the provision of goods and services, our lack of experience in applying the adequate remuneration standard led us to designate this section ''[reserved]'' in the 1997 Proposed Regulations. Unlike the case with the provision of goods and services, however, we have not had the opportunity to gain sufficient experience applying the new standard in the context of government purchases. In addition, while government procurement potentially was a countervailable subsidy prior to the URAA, allegations of procurement subsidies were extremely rare. Thus, we still do not have experience on such matters as the ''timing'' of procurement subsidies or the allocation of such subsidies to a particular time period. Therefore, given our lack of experience with procurement subsidies we are not issuing regulations concerning the government purchase of goods. Instead, we have continued to designate § 351.512 as ''[reserved].''

One commenter, however, encouraged the Department to provide further guidance regarding how it intended to apply the adequate remuneration standard in the context of the government purchase of goods. In particular, this commenter advocated a definition of adequate remuneration which focuses on a comparison of comparable prices for the good or service provided based on prevailing market conditions in the country subject to investigation or review.

As noted above, we are hesitant to promulgate a regulation dealing with the purchase of goods by a government because of our relative lack of experience in this area. However, our intended approach toward the measurement of the adequacy of remuneration is outlined in detail in § 351.511 (government provision of goods or services). While we have not codified this approach with respect to government purchases, we expect that any analysis of the adequacy of remuneration will follow the same basic principle, *i.e.*, will focus on what a market-determined price for the good in question would be.

We also received one comment regarding the threshold for initiating an investigation into whether government purchases have been made for more than adequate remuneration. In particular, this commenter argued for a ''reasonable basis to believe or suspect'' standard. In other words, a petitioner would be required to allege facts that give the Department a reasonable basis to believe or suspect that government purchases have been made for more than adequate remuneration.

We disagree that a heightened initiation threshold should be employed for this type of subsidy. Because we have virtually no experience with this type of subsidy, it would be inappropriate to require petitioners to meet a higher threshold for initiation than that imposed by the statute. According to section 702(b)(1) of the Act, the petitioner need only allege the elements necessary for the imposition of the duty (*i.e.*, the existence of a countervailable subsidy) and support the allegation with reasonably available information.

One additional commenter stated that the government purchase of services should be treated similarly to the government purchase of goods. In the discussion of this point in the preamble to the 1997 Proposed Regulations, we noted that only government purchase of goods is identified as a financial contribution under section 771(5)(D)(iv) of the Act and Article 1.1(a)(1)(iii) of the SCM Agreement. This commenter argued, however, that according to the statute and the SCM Agreement, a subsidy can exist where there is either a financial contribution or an income or price support. A governmental purchase of services, according to this commenter, can be considered an income support and, therefore, can result in a subsidy.

We have not adopted this suggestion. We believe that if governmental purchases of services were intended to be treated similarly to the government purchase of goods, the statute and the SCM Agreement would specifically mention services as they do with the government provision of goods and services.

Finally, we received one comment arguing that if we chose to promulgate a regulation regarding government purchases, we should make clear that purchases by government monopolies are included. While we are not issuing a regulation on this subject, we agree that purchases by government monopolies can constitute subsidies provided there is a benefit and the benefit is specific.

Section 351.513

Section 351.513 deals with worker-related subsidies. Under paragraph (a), the Department will identify and measure the benefit of government-provided assistance to workers based on the extent such assistance relieves the firm of an obligation it otherwise normally would incur. The comments we received dealt mainly with the form the obligation must take in order for worker-related assistance to be countervailable.

All commenters agreed that the Department should continue its practice of countervailing worker-related assistance when there is a pre-existing obligation for the company to provide such assistance. However, the commenters differed in how they defined the term ''obligation.'' Some commenters asked the Department to adopt a broad definition of the term ''obligation'' and not limit it to only contractual or statutory obligations, whereas others argued that an obligation must be contractual or statutory in order for the Department to find the assistance to be countervailable.

As in our 1997 Proposed Regulations, we continue to take the position that ''obligation'' should be interpreted broadly. Even though an obligation is not binding in a contractual or statutory sense, an exemption from it may nevertheless provide a benefit to a firm. As an example, social or political conditions in a country may be such that, although no legal or contractual obligation exists, it is normal practice that companies make severance payments to laid-off workers. If the government decides to shoulder all or part of such payments, then the government relieves the company of a payment it otherwise would have incurred. In this situation, we will find that a countervailable subsidy exists, as long as the government's action is specific.

A related issue arises in situations where a company's obligations to its workers are negotiated by labor and management with the knowledge that the government will make a contribution. We encountered this situation in *Certain Steel Products from Germany*, 58 FR 38318 (July 9, 1993) (''*Certain Steel from Germany*''), where we concluded that the parties'' knowledge of the government's willingness to make a contribution had an impact on the outcome of the negotiations. In the absence of the government's payment, the company would likely have agreed to pay the

workers more. Because the additional amount would depend upon the relative negotiating strengths of labor and management, we found it reasonable to assume that workers and management held approximately equal negotiating strength. We, therefore, decided to split the difference and concluded that in the absence of the government's contribution, the company would have had to pay the workers 50 percent of the amount paid by the government. As a result, we decided that 50 percent of the government's contribution was countervailable because it relieved the company of a payment it otherwise would have had to make.

Some commenters asked the Department to continue to apply the methodology used in *Certain Steel from Germany* whereas another commenter maintained that this approach is too generous to respondents and that the Department should countervail the full amount of the government's contribution. In opposition, other commenters characterized the methodology as speculative and urged the Department not to countervail governmental social aid at all.

As in the 1997 Proposed Regulations, we have declined to codify the approach used in *Certain Steel from Germany*. We believe, and the CIT has found, that where a company's obligations to its workers are negotiated with the knowledge that the government will make a contribution, it is reasonable to conclude that the government's commitment, and the negotiating parties' awareness of the commitment, have an impact on the outcome of the negotiations *(see LTV Steel* v. *United States*, 985 F. Supp. 95 (1997)). However, we believe it is necessary to examine the facts in each case before determining whether it is appropriate to countervail 50 percent of the government's contribution or some other amount.

Paragraph (b) deals with the form and timing of worker-related subsidies. Even though we did not receive any comments on these issues, we are making the following clarifications: Although most worker-related subsidies are provided in the form of cash payments, we consider the term ''payment'' in paragraph (b) to include non-cash benefits. With respect to timing, the Secretary will consider the subsidy to have been received by the firm on the date on which the payment is made that relieves the firm of an obligation that it normally would have incurred.

Paragraph (c) deals with the allocation of worker-related subsidies to a particular time period. As in the past, these subsidies will normally be considered to provide recurring benefits and they will be allocated to the year of receipt (expensed) in accordance with § 351.524(a).

Section 351.514

Section 351.514 contains the standard for determining when a subsidy is an export subsidy, as opposed to a domestic or import substitution subsidy. Consistent with section 771(5A)(B) of the Act, paragraph (a) of § 351.514 codifies the expansion of the definition of an export subsidy to include any subsidy that is, in law or in fact, contingent upon export performance, alone or as one of two or more conditions. Paragraph (b) has been added, incorporating the previously separate regulation regarding general export promotion.

We received a number of comments regarding the expanded definition of export subsidy in the 1997 Proposed Regulations. Several commenters supported the expanded definition in the 1997 Proposed Regulations but suggested that language be added to the regulation making it clear that an export requirement need not be an explicit condition of the program as long as the facts indicated that the benefits were contingent upon actual or anticipated exportation. These commenters highlighted several factual scenarios under which the Department should find an export subsidy to exist. These include subsidies provided to ''for-export'' industries; subsidies provided in situations where the export market is the only market for the subject merchandise; and subsidies provided where a substantial portion of a subsidized project will be devoted to export production.

Several other commenters were opposed to the expanded definition. These commenters argued that, if narrowly applied, the definition would disproportionately penalize exporting countries which may have broad policy statements referring to exports. With the growing economic integration of the North American market under the North American Free Trade Agreement (''NAFTA''), firms in these countries may base their investment decisions on servicing the NAFTA market rather than a domestic and export market, and, as such, the assistance is not truly contingent upon export performance. Further, these commenters argued that mere consideration of possible exportation as one of the factors considered by the government in granting the benefit does not mean that the benefit is ''contingent'' upon export performance. As support, they cited footnote 4 to Article 3.1(a) of the SCM Agreement which states that ''the mere fact that a subsidy is granted to enterprises which export shall not for that reason alone be considered to be an export subsidy within the meaning of this provision.'' One commenter argued that ''contingent upon actual or anticipated exportation or export earnings'' should be limited to situations where the subsidy is conferred only upon actual exportation or is lost if the recipient is unable to demonstrate that the goods were exported.

Finally, one commenter suggested that the regulations should include illustrative (but not all-inclusive) guidance regarding the factors that the Department will consider in its analysis of *de facto* export subsidies. In this commenter's view, the regulations should also incorporate language that clarifies the distinction between a *de jure* and a *de facto* analysis.

While we have made minor changes to more closely conform the language of the 1997 Proposed Regulations with the language in the SCM Agreement and the statute, we have made no changes in response to these comments. However, in applying the standard contained in § 351.514, we will distinguish between broad development goals or economic policy, and specific program objectives and criteria. For purposes of our analysis, we have developed a list of factors that we may consider. This list is non-exhaustive and includes: (1) The stated purpose or purposes of the subsidy as put forth in the governing laws or regulations; (2) the selection criteria and reasons for approval/disapproval; (3) application and approval documents, including market or economic viability studies; (4) the existence and nature of any monitoring or enforcement mechanism; (5) governmental collection of data regarding the program recipients' exports (other than the customary collection of export and import data); (6) the exporting history of recipient firms or industries; and (7) other evidence that the Department deems relevant to consider. We need not examine all of the factors to determine that the program is an export subsidy if our examination of one or more factors provides sufficient evidence to determine that the program is a *de facto* export subsidy.

In situations where the government evaluates multiple criteria under a program, § 351.514 would require an analysis different from that described in *Extruded Rubber Thread from Malaysia*, 57 FR 38472 (August 25, 1992). In that case, the Malaysian Government considered 12 criteria in evaluating

whether a particular company should receive ''Pioneer'' status. Two of these criteria addressed the export potential of a product or activity. In addition, in certain situations, companies were required to agree to export commitments. In analyzing the Pioneer program, the Department examined the criteria being applied with respect to a particular company. If one or more of the criteria applied by the Government included favorable prospects for export, but the export criteria did not carry preponderant weight, we did not consider the award of Pioneer status to constitute an export subsidy. However, under the new standard contained in § 351.514, if exportation or anticipated exportation was either the sole condition or one of several conditions for granting Pioneer status to a firm, we would consider any benefits provided under the program to the firm to be export subsidies unless the firm in question can clearly demonstrate that it had been approved to receive the benefits solely under non-export-related criteria. In such situations, we would not treat the subsidy to that firm as an export subsidy.

We have not adopted the suggestion to limit the interpretation of the phrase ''contingent upon actual or anticipated export performance'' to situations where the subsidy is conferred only upon actual exportation or is lost if the recipient is unable to demonstrate that the goods were exported. Such language would effectively negate the phrase ''tied to * * * anticipated exportation or export earnings'' and directly conflicts with the intent of Congress and the language of the SCM Agreement. The SCM Agreement states that a *de facto* export subsidy exists ''when the facts demonstrate that the granting of a subsidy, without having been made legally contingent upon export performance, is in fact tied to actual or *anticipated* exportation or export earnings.'' *See* Footnote 4 to Article 3.1 of the SCM Agreement (emphasis added).

One commenter protested that the 1997 Proposed Regulations failed to provide a mechanism for notifying export subsidies discovered during an investigation to the Office of the U.S. Trade Representative (''USTR'') for submission to the WTO. We do not believe a regulation is needed given the clear language of the statute which requires the Department to notify USTR of any subsidies which are ''prohibited'' under Article 3 of the SCM Agreement. (*See* section 281(b)(1) of the Act (19 U.S.C. 3571(b)(1) and (c)(1).)

General Export Promotion: Paragraph (b) contains an exception to the general rule which codifies the Department's practice with respect to certain types of government export promotion activities. In the 1997 Proposed Regulations, this paragraph was a separate section (*see,* § Section 351.520). However, we have decided it fits more appropriately as an exception to our discussion of what constitutes an export subsidy. As we have observed in the past, most countries maintain general export promotion programs. As long as these programs provide only general information services, such as information concerning export opportunities or government advocacy efforts on behalf of a country's exporters, they do not confer a benefit for purposes of the CVD law. However, if such activities promote particular products or provide financial assistance to a firm, a benefit could exist.

For example, government guides on how to export, overseas marketing reports, and marketing opportunity bulletins would be considered to be general promotion activities and, as such, would not be countervailable. Similarly, certain advocacy efforts, such as country image events or country product displays, could also be considered to be general promotion activities. However, image events or product displays that focus on individual products or which provide financial assistance to participants would not meet the exception for general export promotion. *See, e.g.,* the discussion regarding the treatment of two ProChile trade promotions, ''Event Bon Appetit'' and ''Summer Harvest'' in *Fresh Atlantic Salmon from Chile,* 63 FR 31437, 31440 (June 9, 1998).

Two commenters argued that the regulation should be modified first to identify what constitutes countervailable export promotion assistance and then to identify the criteria for potentially non-countervailable export promotion assistance. Another commenter argued that the regulation should be revised to make it clear that general export promotion programs never constitute export subsidies because such programs can never be considered to be contingent upon export results. According to the commenter, such treatment would be consistent with the ''green box'' treatment of general marketing and promotional programs under the WTO Agricultural Agreement. This commenter further suggested that the focus of the regulation should be on programs rather than activities. The commenter also argued that even where an export promotion program confers a benefit, the program should be considered to be non-countervailable if it is non-specific. Another commenter argued that even if an export promotion program is superficially generally available but upon examination is *de facto* specific, then it is countervailable.

Having clarified the exception for general export promotion by incorporating that proposed regulation into the general export subsidies regulation, we are not adopting the suggested modification regarding the identification of countervailable export promotion assistance. We also disagree that the regulation should be revised to state that general export promotion activities can never be countervailable because they are never contingent upon export results. As discussed in response to a similar comment posed by this commenter with respect to the general definition of an export subsidy contained in paragraph (a), the phrase ''contingent upon actual or anticipated export performance'' is not limited to actual exportation. Assistance to promote exports, even of a general nature, is designed to result in actual export performance.

With respect to whether the regulation should refer to export promotion programs rather than export promotion activities, we do not see the need to make this change. We often examine and make determinations with respect to certain aspects of, or activities under, a program, and as a result may find one project or activity under a program to be countervailable while finding another project or activity under the same program to be not countervailable.

Finally, with respect to the comments regarding the ''specificity'' of export promotion assistance, we do not need to reach this issue. All export promotion programs, even those of a general nature, are specific under section 771(5A)(B) of the Act. However, as noted above, as long as these programs provide only information services, such as information concerning export opportunities, or government advocacy efforts on behalf of a country's exporters, they do not confer a benefit for purposes of the CVD law.

Section 351.515

Section 351.515 corresponds to paragraph (c) of the Illustrative List, and deals with preferential internal transport and freight charges on export shipments. It is unchanged from the 1997 Proposed Regulations. Paragraph (a)(1) restates the general principle that a benefit exists to the extent that a firm pays less for the transport of goods destined for export than it would for the transport of goods destined for domestic consumption. In addition, paragraph

(a)(2), which is based on § 355.44(g)(2) of the 1989 Proposed Regulations, provides that the Secretary will not consider a benefit to exist if differences in charges are the result of an arm's-length transaction or are commercially justified.

Paragraph (b) provides that the Secretary will consider the benefit to have been received on the date on which the firm pays or, in the absence of payment, was due to pay the transport or freight charges. Paragraph (c) provides that the Secretary will normally allocate (expense) the benefit to the year in which the benefit is received.

Section 351.516

Section 351.516 deals with the government provision of goods or services on favorable terms or conditions to exporters. Like its predecessor, § 355.44(h) of the 1989 Proposed Regulations, § 351.516 is based on paragraph (d) of the Illustrative List, and reflects the changes to paragraph (d) made as part of the Uruguay Round. Paragraph (a) contains the standard for determining the existence and amount of the benefit attributable to these types of subsidy programs. As paragraph (a)(2) makes clear, in determining whether the domestically sourced input is being provided on more favorable terms than are commercially available on world markets, the Department will add to the world market price delivery charges to the country in question. In our view, delivered prices offer the best measure of prices that are commercially available to exporters in that country. Paragraphs (b) and (c) contain rules regarding the timing of benefit receipt and the allocation of the benefit to a particular time period, respectively. As discussed below, one change has been made to paragraph (a)(1) of the 1997 Proposed Regulations.

As noted in the 1997 Proposed Regulations, one commenter argued that the Department should provide that all export subsidy payments are prohibited *per se* under the SCM Agreement and U.S. law, and that nothing in paragraph (d) permits them. According to this commenter, in the past, foreign governments have claimed an exception to paragraph (d) for practices that protect domestic markets while promoting subsidized exports of agricultural and manufactured goods. As an example, this commenter cited the European Union program providing ''export restitution'' payments or ''export refunds'' on durum wheat, the primary agricultural product used in the production of pasta. The commenter stated that these refunds were prohibited because paragraph (d) applies only to the ''provision'' of goods and/or services, not export payments, and that the Department's regulations should clearly prohibit export ''payments.''

This argument is identical to one put forth by petitioners in the1985 administrative review on *Certain Iron-Metal Castings from India,* 55 FR 50747, 50748 (December 10, 1990). In that case, India's International Price Reimbursement Scheme (''IPRS'') provided payments to castings exporters, refunding the difference between the price of raw materials purchased domestically and the price exporters otherwise would have paid on the world market. We refused to examine whether the IPRS met the criteria for non-countervailability under the exception in item (d) and countervailed the IPRS payments in their entirety.

Exporters and importers challenged the Department's determination, and, in its decision in *Creswell Trading Co.* v. *United States,* 783 F. Supp. 1418 (1992), the CIT remanded the case to the Department with instructions to analyze the consistency of the IPRS with item (d). The Federal Circuit discussed this decision with approval in connection with an appeal from a second CIT decision in this same case. *See Creswell Trading Co.* v. *United States,* 15 F. 3d 1054 (1994) (''*Creswell*''). Therefore, based on the above judicial precedent, we disagree with the commenter that paragraph (d) does not apply to programs where a government reimburses an exporter for the difference between a higher domestic price for an input and a lower price that the exporter would have paid on the world market, as opposed to providing the input itself.

Also consistent with the Federal Circuit's decision in *Creswell,* where a program exists that provides inputs for exported goods at a lower price than is available for inputs for use in the production of goods for domestic consumption, the burden will be on respondents to provide evidence that the lower price reflects the price that is commercially available on world markets.

In the preamble to the 1997 Proposed Regulations, we asked parties to comment on whether dumped or subsidized prices should be considered to be commercially available world market prices suitable for use as a benchmark to determine whether a government is providing price preferences for inputs used for exports. Several commenters opposed using dumped or subsidized prices as a benchmark because it would understate the subsidy, undermine the purpose of the SCM Agreement and would be inconsistent with our proposed upstream subsidy methodology. Other commenters argued that subsidized or dumped prices should be considered as a possible benchmark because they represent ''commercially available'' prices.

Where there is more than one commercially available world market price to be used as a benchmark, we intend to average these prices to the extent practicable, making due allowance for factors affecting comparability. If the most appropriate benchmarks are for products that are dumped or subsidized in the country where the subject merchandise is produced, we will adjust the benchmark. However, we will only make an adjustment to reflect a determination of dumping or subsidization made by the importing country with respect to the input product imported from the country from which the world market price is derived.

A number of parties commented on the Department's inclusion of delivery charges in determining the commercially available world market price benchmark. While some commenters supported the inclusion of delivery charges in the benchmark arguing that it more accurately reflected the price available to exporters in that country, others disagreed arguing that delivery charges merely reflect the distance the good is being transported. The difference in delivery costs between a locally sourced product and an imported product is not due to the government subsidy; rather it reflects the comparative advantage the domestic product has over the imported product with respect to geographic proximity.

Consistent with our past practice in evaluating such subsidies, we intend to continue to include delivery charges in the commercially available world market price benchmark used to measure price preferences for inputs used for exports. Item (d) of the Illustrative List specifically sets the benchmark as the price ''commercially available on world markets to their exporters.'' By its very terms, the price they would pay would include freight.

This practice was upheld by the Federal Circuit in *Creswell* v. *the United States,* 141 F.3d 1471 (Fed. Cir. 1998) (''*Creswell II*''), a case which involves IPRS and exporters of iron-metal castings in India. According to the Court:

Item (d) thus recognizes that foreign governments may subsidize their domestic industries to allow them to compete effectively on the world market as long as the extent of the subsidization is not more favorable to their exporters than if those exporters had to participate in the world market without assistance. If the amount of the subsidization exceeds this point, it is excessive and this excessive amount is countervailable under Item (d). Accordingly, Item (d) mandates a comparison between the terms and conditions under which product was supplied to exporters by their governments and the terms and conditions to which those exporters would have been subject had they instead participated in the world market.

The Court explained that:

A castings manufacturer procuring pig iron on the world market would have to pay the FOB price for the pig iron itself, plus the cost of shipping that iron to India. Accordingly, the world market price must include the cost of shipping. To the extent that the Indian government's world market price did not include oceanic shipping costs, its world market price was artificially low and its rebate artificially high by this amount. The price of pig iron that is not delivered to India cannot be fairly compared with the price of pig iron that is delivered. Thus, because of the omission of oceanic shipping costs from the calculation of the world market price, the IPRS program has in effect provided pig iron to India's castings manufacturers on terms more favorable than had those manufacturers actually procured pig iron on the world market.

One commenter stated that, consistent with the SCM Agreement, § 351.516(a)(1) should be amended to include government-provided services. We have adopted this suggestion and have amended § 351.516(a)(1) to include services.

This same commenter also stated that when a foreign government charges less than the commercially available price on world markets, the Department should countervail the full amount of the difference between the price the government charges to domestic producers and that charged to exporters, not just the difference between the government price and the delivered commercially available world market price benchmark. Such an approach would be consistent with the Court's decision in *RSI (India) Pvt., Ltd.* v. *United States,* 687 F. Supp. 605, 611 (CIT 1988) (''*RSI*'').

We have not adopted this suggestion. Where there is a government-mandated scheme in place, the benefit to the recipient from price preferences for inputs used in the production of goods for export is the difference between what the producer actually pays and what the producer would otherwise pay (*i.e.,* the commercially available price on the world market). We disagree that the suggested approach is consistent with the Federal Circuit's decision in *RSI.* In *RSI,* the Court was addressing a situation where the record was deficient, and it found that the Department was under no obligation to make calculations that should have been made by respondents. However, consistent with *RSI* and the Federal Circuit's decision in *Creswell II,* we continue to take the position that the respondents must provide evidence establishing that the lower price being charged by the government reflects the price that is commercially available on world markets.

Section 351.517

Section 351.517 deals with the exemption, remission or rebate upon export of indirect taxes. (''Indirect tax'' is defined in § 351.102.) Section 351.517 is consistent with longstanding U.S. practice, (*see Zenith Radio Corp.* v. *United States,* 437 U.S. 443 (1978)), and is based on paragraph (g) of the Illustrative List. The regulation has been changed to reflect paragraph (g) of the Illustrative List by adding that it also applies to the exemption of indirect taxes, as well as to their remission. Paragraph (g) deals with indirect taxes on the production or distribution of the exported merchandise, such as value added taxes, and provides that the remission or rebate of such taxes constitutes an export subsidy only if the amount of the remittance or rebate is excessive; *i.e.,* if it exceeds the amount of indirect taxes levied on like products sold for domestic consumption. For example, if a government imposes a $7 tax on a widget sold for domestic consumption and provides a $10 rebate if the same type of widget is exported, an export subsidy exists in the amount of $3. In accordance with paragraph (g), the non-excessive exemption or remission upon export of indirect taxes does not constitute a subsidy. *See* note 1 of the SCM Agreement.

Paragraph (b) provides that the benefit from an excessive exemption or rebate of indirect taxes is deemed to be received on the date of exportation. Paragraph (c) provides that the Secretary will normally expense these types of subsidies in the year of receipt.

Section 351.518

While § 351.517 deals with the exemption or remission of indirect taxes in general, § 351.518 deals with the exemption, remission, or deferral of prior-stage cumulative indirect taxes and has been changed from the 1997 Proposed Regulations, as described below. (''Prior-stage indirect tax'' and ''cumulative indirect tax'' are defined in § 351.102.) Section 351.518 is based on paragraph (h) of the Illustrative List, and reflects certain changes made to paragraph (h) as part of the Uruguay Round negotiations. Section 351.518 is consistent with paragraph (h) and the Guidelines on Consumption of Inputs in the Production Process (Annex II to the SCM Agreement).

Section 351.518 is drafted to address separately exemptions, remissions and deferrals of prior stage cumulative indirect taxes. Paragraph (a) deals with whether a benefit is received and how it is calculated. Paragraph (a)(1) deals with exemptions and states that where inputs are exempt from prior stage cumulative indirect taxes, a benefit exists to the extent that the exemption extends to inputs not consumed in the production of the exported product, as defined in accordance with the SAA and Annex II to the SCM Agreement, making normal allowance for waste, or where the exemption covers taxes other than indirect taxes. (''Consumed in the production process'' is defined in § 351.102.) Where a benefit exists, it is equal to the amount of the taxes the firm would otherwise pay on inputs not consumed in the production of the exported product.

Paragraph (a)(2) addresses remissions of indirect taxes and states that a benefit exists to the extent that the amount remitted exceeds the amount of prior stage cumulative indirect taxes paid on inputs that are consumed in the production of the exported product, making normal allowance for waste. Where a benefit exists, paragraph (a)(2) sets forth a general rule to the effect that the amount of the benefit normally will equal the difference between the amount remitted and the amount of prior stage cumulative indirect taxes on inputs that are consumed in the production of the exported product.

Paragraph (a)(3) deals with the amount of the benefit attributable to a deferral of prior-stage cumulative indirect taxes. We have modified paragraph (a)(3) in response to comments that the regulation should identify the practice considered countervailable before addressing the exception. Consistent with footnote 59 to the SCM Agreement, the first sentence of paragraph (a)(3) provides that a deferral gives rise to a benefit if the deferral extends to inputs that are not consumed in the production of the exported product, making normal allowance for waste, and the government does not charge the appropriate interest on the taxes deferred.

Another commenter urged the Department to treat multi-year deferrals as long-term loans, because using a short-term interest rate as a benchmark understates the benefit to the recipient. For the reasons discussed in § 351.509 regarding deferrals of direct taxes, we have adopted this position. Consequently, § 351.518(a)(3) permits us to use long-term benchmark rates for determining the benefit conferred by deferrals of prior stage cumulative indirect taxes, where appropriate.

We have also modified the exception outlined in paragraph (a)(4) in response to a comment that the 1997 Proposed Regulations erroneously applies procedures set out in Annex II to the SCM Agreement only to remissions of indirect taxes and should apply as well to exemptions and deferrals. We agree that Annex II to the SCM Agreement applies not only to remissions but also to exemptions and deferrals. Accordingly, paragraph (a)(4) has been changed and directs that, based on Annex II to the SCM Agreement, the Secretary may consider the entire amount of an exemption, remission or deferral of prior-stage cumulative taxes to be a benefit if the Secretary determines that the foreign government has not examined the inputs in order to confirm which inputs are consumed in the production of exported products and in what amounts, and the taxes that are imposed on those inputs. This qualification is essentially a modified version of the Department's ''linkage test,'' a test upheld in *Industrial Fasteners Group, American Importers Ass'n* v. *United States*, 710 F.2d 1576 (Fed. Cir. 1983). The test has been modified to conform to the guidelines of Annex II. Under the modified test, we will first examine whether the exporting government has a system in place that confirms which inputs are consumed in the production of the exported product, and in what amounts, and which taxes are imposed on the inputs consumed in production. Where we find that such a system is in operation, we will examine the system to determine whether it is reasonable, effective, and based on generally accepted commercial practices in the exporting country. Where such a system is not in operation, or where the system is not reasonable or effective, the government of the exporting country may examine the actual inputs involved to demonstrate that the exemption, remission or deferral of indirect taxes reflects only those inputs consumed in the production of the exported product, the quantity of those inputs consumed in production, including a normal allowance for waste, and only those indirect taxes imposed on the input product.

Paragraph (b) deals with the time of receipt of the benefit. Paragraph (b)(1) provides that in the case of a tax exemption, the benefit is received on the date of exportation. Paragraph (b)(2) provides that in the case of a tax remission, the benefit arises as of the date of exportation. Paragraphs (b)(3) and (b)(4) address deferrals and state that the benefit from deferrals of less than one year will be received on the date the deferred tax becomes due. For multi-year deferrals, the benefit is received on the anniversary date(s) of the deferral.

Paragraph (c) deals with the allocation of the benefit to a particular time period, and provides that the Secretary normally will allocate (expense) the benefit from an exemption, remission or deferral of prior-stage cumulative indirect taxes to the year in which the benefit is considered to have been received under paragraph (b).

Two commenters argued that § 351.518(a)(2) should state that the system, procedure or methodology of examination used by foreign governments to confirm the consumption of inputs in the production process is subject to the further examination by the Department, including verification. We have not adopted the suggested language regarding verification. We see no need to add this language. As with any information relied upon by the Department for its determinations, this information is subject to verification.

Section 351.519

Section 351.519 deals with the remission or drawback of import charges. The regulation has been changed to clarify that the term ''remission or drawback'' includes full or partial exemptions and deferrals of import charges. Section 351.519 is generally consistent with prior Department practice, but contains some revisions to reflect changes made to paragraph (i) of the Illustrative List during the Uruguay Round negotiations. Section 351.519 is based on paragraph (i), the Guidelines on Consumption of Inputs in the Production Process, and the Guidelines in the Determination of Substitution Drawback Systems as Export Subsidies (Annex III to the SCM Agreement).

Paragraph (a)(1) reflects the longstanding principle that governments may remit or drawback import charges paid on imported inputs consumed in production when the finished product is exported. However, if the amount remitted or drawn back exceeds the amount of import charges paid, a benefit exists. In addition, paragraph (a)(1) now incorporates exemptions and deferrals of import charges on inputs consumed in the production of exported products.

Paragraph (a)(2) deals with so-called ''substitution drawback.'' Under a substitution drawback system, a firm may substitute domestic inputs for imported inputs without losing its eligibility for drawback. However, a benefit exists if the amount drawn back exceeds the amount of import charges levied on imported inputs, or if the export of the finished product does not occur within a reasonable time (not to exceed two years) of the import of the inputs.

Paragraph (a)(3) deals with the calculation of the amount of benefit. Paragraph (a)(3)(i) sets forth the rule for calculating the benefit from an excessive remission or drawback and states that the amount of the benefit equals the difference between the amount remitted or drawn back and the amount of import charges paid on the inputs consumed in production for which the remission or drawback is claimed. For example, assume that a firm imports a widget which is an input consumed in the production of a gizmo, and pays $2 in import duties on the widget. If, when the firm exports the finished gizmo, the firm receives $5 in drawback, the benefit equals $3 ($5 − $2 = $3). Paragraphs (a)(3) (ii) and (iii) deal with calculation of the benefit from an exemption or deferral of import charges and parallel the language set forth in § 351.518.

However, paragraph (a)(4) provides that in certain circumstances, the Secretary may consider the amount of the benefit to equal the amount of the exemption, deferral, remission or drawback. Paragraph (a)(4) provides for a ''linkage'' test, and is essentially identical to § 351.518(a)(4). See discussion of § 351.518(a)(4), above.

One commenter suggested that language be added to § 351.519(a)(4) to clarify further the type of system or procedure referred to by the regulation. This commenter and another commenter also argued that the Department should state that the system, procedure or methodology of examination used by foreign governments to confirm the consumption of inputs in the production process is subject to further examination by the Department, including verification.

We have not adopted this clarifying language in § 351.519(a)(4). We believe that clarification regarding the type of system or procedure is unnecessary because any system, regardless of the

type, must meet the standards set forth in paragraph (a)(4) in order to be non-countervailable. We will examine all such systems carefully to ensure full compliance with these standards. With respect to the suggested language regarding verification, we have not adopted this language. As with any information relied upon by the Department for its determinations, this information is subject to verification.

Paragraph (b) deals with the time of receipt of the benefit. Paragraph (b)(1) provides that, in the case of remission or drawback, the Secretary normally will consider the benefit to have been received as of the date of exportation. Paragraphs (b)(2), (b)(3) and (b)(4) have been added to reflect the addition of exemptions and deferrals of import charges to this section. The timing of receipt of the benefit from an exemption or deferral of import charges parallels § 351.518. Paragraph (c) provides that the Secretary normally will allocate this benefit to the year in which the benefits are considered to have been received under paragraph (b).

Section 351.520

Section 351.520 deals with export insurance and is unchanged from the 1997 Proposed Regulations. Paragraph (a), which deals with the benefit attributable to export insurance, is based on paragraph (j) of the Illustrative List. Paragraph (a) differs from the section of the 1989 Proposed Regulations dealing with export insurance, § 355.44(d). First, to reflect changes made to the Illustrative List during the Uruguay Round, the word ''manifestly'' has been deleted.

Second, § 355.44(d)(1) of the 1989 Proposed Regulations required that an export insurance program must have exhibited losses for a five-year period before the Secretary would consider the program a countervailable subsidy. We have not included the five-year loss requirement in these regulations, because, depending on how an export insurance program is structured, it may be evident within less than five years that premiums will be inadequate to cover the long-term operating costs and losses of the program. On the other hand, where the program is structured in such a way that expected premiums can cover expected long-term operating costs and losses, we anticipate that we will continue to apply the five-year rule. For example, we would continue to apply the five-year rule to programs like Israel's Exchange Rate Risk Insurance Scheme. With respect to this program, we originally determined that it was structured so as to be self-balancing in the sense that it could reasonably be expected to break even over the long term. See Potassium Chloride from Israel, 49 FR 36122, 36124 (September 14, 1984). Therefore, we did not find a countervailable subsidy despite losses in the early years of the program. *Id.* However, after observing losses for five years, we concluded that the premiums charged were inadequate, and we determined that the scheme conferred a countervailable benefit. See Industrial Phosphoric Acid from Israel, 52 FR 25447, 25449–50 (July 7, 1987).

Finally, § 355.44(d)(1) of the 1989 Proposed Regulations stated that the Department would take into account income from other insurance programs operated by the entity in question. As discussed in the Preamble to the 1997 Proposed Regulations, we have reconsidered this policy, and, although we do not have much experience in this regard, have concluded that this requirement may be overly restrictive. For example, there may be instances where the insuring entity operates on a commercial basis, except for the export insurance function that may be specifically underwritten by the government. In such a situation, it would be inappropriate to take into account the insuring company's income from other insurance programs.

One commenter suggested that the Department's regulations should clearly state that the Department's evaluation of whether export insurance programs are being subsidized will be limited to those programs and not other insurance programs which may be offered by the insurer.

Section 351.520(a)(1) states, ''In the case of export insurance, a benefit exists if the premium rates charged are inadequate to cover the long-term operating costs and losses *of the program*.'' (Emphasis added). We do not see a need to clarify the regulation any further.

Section 351.521

Section 771(5A)(C) of the Act defines an ''import substitution subsidy'' as ''a subsidy that is contingent upon the use of domestic goods over imported goods, alone or as 1 of 2 or more conditions.'' As stated in the Senate Report, ''the category of import substitution subsidies is a new one that is neither part of the 1979 Subsidies Code nor included in current law.'' S. Rep. No. 103–412, at 93 (1994). Under the new law, import substitution subsidies are automatically considered to be specific.

In the 1997 Proposed Regulations, we stated that we were not issuing a regulation on import substitution subsidies due to our lack of experience in dealing with this new category of subsidies.

One commenter supported the Department's decision not to issue a regulation on this topic but asked that we explain in these Final Regulations our reasons for not doing so. This commenter also requested that we reiterate our view, as expressed in the 1997 Proposed Regulations, that section 771(5A)(C) of the Act does not limit the definition of import substitution subsidies to include only *de jure* subsidies. Another commenter urged us to issue a regulation to clarify that both *de jure* and *de facto* import substitution subsidies are countervailable.

Because of our lack of experience in dealing with import substitution subsidies, we have continued to designate § 351.521 as ''reserved.'' We intend to develop our practice regarding import substitution subsidies on a case-by-case basis. As we stated in the 1997 Proposed Regulations, the plain language of section 771(5A)(C) of the Act does not limit the definition of import substitution subsidies to only those subsidies that are contingent ''in law'' upon the use of domestic goods. Moreover, the absence of a regulation making explicit the coverage of *de facto* import substitution subsidies should not be construed as an indication that the Department believes that section 771(5A)(C) applies only to *de jure* import substitution subsidies.

A third commenter contended that investigations of import substitution subsidies would be very complex and time-consuming and that they, therefore, would divert attention and resources from the main countervailing duty investigation. For this reason, the commenter argued, the Department should not initiate an investigation of import substitution subsidies absent a specific allegation by petitioners that gives the Department a reasonable basis to believe or suspect that such subsidies have been bestowed.

We have not adopted this suggestion. Contrary to the commenter's view, we believe that investigation of import substitution subsidies may place less of a burden on the Department and respondents because import substitution subsidies are *per se* specific. Consequently, we would only need to investigate the existence and amount of any benefit. Therefore, we see no basis for employing a heightened initiation standard.

A fourth commenter asked that the regulations clarify that the term ''domestic goods'' should also apply to purchases within a customs union of which the subsidizing country is a member. The commenter argued that

this definition of ''domestic'' would be consistent with the definition of ''country'' in section 771(3) of the Act. The commenter noted that the Department has countervailed subsidies provided by the European Union in the past. According to the commenter, a regulation that includes purchases from within a customs union in the term ''domestic goods'' would, therefore, be consistent with the Department's past practice.

Import substitution subsidies generally protect domestic input producers by imposing requirements or providing incentives for companies to use these inputs. It seems unlikely that one country would provide incentives to use inputs from another country, even if the other country is in the same customs union. However, if the subsidy is provided by the customs union itself, we can reach that program directly through the definition of ''country,'' as defined further in the preamble to § 351.523 on upstream subsidies. Furthermore, we believe the commenter's analysis of the relationship between ''domestic goods'' as used in section 771(5A)(C) and ''country'' as used in section 771(3) may have merit, and we will look carefully at this suggestion if the situation is presented in a specific case.

Section 351.522

Section 351.522 of the 1997 Proposed Regulations, entitled ''Certain agricultural subsidies,'' codified particular aspects of how the Department intends to analyze ''green box'' subsidies. We did not promulgate proposed regulations governing the non-countervailable status of ''green light'' subsidies because we considered the statute and the SAA sufficiently clear with respect to these exceptions in the countervailing duty law. However, based on comments received, as discussed below, we have codified certain standards concerning our analysis of green light research and environmental subsidies in §§ 351.522(b) and 351.522(c). To reflect these changes from the 1997 Proposed Regulations, we have renamed § 351.522 ''Green Light and Green Box Subsidies,'' and we have added paragraphs (b) and (c) in these Final Regulations.

Certain agricultural subsidies: Section 771(5B)(F) of the Act implements Article 13(a)(i) of the WTO Agreement on Agriculture regarding the non-countervailable status of certain ''domestic support measures.'' Under Article (6)(1) of the Agreement on Agriculture, domestic support measures that meet the policy-specific criteria and conditions of Annex 2 of the WTO Agreement on Agriculture are exempt from member countries' commitments to reduce subsidies. In addition, Article 13(a)(i) of the Agreement on Agriculture directs that these subsidies, commonly referred to as ''green box'' subsidies, will be non-countervailable during the nine-year implementation period described in Article 1(f) of the Agreement on Agriculture.

Consistent with Article 13(a)(i) of the Agreement, section 771(5B)(F) of the Act provides that the Secretary will treat as non-countervailable domestic support measures that (1) are provided with respect to products listed in Annex 1 to the Agreement on Agriculture, and (2) the Secretary ''determines conform fully to the provisions of Annex 2'' to that Agreement. To implement section 771(5B)(F) of the Act, § 351.522(a) sets out the criteria the Secretary will consider in determining whether a particular domestic support measure conforms fully to the provisions of Annex 2.

One commenter argued that the Department should clarify that, in order to obtain green box status, a subsidy must truly be designed for agriculture because the Agreement on Agriculture makes a distinction between support provided to raw products and support provided to processed products. Specifically, the Department should make clear that a grant to upgrade a facility for processing agricultural products, while technically covered by the Agreement on Agriculture, would not receive green box treatment.

We have not adopted this proposal because neither Annex 1 nor Annex 2 of the Agreement on Agriculture draws a distinction between raw and processed agricultural products for purposes of green box treatment. Annex 1 covers products from HS Chapters 1–24 and various other HS Codes and Headings. These tariff categories include numerous forms of both raw and processed agricultural products. The policy-specific criteria and other conditions set forth in Annex 2 are not product-specific. Hence, a domestic support measure provided with respect to the specific agricultural products identified only in Annex 1, whether raw or processed, may warrant green box treatment as long as the measure fully conforms to the relevant criteria in Annex 2.

One commenter argued that the regulations should require the Department to consider whether or not an alleged green box subsidy has trade-distorting effects. Further, the commenter noted that the SAA enumerates certain U.S. programs that meet the green box criteria. According to the commenter, the regulations should explicitly treat as non-countervailable a foreign program that is similar to an enumerated U.S. program. This same commenter also argued that the list of eight types of direct payments to producers included in Annex 2 is illustrative, not exclusive. The commenter stated that the regulations should provide ''precise, objective and even-handed'' criteria for determining whether a particular subsidy is a green box subsidy.

Another commenter disputed the suggestion that the regulations should include a list of agricultural programs that the Department automatically would consider as non-countervailable. According to this commenter, there is no basis in the statute for automatically exempting particular programs from the CVD law. Instead, this commenter argued, the Department should assess whether particular programs meet the green box criteria on a case-by-case basis.

We believe there is little to be gained from enumerating in the regulations specific types of programs that would qualify automatically as green box subsidies. Annex 2 of the Agreement provides explicit criteria that a program must meet in order to receive green box status, and § 351.522(a) incorporates these criteria. Consistent with section 771(5B)(F) of the Act and the Agreement on Agriculture, paragraph (a) of § 351.522 provides that we will treat as non-countervailable a subsidy provided to an agricultural product listed in Annex 1 of the Agreement if the subsidy fully conforms to both the basic criteria of subparagraphs (a) and (b) of paragraph 1 of Annex 2 of the Agreement on Agriculture and the relevant policy-specific criteria and conditions set out in paragraphs 2 through 13 of that Annex.

We received two comments concerning the so-called ''peace clause'' in the Agreement on Agriculture. Specifically, Articles 13(b) and (c) of that Agreement require WTO member countries to exercise ''due restraint'' in initiating CVD proceedings on agricultural subsidies provided by a member whose total non-green box agricultural subsidies (both domestic and export) are within that member's reduction commitments. See SAA at 723–25. The obligation to exercise ''due restraint'' exists only during the ''implementation period,'' defined in Article 1(f) of the Agreement on Agriculture.

One commenter argued that the Department's regulations should ensure that the Department exercise due restraint by not self-initiating CVD

investigations on products that benefit from subsidies described in Articles 13(b) and (c). A second commenter argued that the Department should interpret the due restraint clause narrowly.

We do not believe that a regulation is necessary. The Department understands the due restraint requirement to entail a commitment to refrain from self-initiating CVD investigations with respect to agricultural subsidies described in Articles 13(b) and (c) during the implementation period, and the Department will administer the statute accordingly. See SAA at 937.

Green light subsidies in general: Under section 771(5B) of the Act, which implements Article 8 of the SCM Agreement, certain domestic subsidies and domestic subsidy programs that meet all the requirements may be treated as non-countervailable. There are three categories of these so-called ''green light'' subsidies: (1) Research subsidies (see section 771(5B)(B) of the Act); (2) subsidies to disadvantaged regions (see section 771(5B)(C) of the Act); and (3) subsidies for adaptation of existing facilities to new environmental requirements (see section 771(5B)(D) of the Act).

The non-countervailable status of these green light subsidies can be established in two ways. First, a WTO Member country can notify a subsidy program to the WTO SCM Committee in accordance with Article 8.3 of the SCM Agreement. Once notified, section 771(5B)(E) of the Act provides that a green light subsidy program ''shall not be subject to investigation or review'' by the Department. However, an exception to this rule exists in situations where a Member country has successfully challenged in the WTO a claim for green light status. In the event of a successful challenge, section 751(g) and section 775 of the Act establish mechanisms for promptly including the subsidy or subsidy program in an existing CVD proceeding should there be reason to believe that merchandise subject to the proceeding may be benefitting from the subsidy or subsidy program.

We received one comment on subsidy notifications. The commenter requested that the Department ensure that public subsidy notifications under Article 8.3 are made available and are circulated promptly upon receipt. We have adopted this suggestion. The Subsidies Enforcement Office within Import Administration intends to promptly add to the Subsidies Library all derestricted subsidy notifications, including those reported under Article 8.3. The Subsidies Library can be accessed via the Internet at http://www.ita.doc.gov/import_admin/records/esel/.

The second method for obtaining green light status involves situations where a subsidy or subsidy program has not been notified to the SCM Committee. In the case of a subsidy given under a non-notified program, the subsidy is non-countervailable if the Secretary determines in a CVD investigation or review that the subsidy satisfies the relevant green light criteria contained in subparagraphs (B), (C) or (D) of section 771(5B) of the Act (or a WTO panel determines in a dispute settlement proceeding that the relevant criteria of Article 8 of the SCM Agreement are met). The Secretary must determine that the subsidy satisfies all of the relevant criteria before a given subsidy will be treated as non-countervailable. *See* section 771(5B)(A) of the Act; SAA at 936. Moreover, as discussed in the SAA, in investigations and reviews of non-notified subsidies, the burden will be on the party claiming green light status to present evidence demonstrating that a particular subsidy meets all of the relevant criteria. SAA at 936. In addition, under section 771(5B)(A) of the Act, green light status may be claimed only in proceedings involving merchandise imported from a WTO Member country.

In the 1997 Proposed Regulations, we stated that, in accordance with the Administration's commitment in the SAA, we intend to construe strictly the various green light provisions to ''limit the scope of the provision[s] to only those situations which clearly warrant non-countervailable treatment.'' SAA at 935. Thus, the Department ''will not limit its analysis * * * to a narrow review of the technical criteria of Article 8 of the SCM Agreement, but will analyze all aspects of the subsidy program and its implementation to ensure that the purposes and terms of Article 8 have been respected.'' SAA at 937.

Two commenters argued that the green light provisions should not be construed more restrictively than other CVD law provisions. Therefore, these commenters stated that the Department should either eliminate any references to a strict interpretation of these provisions or explain why this different treatment is necessary, appropriate, and justified.

We reaffirm our commitment to interpret these provisions strictly as required by the SAA. The legislative history recognizes that complete exemption from the CVD law of government programs that meet the definition of a countervailable subsidy and that cause injury is extraordinary. Strict interpretation is needed both to prevent circumvention and to preserve the balance of commitments negotiated in the SCM Agreement. For these reasons, where there is a question regarding the green light status of a particular subsidy, we will ensure that the subsidy clearly qualifies before according it green light status. Moreover, a determination that a particular subsidy received by a firm is a green light or green box subsidy would not necessarily mean that we would find that the entire program under which the subsidy is provided satisfies all of the applicable green light criteria in all cases.

Certain commenters suggested that the Department ''incorporate fully'' in the regulations the discussion of green light subsidies contained in the SAA or the preamble to the 1997 Proposed Regulations. Another commenter suggested that the Department publish a regulation stating that green light is set to expire unless extended.

We have not adopted these suggestions. As with other areas of these regulations, unless we have determined that a particular aspect of our CVD methodology warrants clarification, we have not repeated language from the statute or the SAA. In response to the latter comment, the statute, at section 771(5B)(G), is explicit regarding the provisional application of the green light provisions.

Investigation of notified subsidies: One commenter, noting the text of section 771(5B)(E) of the Act, suggested that the Department should refrain from investigating notified subsidy programs. According to the commenter, a failure to ''screen out'' notified subsidies prior to the initiation of an investigation would result in a waste of Departmental resources and unnecessary burdens on foreign governments.

In response, several commenters argued that if there is any ambiguity regarding whether a subsidy alleged by a petitioner does, in fact, qualify as a notified green light subsidy, the Department should include the subsidy in its CVD investigation or review to determine whether it qualifies for a green light exemption. One example given by these commenters is a situation where a petitioner presents evidence that a subsidy program has been modified subsequent to its notification to the SCM Committee. These commenters also suggested that it may simply be unclear whether an alleged subsidy is the same as the notified subsidy, in which case the Department should include the alleged subsidy in the investigation to make this determination.

We reaffirm our position in the preamble to the 1997 Proposed Regulations that section 771(5B)(E) of the Act and the SAA make clear that, if a subsidy program has been notified under Article 8.3 of the SCM Agreement, any challenge regarding its eligibility for green light treatment, whether due to later modification or otherwise, must be made through the review procedures under the WTO rather than in the context of a CVD proceeding. As described above, the Department may not initiate a CVD investigation or review of a notified subsidy program (which appears to benefit subject merchandise) unless informed by USTR that a violation has been determined under the procedures of Article 8.

However, as we explained further in the preamble to the 1997 Proposed Regulations, the identity of a subsidy is a different matter. If there is a legitimate question as to whether a subsidy alleged in a petition is, in fact, a subsidy provided under a program that has been notified under Article 8.3, pre-initiation consultations may be used to clarify that a subsidy or subsidy program contained in the petition was, in fact, notified. If consultations do not resolve the question, the Department will include the subsidy in a CVD investigation or review until the party claiming green light status demonstrates that a subsidy has been notified. If the party fails to establish that the alleged subsidy or subsidy program has been notified, then we will analyze the subsidy's eligibility for green light status in the same manner as for any other non-notified subsidy. To clarify the Department's procedure for investigating alleged subsidy programs notified under Article 8.3, as set forth below, we have codified § 351.301(d)(7) as an interim final rule.

Policy for investigating non-notified subsidies: One commenter argued that the Department should adopt a regulation providing that, whenever a petition includes a potential green light subsidy that has not been notified under Article 8.3, the Department will conduct a full investigation to determine whether the subsidy meets the relevant requirements of section 771(5B) of the Act. This commenter and others emphasized that the regulations also should include the SAA's express requirement that the party claiming green light status has the burden of presenting evidence demonstrating compliance with all of the relevant criteria for any particular subsidy category. See SAA at 936.

While we agree with the policy espoused, we do not believe that this policy must be codified in the regulations. As discussed above, the SAA is clear that in investigations and reviews of subsidies that have not been notified under Article 8.3 of the SCM Agreement, the party claiming green status must provide evidence demonstrating that a particular subsidy meets all of the relevant criteria for non-countervailable status.

Another commenter argued that all non-notified programs should be presumed countervailable. We have not adopted this suggestion. The SCM Agreement and the URAA make clear that there are two ways to achieve green light status—WTO notification and pursuant to a CVD investigation. We see no basis for presuming that a program is countervailable simply because a foreign government elects not to use the notification procedures established under Article 8.

Alleged green light subsidies not used during the period of investigation or review: As we stated in the preamble to the 1997 Proposed Regulations, in an investigation or a review of a CVD order or suspended investigation, we will not consider claims for green light status if the subject merchandise did not benefit from the subsidy during the period of investigation or review. Instead, consistent with the Department's existing practice, the green light status of a subsidy will be considered only in an investigation or review of a time period where the subject merchandise did benefit from the subsidy.

One commenter supported this position and argued that it should be codified. However, we continue to believe that a regulation is not needed to clarify this issue.

Research subsidies: Prior to the enactment of the URAA, we treated assistance provided by a government to finance research and development (''R&D'') as non-countervailable if the R&D results were (or would be) made available to the public, including the U.S. competitors of the recipient of the assistance. This policy, sometimes referred to as the public availability test, was described by the Department in § 355.44(l) of the 1989 Proposed Regulations.

In the 1997 Proposed Regulations, we elected not to retain the public availability test. We stated that the objectives served by the public availability test were better met by applying the criteria listed in section 771(5B)(B) of the Act and Article 8.2(a) of the SCM Agreement. Two commenters supported our decision not to codify the public availability test, and two commenters argued that the Department should reinstate the public availability test. One commenter requested clarification of whether the public availability test would apply to the aircraft sector in light of the fact that the R&D green light provisions of the SCM Agreement do not apply to aircraft. In this commenter's view, the public availability test should be abandoned completely.

In these Final Regulations, we confirm our decision not to retain the public availability test for any sector. We believe the public availability test is inconsistent with the concept of benefit which underlies the SCM Agreement and statute, and which we have codified in § 351.503. According to § 351.503, a benefit is conferred when a firm pays less for its ''inputs'' than it otherwise would pay in the absence of the government-provided input or earns more than it otherwise would earn. A research and development subsidy would reduce the firm's input costs, whether or not the results of the research were made publicly available. This same rationale applies to the aircraft industry. Consequently, even though the R&D green light provisions of the SCM Agreement do not apply to aircraft, we do not intend to apply the public availability standard to the aircraft sector.

One commenter suggested that the Department should adopt an assumption that only grants will qualify for green light status under the R&D provisions; tax breaks and subsidized loans usually will not qualify. We have not adopted this proposal because neither the statute nor the SAA limits R&D green light provisions to grants.

One commenter argued that, in determining whether a given research subsidy falls within the 75 and 50 percent maximums allowed under section 771(5B)(B) of the Act, the Department should base its analysis on the total costs incurred over the duration of the project in question. Under this reasoning, the Department would not countervail a subsidy if the 75 or 50 percent maximum were exceeded in the particular year covered by the investigation or review, provided that the applicable threshold ''is not exceeded over the life of the project.'' This commenter further argued that, if the Department determined that the applicable threshold was exceeded over the life of the project, only the amount of subsidy in excess of the relevant ''maximum'' should be countervailed.

Several commenters challenged these arguments. First, they argued that the Department should evaluate the 75 and 50 percent maximums based on the costs already incurred at the time of the relevant investigation or administrative review, and not on the basis of expected

costs over the lifetime of the project. Second, these commenters argued that, if the Department determined that the applicable threshold had been exceeded, the entire benefit—not just the excess over the relevant threshold—should be countervailed. According to these commenters, the SAA states clearly that all of the relevant criteria must be met for a given program to receive green light status, and that a failure to meet all relevant criteria would result in the ''entire subsidy'' being countervailable in full. See SAA at 936.

We agree in part with the first commenter, and in part with the latter commenters. With respect to the proper frame of reference for determining whether a given research subsidy has exceeded the specified statutory thresholds, section 771(5B)(B)(iii)(II) of the Act instructs the Department to base its analysis on ''the total eligible costs incurred over the duration of a particular project.'' Thus, it would be improper for the Department to limit its analysis to only those costs incurred as of the time period covered by an investigation or administrative review. We recognize that a finding of non-countervailability may be based on projected or estimated costs. Given the Agreement's ceilings on government support, we expect that such projections will have been required by the program's administrators. On the basis of a reasonably-supported allegation in a subsequent review, we will revisit this finding to ensure that actual costs expended did not differ from the estimates upon which an earlier finding of green light status was based. Changes or amendments to the original project will be carefully scrutinized to ensure consistency with these provisions. We agree that, if it becomes clear at any point during the life of the project that the subsidy will exceed the relevant statutory threshold, the entire amount of the subsidy would be countervailable, not merely the excess.

Subsidies to disadvantaged regions: One commenter argued that the Department should clarify that the green light category regarding subsidies to disadvantaged regions is not limited to subsidies provided by national governments, but also includes subsidies granted by subnational levels of government, such as states or provinces. This commenter further argued that, in determining whether a subsidy provided by a state or province to a disadvantaged region meets the criteria of section 771(5B)(C) of the Act, the Department should assess the criteria within the framework of the subnational government's jurisdiction.

In response, other commenters argued that the Department should assess the green light criteria in relation to the investigated country as a whole, not just in relation to the jurisdiction of the subsidizing government if that government is at the subnational level. According to these commenters, the statute and the SAA instruct the Department to evaluate the relevant green light criteria in relation to the ''average for the country subject to investigation or review.''

We agree with the first commenter that the green light categories include subsidies granted by governments at the subnational level and that, in the case of the regional green light category, we should assess the relevant criteria in relation to the jurisdiction of the granting authority. In discussing the language in section 771(5B)(C)(ii) of the Act regarding the ''average for the country subject to investigation or review,'' the SAA explains that, where a CVD proceeding involves a member of a customs union, the term ''country'' shall be defined in accordance with the structure of the regional assistance program. SAA at 934–35. For example, if we were to investigate a product from Luxembourg, the term ''country'' would refer to the EU as a whole if the subsidy being investigated were received under an EU regional assistance program. Thus, the SAA indicates that the Department should make its determinations based on averages for the jurisdiction granting the regional assistance subsidy.

Other commenters argued that where certain regions receiving assistance under a program do not meet the criteria for green light treatment, that should not prejudice the green light treatment of assistance to regions that do meet the criteria.

Because we have only limited experience in administering the regional green light provisions, we are not prepared to adopt a formal policy at this time. However, we find persuasive the argument that some regions that meet the jurisdiction's general framework of economic development but do not otherwise meet the green light criteria could potentially be given aid without automatically disqualifying all regions from green light treatment.

The language in section 771(5B)(C) of the Act states that a subsidy provided to a person in a disadvantaged region, ''pursuant to a general framework of regional development,'' shall be treated as non-countervailable. This implies that some of the regions within the general framework may not necessarily meet the statutory criteria to be considered ''disadvantaged.'' However, if the number of regions that do not qualify for green light treatment but continue to receive assistance is significant, this may call into question the basic principles of the general framework itself and, therefore, the eligibility for green light treatment of any subsidies provided under it.

Subsidies for adaptation of existing facilities to new environmental requirements: Certain commenters argued that, with respect to the Department's criteria for green light environmental subsidies described in section 771(5B)(D) of the Act, the Department should treat as non-countervailable those subsidies given to upgrade existing facilities to environmental standards that are higher than the minimum standards imposed by law or regulation. According to these commenters, governments should be allowed to encourage higher environmental standards than the minimum required by law by sharing the additional costs of achieving the higher environmental standards. Moreover, according to these commenters, the language of the statute does not limit green light treatment to subsidies that allow companies to meet, rather than exceed, standards. These commenters believe that the Department should retain the flexibility to find non-countervailable subsidies that assist in upgrading existing facilities to higher environmental standards than the minimum imposed by law or regulation.

Several commenters disputed this suggestion, claiming that section 771(5B)(D)(i) of the Act specifically limits green light status for environmental subsidies to those that are ''provided to promote the adaptation of existing facilities to new environmental requirements * * *.'' According to these commenters, the Department has no authority to broaden the scope of environmental subsidies eligible for green light treatment. One commenter further argued that where the environmental subsidy exceeds the amount necessary to meet the minimum regulatory requirements of the law, even by a *de minimis* amount, the Department should confirm its intent to find countervailable the entire subsidy.

Although we acknowledge that governments have the flexibility to encourage higher environmental standards, we agree with the latter commenters. As noted above, section 771(5B)(D)(i) of the Act provides that non-countervailable environmental subsidies are those that are ''provided to promote the adaptation of existing facilities to new environmental requirements that are imposed by statute or by regulation.'' According to

the SAA, ''strict application of these requirements is essential in order to limit the scope of the provision to only those situations which clearly warrant non-countervailable treatment.'' SAA at 935. Given the clear language of the statute and the SAA, we believe that subsidies given to upgrade existing facilities to environmental standards in excess of legal requirements are countervailable. In response to the last comment on subsidies which exceed the amount necessary to meet the minimum statutory or regulatory requirements, we agree that the full amount of the subsidy would be countervailable.

One commenter suggested that the regulations should specify that environmental subsidies will receive green light treatment only if: (1) Required by law or regulations (administrative practice should not be sufficient); (2) limited to investments absolutely needed to meet new requirements; (3) limited to the adaptation of equipment and plant facilities; and (4) directly linked to the new investment.

Because we have received no green light claims for environmental subsidies and, therefore, have no experience in administering these provisions, we are not adopting the proposed criteria. Without experience, we cannot judge what impact the proposed criteria would have. Therefore, we are not yet prepared to adopt criteria such as these at this time. However, we do not rule out the possibility that such criteria may be adopted at a later time. With respect to the first proposed criterion (required by law or regulation, as opposed to practice), section 771(5B)(D)(i) of the Act and the SAA already include such a limitation.

One commenter argued that when a respondent can show that environmental assistance is not relieving a company of an obligation and that the assistance does not benefit the manufacture, production, or exportation of the subject merchandise, such assistance should not be countervailable. We disagree with the commenter's attempt to expand the criteria, which are clearly stated in the SCM Agreement, statute, and the SAA, under which the Department would find environmental assistance non-countervailable.

Finally, we have concluded that procedural rules setting forth the deadlines and obligations for filing green light and green box claims are necessary to ensure efficient and orderly administration of these new provisions in the CVD statute. As discussed in the Explanation of the Final Rules, we are issuing these procedural rules as interim final rules effective on their date of publication in the **Federal Register**. In keeping with our decision to consolidate antidumping and countervailing duty procedures, these interim final rules amend § 351.301(d) of the Department's regulations.

Section 351.301(d)(6) sets forth time limits for filing green light and green box claims. These time limits parallel the deadlines for filing new countervailable subsidy allegations in investigations and reviews. Consistent with the evidentiary burden to establish the validity of such claims, § 351.301(d)(6) also clarifies that all green light and green box claims must be made by the competent government with the full participation of the administering authority of the relevant program. We note that examinations of green light and green box requests require the full participation of the administering governments. Section 301(d)(7) clarifies procedures for investigating subsidies or subsidy programs notified under Article 8.3 of the SCM Agreement.

Section 351.523

Section 351.523 deals with the identification and measurement of upstream subsidies. Because the URAA did not significantly amend the corresponding statutory provision (section 771A of the Act), § 351.523 is based largely on § 355.45 of the 1989 Proposed Regulations, except for the deletion of language that merely repeats the statute. We have, however, adopted new terminology in § 351.523(a). Specifically, ''affiliation'' replaces ''control'' as the standard for when we will have a reasonable basis to believe or suspect that a competitive benefit is bestowed on the subject merchandise. This also represents a change from our 1997 Proposed Regulations, where the standard was ''cross-ownership'' (see discussion of cross-ownership in preamble to § 351.525 below) . We believe the new definition of ''affiliated persons'' contained in section 771(33) of the Act is sufficient to meet the threshold for deciding whether a competitive benefit is bestowed for purposes of initiating an upstream subsidy investigation. In addition, because we have changed our attribution rules regarding cross-owned input and downstream suppliers, it is no longer appropriate to use the ''cross-ownership'' standard.

With regard to the upstream subsidy provision in general, one commenter requested that the Department issue a regulation making clear its ability to apply an upstream subsidy analysis even where the subsidized input producer is located in a separate country from the producer of the subject merchandise. We agree that the statute provides the Department the flexibility to perform such an analysis in two specific circumstances. First, where two or more foreign countries are organized as a customs union, section 771A(a) clearly states that the Department may treat the customs union as a single country in conducting an upstream subsidy analysis if the countervailable subsidy is provided by the customs union. In addition, the definition of ''country'' in section 771(3) of the Act does not limit this reading of ''country'' to situations in which the subsidy is provided by the customs union itself. Second, where an international consortium is engaged in the production of the subject merchandise, section 701(d) of the Act allows the Department to cumulate the subsidies provided to members of the consortium by their respective home countries. We interpret this provision to include the receipt by members of the consortium of upstream subsidies provided by the member's own country or (where appropriate) customs union. Therefore, we see no need to include a regulation on this issue.

Another commenter suggested that the Final Regulations should expressly state that the Department is not required to investigate upstream subsidies further than one stage back in the chain of production. This commenter cites to legislative history which indicates Congress' intent to limit the scope of an upstream inquiry to the stage prior to final manufacture or production, unless information demonstrates the significance of subsidies at earlier stages. H.R. Rep. No. 725, 98th Cong., 2d Sess. 33–34 (1984).

We do not believe it is necessary to issue a regulation on this topic. Section 351.523(a)(iii) already requires a demonstration of the significance of prior-stage subsidies in order for the Department to initiate an upstream subsidy investigation. As one moves back in the chain of commerce, it is less and less likely that the subsidies will have a significant effect on the cost of manufacturing or producing the subject merchandise and, therefore, less likely that we would initiate an upstream subsidy investigation. However, in those circumstances where a party is able to demonstrate the significance of subsidies at earlier stages, we will investigate accordingly.

As noted in the 1997 Proposed Regulations, one aspect of these regulations which differs from the 1989 Proposed Regulations involves the standard for determining whether a

competitive benefit exists. In this regard, section 771A(b)(1) of the Act provides that a competitive benefit has been bestowed when:

> The price for the (subsidized) input product * * * is lower than the price that the manufacturer or producer of merchandise which is the subject of a countervailing duty proceeding would otherwise pay for the product in obtaining it from another seller in an arms-length transaction.

In addition, section 771A(b)(2) of the Act provides that when the Secretary has determined in a previous proceeding that a countervailable subsidy is paid or bestowed on the comparison input product, the Department ''may (A) where appropriate, adjust the price that the manufacturer or producer of merchandise which is the subject of such proceeding would otherwise pay for the product to reflect the effects of the countervailable subsidy, or (B) select in lieu of that price a price from another source.''

In the past, as reflected in § 355.45(d) of the 1989 Proposed Regulations, we preferred to base our comparisons upon the price charged for unsubsidized inputs produced by other producers in the same country as the producer of the subject merchandise. If we had determined in a prior CVD proceeding that a countervailable subsidy had been bestowed in the subject country on the comparison input, our next preferred alternative was to adjust the price of the input product to reflect the subsidy. As a final alternative, we could select a ''world market price for the input product.'' We interpreted the phrase ''world market price'' broadly to include (1) actual prices charged for the input product by producers located in other countries, and (2) average import prices. Additionally, because the statute did not preclude, for comparison purposes, the use of prices of subsidized, imported inputs, we had determined that it would be ''inappropriate to exclude all subsidized producers, even assuming that we could identify them.'' Circular Welded Non-Alloy Steel Pipe From Venezuela, 57 FR 42964, 42967–68 (September 17, 1992) (''Venezuelan Steel Pipe'').

We have revised our approach regarding ''competitive benefit'' in the following manner. Under paragraph (c)(1)(i), we will rely first upon the actual price charged or offered for an unsubsidized input product, regardless of whether the producer of that input is located in the same country as the producer of the subject merchandise. We will make due allowance for quantities, physical characteristics, and other factors that affect comparability. Upon further reflection, we see no justification for distinguishing between input products based on the country of production. Section 771A(b)(1) of the Act merely requires the Department to compare the price paid for the subsidized input product to the price that the producer ''would otherwise pay for the product in obtaining it from another seller in an arms-length transaction.'' The price that the producer ''would otherwise pay'' could include the actual price paid by the producer of subject merchandise to an unrelated supplier or a bid offered by an unrelated supplier, regardless of the location of that supplier. However, we will examine quantities, physical characteristics, and other factors that may affect the comparability of the prices.

While several commenters argued against the use of offered prices, asserting that such prices do not reflect the true cost of alternative purchases, we have left this provision unchanged. Our preference, of course, is to use a price resulting from an actual sale; however, a *bona fide* price offer made at a time reasonably corresponding to the time of the purchase of the input does constitute a commercial alternative to the subsidized input product and, as such, is an acceptable benchmark.

Other comments concerning the use of actual or offered prices focused on the extent to which such prices are ''representative.'' Essentially, these commenters defined a ''representative'' price as a price that is not less than the world market price. Therefore, they argued that if the actual unsubsidized price is less than the world market price, the Department should presume that the price is not representative and use the world market price.

We have not adopted this suggestion. As noted above, an actual price charged or offered represents the best example of what a downstream producer would ''otherwise pay'' for the subsidized input product. However, we are willing to entertain arguments during the course of a proceeding pertaining to whether an actual price or offer is anomalous or otherwise not comparable, including arguments that such price may be dumped or subsidized.

If actual prices or offers for unsubsidized inputs are not available, we will rely upon a world market price, *i.e.*, generally an average of publicly available prices for unsubsidized inputs from different countries or some other surrogate price deemed appropriate by the Department. See paragraph (c)(1)(ii). One commenter objected to the use of an average price, arguing that it is more reasonable to assume that the downstream producer would purchase the input product at the lowest publicly available price. Another commenter supported the use of an average world market price, but urged the Department to make it a weighted-average price.

We have made no change in response to these comments. Absent an actual price or offer for an unsubsidized product, we are in a position of having to construct the price that a company would ''otherwise pay.'' We cannot assume that the downstream producer would always be able to purchase its inputs at the lowest publicly available price. Such a price might be an anomaly resulting from unusual market circumstances which may not always be available to the producer in question. Therefore, it is more appropriate to use an average of the publicly available prices. The use of weighted-average prices, however, is impractical because we are unlikely to have the information with which to weight the publicly available prices. Although we will generally use an average of available world market prices, we will consider arguments that certain world market prices may be inappropriate.

Finally, if there are no prices for unsubsidized inputs available from any source, we will resort to prices of subsidized input products, adjusted to reflect the countervailable subsidy. In such a case, under paragraph (c)(1)(iii), we first will rely upon the actual price that the producer of the subject merchandise otherwise would pay for the input product adjusted to reflect the subsidy, regardless of the country in which the input product is produced. If such a price is not available, under paragraph (c)(1)(iv), we would use an average price for the input product from different countries adjusted to reflect the subsidy or some other adjusted surrogate price. When no adjustable price is available (*e.g.*, the only available price is a published price reflecting an average of both subsidized and non-subsidized prices), we may include the price of a subsidized input in our analysis or we may resort to any other reasonable price. See paragraph (c)(1)(v).

We believe that this new approach for measuring the competitive benefit better reflects the overall purpose of the upstream subsidies provision, which is to account, when appropriate, for upstream subsidies provided on input products used in the production or manufacture of subject merchandise. The language of section 771A itself does not express a preference regarding the selection of a comparison input price, and grants the Department wide latitude in determining when to adjust the price

of the comparison product to reflect known countervailable subsidies. However, parts of the legislative history underlying the Trade and Tariff Act of 1984, which added section 771A to the Act, support a preference for using the price of an unsubsidized input, and support making adjustments for subsidies when there is no price for unsubsidized inputs. See, *e.g.*, 130 Cong. Rec. S13970 (daily ed. Oct. 9, 1984) (statement of Sen. Dole). Although, as described above, we are revising our practice regarding the identification and measurement of a competitive benefit, the preference for using the price of unsubsidized inputs also was reflected in our earlier practice See, *e.g.*, Certain Agricultural Tillage Tools From Brazil, 50 FR 24270, 24273 (June 10, 1985).

In determining whether a price is subsidized, we will rely primarily on CVD findings made by the United States or the investigating authorities of other countries in the recent past (*i.e.*, within the past five years).

As we noted in the 1997 Proposed Regulations, in determining whether there is a competitive benefit, we will adjust prices upward to account for delivery charges (*e.g.*, c.& f.). We received a number of comments concerning this point. Several commenters expressed support of this policy. One commenter objected, however, arguing that the inclusion of delivery charges could result in the Department finding a competitive benefit which results solely from the difference in the cost of transporting the subsidized versus unsubsidized goods, rather than from the subsidy to the input product.

Although the statute does not specify the precise basis for calculating a benchmark price for the input product, section 771A(b)(1) does require the use of the price that the manufacturer or producer of the subject merchandise ''would otherwise pay.'' In our view, this requires the use of a price that represents a commercial alternative to the producer of the subject merchandise, and f.o.b. prices do not provide a measurement of the commercial alternative to the downstream producer. See, *e.g.*, Venezuelan Steel Pipe.

As the Federal Circuit recently stated in upholding the Department's inclusion of freight charges in determining the world price under Item (d) of the Illustrative List of Export Subsidies, ''A castings manufacturer procuring pig iron on the world market would have to pay the f.o.b. price for the pig iron itself, plus the cost of shipping that iron to India. Accordingly, the world market price must include the cost of shipping.'' *Creswell Trading Co.* v. *United States*, 141 F.3d 1471, 1478 (Fed. Cir. 1998). For these reasons, we have not changed the position taken in the 1997 Proposed Regulations.

Section 351.524

In the 1997 Proposed Regulations, the Department's method for allocating benefits from subsidies was included in the grant section (see § 351.503(c) of the 1997 Proposed Regulations). For these Final Regulations, however, we have decided to issue a separate regulation on allocation because this issue concerns all types of subsidies, not only grants. Therefore, unless otherwise specified in §§ 351.504–523, the Secretary will allocate benefits to a particular time period in accordance with this section.

Which Benefits Are Allocated Over Time

Section 351.524 retains the distinction between ''recurring'' and ''non-recurring'' benefits. Although more precise terms might be ''non-allocable'' and ''allocable,'' we are retaining the terms ''recurring'' and ''non-recurring'' because they are widely understood in the international trading community. Paragraph (a) provides that the Secretary will allocate a recurring benefit to the year in which the subsidy is considered to have been received, a practice usually referred to as ''expensing.'' Paragraph (b) provides that, with one exception (discussed as ''the 0.5 percent test'' below), the Secretary will allocate non-recurring benefits over time.

Paragraph (c) contains a test for distinguishing between recurring and non-recurring benefits. In the 1997 Proposed Regulations, we proposed to codify the test applied by the Department in the GIA. Under the GIA standard, if a benefit is exceptional, *i.e.*, not received on a regular or predictable basis, or if it requires express government authorization or approval, the Department will consider it as non-recurring. Otherwise, the Department will treat it as a recurring benefit. However, as stated in the preamble to the 1997 Proposed Regulations, we were considering:

> * * * whether there might be a better standard for distinguishing between these two types of benefits. An important purpose of the recurring/non-recurring test is to reduce the burden on the Department and interested parties by limiting the amount of information requested on subsidies bestowed prior to the period of investigation or review. However, the Department is increasingly facing arguments regarding its application of the standard described in the GIA. At some point, the burden of applying the GIA standard may well outweigh the benefits. Therefore, we particularly invite comments on this issue. We note that the Department has considered other options in the past including: (1) Developing a list of the types of subsidies that would be allocated and those that would be expensed; (2) allocating any grant-like benefit that exceeds 0.5 percent * * *; and (3) allocating only those grant-like subsidies that are tied to the purchase of fixed assets.

We received a number of comments on this issue. (Because this and the other allocation issues discussed below were included in the grant section of our 1997 Proposed Regulations, the comments consistently refer to ''grants.'' Our responses, however, are more generally drafted and refer not only to grants, but also to the allocation of other types of subsidies.)

One commenter argued that the regulation should include a provision that there will be a rebuttable presumption that certain grants will be expensed and others allocated. This commenter supported the option of developing an illustrative list showing which types of grants will be expensed and which will be allocated. According to the commenter, this approach would make the application of the law more predictable and consistent, and would reduce the administrative burden on the Department. Another commenter opposed the inclusion of an illustrative list as a rebuttable presumption, arguing that this would unfairly benefit respondents who control all information relating to the purpose and use of a subsidy.

Most commenters asked the Department to retain the GIA test for determining whether a grant is recurring or non-recurring. They argued that this methodology is both predictable and flexible and that it has worked well in the past. One commenter, however, asked the Department to take into consideration two factors which were included in the preamble to the Department's 1989 Proposed Regulations, but not in the GIA: (1) Whether the program is of a longstanding nature, and (2) whether there is reason to believe that the program will continue in the future.

Most of the commenters rejected our three suggested alternatives to the GIA test. They argued that the first option (*i.e.*, to develop a list of different types of subsidies) would be rigid, unworkable, inconsistent with commercial reality, and subject to abuse. In addition, they felt that it would be very difficult for the Department to compile a binding list, which would not only have to identify and categorize every type of subsidy we

have ever encountered, but which would also have to anticipate future grant programs. However, one commenter suggested that, as an alternative, the Department could develop a non-binding informative list, based on previous practice, as a complement to the GIA test.

These commenters agreed that the second option (to allocate all grants that exceed 0.5 percent *ad valorem*) would create unnecessary work since the Department would have to obtain historical information for all grant programs regardless of their nature and the Department's past treatment of identical or similar programs. One commenter argued that the courts are likely to find such a methodology arbitrary, adding that it was Congress' intent that only non-recurring subsidies be allocated over time.

The commenters agreed that the third option (*i.e.*, to allocate only grants that can be tied to the purchase of fixed assets) would be inconsistent with commercial reality since it would be based upon a flawed assumption, namely that only fixed assets continue to provide benefits after the year of receipt. In addition, this methodology would require the Department to abandon its longstanding practice of not considering the effect of a subsidy, the commenters stated.

We agree with the commenters that none of the three options listed in the 1997 Proposed Regulations provides a more reliable basis for determining whether a subsidy benefit should be treated as recurring or non-recurring than that in the GIA test. However, we do not think that the GIA test, on its own, should be the sole basis for determining whether a subsidy is recurring or non-recurring. If we applied only the GIA test, we believe we would run the risk of expensing some subsidies in the year of receipt that are more appropriately allocated over time, as explained in further detail below. In addition, the GIA test alone may lead to unnecessary arguments over which subsidies are recurring or non-recurring. We also do not agree with the commenter who asked us to modify the GIA test by resurrecting two standards from our 1989 Proposed Regulations (*i.e.*, to examine whether a program is longstanding and if there is reason to believe that it will continue in the future). As stated in the GIA, we changed our approach for distinguishing between recurring and non-recurring benefits in Certain Hot-Rolled Lead and Bismuth Carbon Steel Products from France, 58 FR 6221 (January 27, 1993). In that determination, we explained that the two standards from the 1989 Proposed Regulations had not proven helpful in determining the nature of a benefit and that they had been difficult to interpret and apply in practice. Nothing in our subsequent experience has changed our view on this matter.

However, we find persuasive the comment that suggested developing a non-binding illustrative list as a complement to the GIA test. We believe that non-binding lists illustrating which types of subsidies we will normally treat as providing recurring benefits, and which types of subsidies we will normally treat as providing non-recurring benefits, would offer valuable guidance on how the Department views different types of subsidies. Since they are non-binding, the lists do not have to cover every single type of subsidy that we have encountered in the past, nor do they have to anticipate all conceivable new subsidies that we might come across in the future.

Therefore, for illustrative purposes we have added to paragraph (c) non-binding lists of subsidies which we will normally treat as providing recurring benefits, and subsidies which we will normally treat as providing non-recurring benefits. These lists have been developed based upon our past experience and our findings described in the GIA. Because these lists are non-binding, paragraph (c) also provides that parties may argue that the benefit from a subsidy on the recurring list should be considered non-recurring, or that the benefit from a subsidy on the non-recurring list should be considered recurring.

Our determination of whether a recurring subsidy should be treated as non-recurring, or vice versa, will rely principally on the test set forth in the GIA. However, because we have decided to codify these illustrative lists, we have reevaluated the GIA test to ensure that it covers all of the factors that should be considered in determining whether a subsidy should be treated as recurring or non-recurring. Based on this reevaluation, and the comments we received, we have determined that it is appropriate to expand the criteria that will be considered in applying the test of whether a subsidy traditionally considered as recurring should be treated as non-recurring, or whether a subsidy traditionally considered as non-recurring should be treated as recurring. Therefore, in addition to examining whether the subsidy is exceptional, or whether express government authorization or approval is provided or required, we will also examine whether the subsidy was provided for, or tied to, the capital structure or capital assets of the company. In this context, capital structure is considered to be the combination of common equity (including retained earnings), preferred stock, and long-term debt that comprises a firm's financial framework. Capital assets are the plant and equipment which produce other goods, and include industrial buildings, machinery and equipment. Thus, it is appropriate to consider the benefit from a subsidy provided for, or tied to, the capital structure or capital assets of a firm to be non-recurring because these types of subsidies generally benefit the creation, expansion, and/or continued existence of a firm.

The addition of this criterion to the GIA test in no way envisions or requires an examination of the effects or uses of the subsidy. Rather, we will examine whether, at the point of bestowal, the subsidy was provided to, or tied to, the company's capital structure or capital assets. For example, debt forgiveness benefits the capital structure of a company by reducing long-term liabilities, and thus increasing net worth. Similarly, a government's coverage of a company's losses benefits its capital structure because the company need not cover the losses out of its retained earnings.

If the government provides a grant expressly for the purchase of an industrial building, the capital assets of the firm are benefitted and, as such, it is reasonable to conclude that the benefit from the grant should be considered non-recurring. In the same vein, if the government provides import duty exemptions tied to major capital equipment purchases, it may be reasonable to conclude that, because these duty exemptions are tied to capital assets, the benefits from such duty exemptions should be considered non-recurring, even though import duty exemptions are on the list of recurring subsidies.

While we agree with the commenters who argued that one of the proposed options—allocating only those grant-like subsidies tied to the purchase of fixed assets—is based on a flawed assumption that only fixed assets continue to provide benefits after the year of receipt, we do not consider that our addition to the GIA test in these Final Regulations reflects the same flawed assumption. By including not only capital assets, but also capital structure, in our examination of whether a subsidy is recurring or non-recurring, we will be better able to identify those subsidies that continue to benefit a company after the year of receipt.

Under paragraph (c), a party may argue that a subsidy included on the illustrative list of recurring subsidies be

treated as non-recurring or that a subsidy on the non-recurring list be treated as recurring. If such arguments are presented to us and supported by sufficient information, we will apply the standards set forth in the regulation. In other words, we will examine whether the program is exceptional, whether it requires express government authorization or approval, or whether, at the point of bestowal, the subsidy was provided for, or was tied to, the capital structure or capital assets of the company. If a subsidy is not on either list, the Secretary will apply the standards set forth in the regulation to determine if it should be treated as recurring or non-recurring.

The 0.5 Percent Test and the Expensing of Small Subsidies

Although we normally will allocate non-recurring benefits over time, paragraph (b)(2) retains the so-called 0.5 percent test with a few minor modifications which are discussed below. *See* § 355.49(a)(3)(i) of the 1989 Proposed Regulations and the GIA at 37226. Under this test, we will expense non-recurring benefits under a particular subsidy program in the year of receipt if the total amount of such benefits is less than 0.5 percent *ad valorem*, as calculated under § 351.525.

We consider this test to be an important part of our efforts to simplify countervailing duty proceedings and to reduce the burdens on all parties involved. By expensing small non-recurring benefits in the year of receipt, we avoid the need to: (1) Collect, analyze, and verify the data needed to allocate such benefits over time; and (2) keep track of the allocation calculations for minuscule subsidies from year to year. If considered only in the context of a single case, the burdens imposed by this activity may not appear to be particularly onerous. However, when considered across all investigations and administrative reviews, the cumulative burden becomes considerable.

Since the 1993 Certain Steel investigations, we have performed the 0.5 percent test using the so-called ''program-by-program'' approach. Under this approach, we add the *ad valorem* rates for all subsidies received by a company under a single program in that year. If the resulting sum is below 0.5 percent, we expense the benefits in the year of receipt. An alternative approach would be to add the *ad valorem* rates for all subsidies approved under all programs for each company in a given year and examine whether this total rate is below 0.5 percent (the so-called ''company-by-company'' approach). In the 1997 Proposed Regulations, we stated that we intended to retain the program-by-program approach, but that we wanted to preserve ''the flexibility to take a different approach in situations where petitioners are able to point to clear evidence that the foreign government has deliberately structured its subsidy programs so as to reduce the exposure of its exporters to countervailing duties.''

We received three comments on the 0.5 percent test, all of which urged us to administer the test on a company-by-company basis. One commenter argued that the current program-by-program test could lead to anomalous results. For example, a company that received several small non-recurring grants, all below 0.5 percent of the company's total sales, would face a countervailing duty rate different from a company that received the same total amount of money in the form of one large non-recurring grant. Such anomalies would allow foreign governments to evade the countervailing duty law by providing several small subsidies instead of one large subsidy, according to the commenter. All three commenters agreed that the administrative convenience of expensing small non-recurring grants would be outweighed by the potential for abuse.

The same commenters also criticized the exception to the 0.5 percent rule as outlined in the 1997 Proposed Regulations, *i.e.*, that petitioners must show the intent of the foreign government if the Department is to deviate from the rule. These commenters argued that the standard imposes an improper burden on petitioners, who cannot be expected to divine the intent of a foreign government.

As explained above, the administrative burden on the Department to collect the information necessary to allocate very small non-recurring benefits over time would be considerable. This burden cannot be justified given that, after careful consideration, we believe that in most cases there would be little demonstrable impact in aggregating all programs on a company-specific basis. However, we agree that some potential for manipulation exists with the program-by-program approach. We also agree that petitioners may have difficulty demonstrating the intent of a foreign government. To address these concerns, we have made several changes to the 1997 Proposed Regulations.

Paragraph 351.524(b)(2) now states that the Secretary will normally expense non-recurring benefits in the year of receipt if the total of the benefits from subsidies approved in each year under a program is less than 0.5 percent *ad valorem* of the relevant sales. The relevant sales that we use to calculate the *ad valorem* rate are either the firm's total sales or, if the subsidy is tied, the sales of the product(s) or the sales to the market to which the subsidy is tied. In the case of an export subsidy program, we use the firm's export sales. The new paragraph adds the word ''normally'' and makes clear that we will apply the 0.5 percent test to all benefits associated with a particular program, not each individual benefit, if there are more than one. We have also changed the word ''received'' to ''approved'' with respect to all benefits associated with a particular program. This is intended to cover the situation where a government approves a subsidy in one year but disburses the funds in installments over a period of years. We will apply the 0.5 percent test to the full amount approved, not to each individual installment. In our experience, governments often make one-time approvals for large grants, but disburse the funds over a period of years. This is often the case in research and development programs. As such, basing our 0.5 percent test on disbursements could result in certain large non-recurring subsidies being expensed rather than allocated. To avoid this, it is more appropriate to base our determination of whether the subsidy should be allocated over time on the full amount approved, rather than on periodic installments. However, we will continue to countervail according to the amount received by the company in each year. The only difference is that once the 0.5 percent test has been applied to the approved amount and the subsidy exceeds 0.5 percent of sales, all disbursements will be allocated over time.

In addition, we have abandoned the requirement that petitioners show, in order to convince the Department to abandon the program-by-program approach, that a government deliberately structured its subsidy program so as to reduce exposure to countervailing duties. Instead, we intend to follow the program-by-program method, but we will consider aggregating all programs on a company-specific basis where the application of the 0.5 percent rule would have a significant impact on the results of the investigation or review. Since we have no experience in determining what constitutes a significant impact, we will examine this on a case-by-case basis in response to comments or on our own initiative.

The Time Period Over Which Non-Recurring Benefits Are Allocated

As described below, we have made changes in the methods used to determine certain variables included in our formula for allocating non-recurring benefits over time. In a departure from our current practice and from the 1997 Proposed Regulations, we have adopted a rebuttable presumption that non-recurring benefits will be allocated over the number of years corresponding to the average useful life (''AUL'') of a firm's renewable physical assets, as set forth for the industry concerned in the U.S. Internal Revenue Service's 1977 Class Life Asset Depreciation Range System (Rev. Proc. 77–10, 1977–1, C.B. 548 (RR–38)) (''the IRS tables method''), as updated by the Department of Treasury, unless the parties establish that the IRS tables do not reasonably reflect the AUL of a firm's assets. Parties may rebut the presumption to use the IRS tables by demonstrating either that the company-specific AUL or country-wide AUL for the industry in the respondent country differs by one year or more from the AUL in the IRS tables for the industry under investigation. Before describing the criteria that we will consider in determining whether the presumption has been rebutted, we will first explain why we have decided to change the 1997 Proposed Regulations, which stated that we would use a company-specific AUL.

Selection of AUL Method

Before 1995, we allocated non-recurring benefits over the AUL listed in the IRS tables in accordance with our 1989 Proposed Regulations. We believed, and continue to believe, that the IRS tables method offers consistency and predictability and that it is simple to administer. However, for purposes of the 1997 Proposed Regulations, we decided to change our practice due to several CIT decisions which ruled against our use of the IRS tables method (*see, e.g., Ipsco* v. *United States,* 687 F. Supp. 614, 626 (CIT 1988) (''*Ipsco*''). One common theme of these decisions was that because the IRS tables method was not a company-specific approach, it failed to reflect adequately the benefit of a subsidy to a particular firm. Another common theme was that the IRS tables method could not be affirmed in the absence of a properly promulgated regulation (see *Ipsco*). In the 1997 Proposed Regulations, we also cited the findings in an unadopted GATT panel report (United States—Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in France, Germany, and the United Kingdom, SCM/185, Nov. 15, 1994) (''Leaded Bar'') which criticized the way in which the Department applied the IRS tables method.

Although we did not necessarily agree with the reasoning of these decisions, we decided to develop an alternative method. Among several options, we chose to allocate non-recurring subsidies over the company-specific AUL of productive assets because we believed that this methodology would be more administrable and predictable than the alternatives and, also, that it would be easily calculable from a firm's accounting records. Consequently, in the 1997 Proposed Regulations, we codified our recent practice of allocating non-recurring benefits over a period corresponding to the company-specific AUL of productive assets.

We received many comments on the AUL method. Several commenters, including respondents, urged the Department to return to the use of the IRS tables or, alternatively, to use the IRS tables as a rebuttable presumption or a fallback methodology in situations where a company-specific AUL could not be calculated. These commenters argued that the main reason for the CIT's rejection of the IRS tables was that the Department had failed to codify its methodology into a regulation pursuant to the Administrative Procedure Act. One commenter observed that the GATT panel report referred to in the 1997 Proposed Regulations did not find that the Department was barred from using the IRS tables. Rather, the panel determined that the use of this methodology in Leaded Bar had not been supported by sufficient reasoning on the record.

The main arguments in favor of codifying the IRS tables methodology presented by the commenters were that this approach offers consistency and predictability and that the Department's use of the IRS tables has not been controversial in the vast majority of cases. In contrast, the commenters stated, the company-specific AUL methodology would produce inconsistent and unpredictable results, among other things, due to the respondents' varying accounting practices. In addition, it would increase the workload for all parties. Also, it would not be possible to use the methodology universally, *e.g.,* when respondent companies do not collect the information needed to calculate the AUL, when they do not use straight-line depreciation, or when they write down the value of their assets. Furthermore, one of the commenters pointed to problems allegedly associated with the Department's calculation of the gross book value of a firm's assets. The same commenter was also troubled by the fact that all of a company's assets are included in the asset base, as opposed to only those assets that are used to produce the subject merchandise.

We also received comments on our statement in the 1997 Proposed Regulations that, in certain situations, it might ''be necessary to make normalizing adjustments for factors that may distort the calculation of an AUL'' (*e.g.,* adjustments for extraordinary asset write-downs or hyperinflation). Some commenters expressed misgivings about such adjustments which, they said, might compromise the reliability of the data. One commenter also argued that relying on a company-specific AUL would allow respondents to manipulate the data and that the methodology, therefore, would lead to more litigation.

Other commenters suggested other approaches. One commenter argued that the Department should not limit its discretion to use one method or the other. Rather, the commenter suggested, the Department should make a case-by-case determination of the appropriate methodology after requiring respondents to report the average useful life of assets used in the production of the subject merchandise. In this commenter's view, the burden should be on respondents to show that their reported data are superior to the IRS tables.

Another commenter argued that unless challenged by respondents, the Department should use the AUL of fixed assets alleged in the petition, which generally would be the number of years set forth in the IRS tables. This commenter cited the significant burden that would be put on all parties, particularly respondents, and on the Department if the company-specific methodology were codified.

One group of commenters urged the Department not to return to the IRS tables methodology. One of these commenters supported the company-specific AUL methodology, arguing that this approach is more accurate than the IRS tables methodology, thus rendering fairer and more equitable results. The other commenters in this group expressed a preference for either of the two alternative methods for determining the allocation period which were outlined in our 1997 Proposed Regulations (*i.e.,* the company-specific average maturity of long-term debt and the company-specific weighted-average use of funds). These commenters' chief arguments against the IRS tables methodology were (1) that it had been struck down by the CIT and a GATT

panel, and (2) that it does not accurately reflect the benefit conferred upon the actual recipient of the subsidy.

Another commenter conveyed general criticism of what it claimed was the U.S. practice of assessing subsidy benefits over an ''inordinate'' number of years. This commenter stated that countervailing duties are intended to be remedial, not punitive, and urged the Department to achieve a fairer, more transparent, and more consistent regime. A second commenter argued that data from outside a certain country can never be used to evaluate subsidies within that country except in the absence of data from the country in question, which seems to suggest that in this commenter's view, the IRS tables should only be used as ''facts available.''

We have gained some experience with the company-specific AUL method over the last few years. In some cases, this method has turned out to be more burdensome than we had envisioned. We have also found that the method may not be appropriate for companies that have been sold and that it presents problems when a company revalues its assets, for example as a result of declaring bankruptcy (see, *e.g.*, Steel Wire Rod from Germany, 62 FR 54990 (October 22, 1997)). The results we have obtained using the company-specific AUL method have been mixed: in some cases, they have been close to the IRS tables, whereas in other cases we have found anomalies within the same industry.

Taking into account our experience with the use of the company-specific AUL method and our review of the numerous comments and concerns raised by both petitioner and respondent parties, we have decided to codify the IRS tables method as a rebuttable presumption. In our view, the IRS tables method offers consistency, predictability, and simplicity, and presents a reasonable substitute for the AUL of assets in specific industries around the world. Furthermore, we agree with the comment that one important reason behind the CIT's decisions regarding the IRS tables method was that it had not been codified into a final regulation. With respect to the GATT panel report, it is true that the panel found fault with the way the Department applied the IRS tables method. However, it is also true, as suggested by one commenter, that the panel concluded that it was not necessarily inconsistent with GATT's Guidelines on Amortization and Depreciation (Committee on Subsidies and Countervailing Measures, April 1985) for a signatory to apply a standard period as the average useful life of assets in a given industry, provided that such standard period was not established on an arbitrary basis and that it was applied with a degree of flexibility, taking into account the circumstances of a given case.

Therefore, as set forth in paragraph (d)(2), we will use the AUL listed in the IRS tables for the industry under investigation, unless parties claim and establish that these tables do not reasonably reflect the AUL of the renewable physical assets for the firm or industry under investigation. Since it is quite likely that the IRS tables, which are based on industry averages, will never exactly match a firm's AUL, we will not allow parties to claim that the IRS tables do not reflect the firm's AUL unless they can demonstrate either: (1) That the AUL for the firm differs by one year or more from the AUL listed for the industry in the IRS tables, or (2) that the relevant authorities in the respondent country have in place a system, equivalent to the IRS tables, for determining the actual AUL of assets in specific industries, and the respondent country's tables show that the AUL for the industry under investigation differs by one year or more from the IRS tables.

By requiring any party objecting to the application of the IRS tables to show that either the company-specific AUL, or the industry AUL in that country, differs by one year or more from the IRS tables, we will reduce the burden on all parties, as well as the Department, in analyzing, commenting on, and challenging claims that, even if ultimately accepted, would have relatively little impact on the calculation.

Although most commenters focused on some variation of the AUL method as the appropriate period over which to allocate non-recurring subsidies, one commenter urged the Department to adopt a special rule for determining the period over which to allocate subsidies that are tied to the development of a new product or which fund a specific project. This commenter maintained that the proper allocation period in cases where a subsidy is provided for the development of a specific product is the life of the product, and not the life of the renewable physical assets used to manufacture the product. The commenter stated that subsidies for the development of a new product continue to benefit the recipient over the life of the product and have no relationship to the recipient's AUL.

The same commenter noted that under the Department's methodology, regardless of whether it uses the IRS tables or the company-specific AUL, the allocation period begins with the receipt of the subsidy. The commenter argued that the allocation period should begin with the sale of the first product that has been developed with the aid of the subsidy, which may be several years after the initial provision of the subsidy. In the commenter's view, the Department's standard calculation methodology severely understates the duration of the benefit.

In our experience, we have found that for most industries and most types of subsidies, the IRS tables have provided an accurate and fair approximation of the AUL of assets in the industry in question, and that the AUL of assets represents a reasonable reflection of the duration of the benefit from a non-recurring subsidy. We recognize, however, that for certain types of industries or certain types of subsidies, the AUL of assets may not represent the best reflection of the duration of the benefit. In addition, with respect to certain types of subsidies, even if we were to use the AUL of assets, it is not clear when the benefit stream should commence.

It is reasonable to assume that the AUL of assets closely approximates the duration of the benefit in mature or traditional industries. For example, if a government provides a grant to a chair producer to purchase electric saws and wood-carving equipment, it is reasonable to assume that the grant will continue to benefit the chair producer as long as the equipment lasts. In this instance, the focus of the government's attention is to provide the means for the company to produce already developed products, or modest innovations in the manufacturing process of developed products. Often, both the equipment and the products made from the equipment have already been developed. There is usually only a relatively short lead time between receipt of the subsidy and production. In comparison with the total investment, research and development and marketing expenses are likely to be relatively low. In addition, the level of risk associated with the investment may be lower than that associated with the type of investment described below.

However, when a government provides a subsidy to fund the development of certain new technologies, or to fund an extraordinarily large project for the development of new products that encompasses not only basic research and development, but also implementation and commercialization, the duration of the benefit may not necessarily be related to the AUL of assets in that industry. For one thing, by definition, estimates of the AUL of

assets are based on existing equipment used to make existing products. The assets needed to develop new technologies, or to produce a new product may not even have been designed yet, and certainly the product is not yet developed. Often there is a significant lead time between receipt of the subsidy and development of the product and between the development of the product and the product's commercialization (*e.g.*, the first commercial sale); in some industries, these lead times can be several years. In these instances, even if we were to rely on the AUL of assets, there is a question as to when the benefit stream should begin: at the time the grant is received or at the time the product reaches commercial production.

For these reasons, we have added an exception to paragraph (d). Under paragraph (d)(2)(iv), we will consider arguments, with respect to subsidies to develop certain new technologies, or to fund extraordinarily large development projects that require extensive research and development prior to implementation of production, that we should rely on allocation periods other than AUL, or that the benefit stream should begin at some time other than the date the subsidy is received.

Calculation of a Company-Specific AUL

As noted above, in order to rebut the presumption that the IRS tables reasonably reflect the AUL of assets of the respondent company, a party must provide information showing either that a company-specific AUL differs by one year or more from the AUL listed in the IRS tables for that industry, or that the AUL of the industry in the respondent country differs by one year or more from the AUL in the IRS tables. The criteria that the Department will apply in deciding whether the presumption has been rebutted are discussed below and are set forth in paragraphs (d)(2)(ii) and (iii).

Because firms usually do not calculate the ''actual'' AUL of assets in the normal course of business, and requiring firms to calculate this figure for purposes of a countervailing duty proceeding could pose an extremely onerous burden on firms with thousands of individual assets, and on the Department to verify the accuracy of those calculations, we intend to continue relying on the basic method for calculating company-specific AUL which has been used by the Department since the remand determination in the 1993 Certain Steel investigations (*see, British Steel* v. *United States,* 929 F. Supp. 426, 432–34 (CIT 1996)). Under this method, which is set forth in general terms in paragraph (d)(2)(iii), a firm calculates an AUL as follows. First, the annual average gross book value of the firm's depreciable productive fixed assets (which is usually based on acquisition cost) is cumulated, for a period considered appropriate by the Department. In the preamble to the 1997 Proposed Regulations, we indicated that we had been requesting 10 years of data to calculate a company-specific AUL; however, we are still evaluating whether 10 years of data are necessary or appropriate. Second, the firm's annual charges to accumulated depreciation for the same time period are summed. Third, the sum of the annual average gross book values is divided by the sum of annual depreciation charges. The resulting number is a company-specific AUL. As we gain more experience in addressing the calculation of AULs under these regulations, we may make refinements to the approach described above.

The Secretary will attempt to exclude fixed assets that are not depreciable (such as land or construction in progress) and assets that have been fully depreciated and that are no longer in service. However, assets that are in service would be included even if they have been fully depreciated. There may be situations in which the company-specific AUL calculated in the manner described above is not representative of the company's actual AUL. For example, if a firm's depreciation is not based on an estimate of the actual useful life of its assets, the calculation described above is not a reasonable method of calculating AUL. Similarly, AUL cannot be calculated in this manner if the firm does not use straight-line depreciation unless additions to the firm's asset pool are regular and even. In addition, we will not use a company-specific AUL where we conclude that the company-specific AUL is aberrational, or in some other way not usable. As noted above, we have found that company-specific AULs may not be usable in the face of a recent change in ownership or bankruptcy.

It may also be necessary to make normalizing adjustments for factors that distort the calculation of an AUL. We are not in a position at this time to provide additional detail in the regulation itself on when we will make normalizing adjustments and how such adjustments will be made because the types of necessary adjustments will likely vary based on the facts of a particular case. However, certain obvious normalizing adjustments that come to mind are situations in which a firm may have charged an extraordinary write-down of fixed assets to depreciation, or where the economy of the country in question has experienced persistently high inflation.

If a party can show that a company's AUL meets all of the requirements set forth in paragraph (d)(2)(iii), and that the company-specific AUL differs from the IRS tables by one year or more, we will consider that the presumption has been rebutted and will use the company's own AUL for purposes of its analysis. Because petitioners may not have access to translated financial statements (which is where much of the required information on asset values and depreciation is reported), petitioners will be allowed to base their arguments that the IRS tables are not representative of a company's AUL either on the financial statements they submit in the petition, or on information submitted by respondents in their initial questionnaire responses. We recognize that, by waiting until the initial questionnaire response to examine claims to rebut the IRS tables presumption, we may be faced with a situation where we will need to collect additional years of information on the alleged subsidy programs. If that situation arises, we will determine on a case-by-case basis whether this provides sufficient reason to declare an investigation extraordinarily complicated in accordance with section 703(c) of the Act.

In addition to rebutting the presumption to use the IRS tables through the calculation of a company-specific AUL, we will also permit the respondent government to demonstrate that it has a system in place which reasonably reflects the AUL for industries. The government must demonstrate that the system was set up to determine the AUL of industries in the country, that it has conducted reliable surveys and/or studies to gather information from the companies on their AULs, and that it has ensured the accuracy of any reported information and of any calculations performed. If the respondent government's system meets these standards, and the AUL for the industry under investigation differs by one year or more from the IRS tables, we will consider that the presumption has been rebutted, and will use the AUL from the respondent government's system for the industry under investigation.

As is the case for any other information included in a response to a countervailing duty questionnaire, a firm's calculation of its AUL, or a government's system for determining the AULs of its industries, would be subject to verification by the Department and comment by parties to

the proceeding. The regulation setting forth the use of the IRS tables as a rebuttable presumption is in paragraph (d)(2)(i); the standards we will apply to determine if the presumption has been rebutted are set forth in paragraphs (d)(2)(ii) and (iii).

Several commenters who objected to the use of a company-specific AUL also submitted comments on the method for calculating the company-specific AUL should the Department decide to retain this methodology. Although we have decided to use the IRS tables as a rebuttable presumption to determine the allocation period, parties will be able to use the company-specific AUL method to rebut the presumption. As such, we address these additional comments below regarding the calculation and application of a company-specific AUL.

One commenter argued that, in a situation where the petition is based upon the IRS tables and the company-specific AUL exceeds the AUL in the IRS tables, the Department must investigate all subsidies provided during the allocation period, and the petitioners must have a reasonable amount of time after the Department has made its AUL determination to allege additional subsidies from earlier years. To this effect, the commenter suggested that the investigation be declared extraordinarily complicated in accordance with the Department's regulations for postponing preliminary and final countervailing duty determinations when the company-specific AUL exceeds the AUL in the IRS tables.

In cases where the petition is based upon the AUL listed in the IRS tables, and where a party rebuts that presumption based on the factors discussed above, it is our intention to give the parties a reasonable amount of time to provide information concerning subsidies received in the earlier period (see the rules regarding the time limits for submission of factual information in § 351.301(b) of Antidumping Duties; Countervailing Duties; Final rule, 62 FR 27296 (May 19, 1997)). We will decide on a case-by-case basis if rebutting the use of the IRS tables provides sufficient reason to declare an investigation extraordinarily complicated in accordance with section 703(c) of the Act.

The same commenter asked that the regulations clearly state that the company-specific AUL method will be used only if the respondent (1) bases its depreciation charges on an estimate of the actual useful life of its productive assets, and (2) employs a straight-line depreciation methodology. Another commenter argued that there are two circumstances under which the Department should be precluded from using the company-specific AUL method: (1) When additions to a firm's asset pool are irregular and uneven, and (2) when the number of producers and exporters is so large that the Department uses aggregate data, as was the case in, *e.g.*, Live Swine from Canada, 62 FR 18087 (April 14, 1997).

As stated in the 1997 Proposed Regulations and reiterated previously, there are certain situations in which a company cannot compute its AUL using the methodology described above. For example, if a firm's depreciation is not based on an estimate of the actual useful life of its assets, the methodology cannot be used. Similarly, an AUL cannot be calculated in this manner if the firm does not use straight-line depreciation and additions to the firm's asset pool are irregular and uneven. With respect to the last comment about aggregate cases, we have found that in some aggregate cases it is possible to calculate an AUL based on combined data from a large number of companies (see, *e.g.*, Fresh Atlantic Salmon from Chile, 63 FR 31437 (June 9, 1998)). However, because we now intend to use the AUL in the IRS tables as a rebuttable presumption in all investigations, parties in an aggregate case that wish to rebut the presumption would have to provide the same type of information outlined above.

One commenter criticized the Department's practice of including fully depreciated assets that are still in service in the asset base used to calculate the company-specific AUL. The commenter argued that the Department would have to assign an actual value to a fully depreciated asset to be used as a substitute for its acquisition cost which would involve complicated calculations. The commenter asked that the Department instead exclude fully depreciated assets from the asset base for purposes of the AUL calculation.

We note that, in cases where assets are fully depreciated, yet remain in service, their useful life is simply longer than the depreciation period used by the respondent for accounting purposes. By including fully depreciated assets that are still in service, our calculation more accurately reflects the assets' useful life. With respect to the commenter's concern that we would have to assign a value to a fully depreciated asset in lieu of its acquisition cost, this is simply incorrect. As explained above, one element of our calculation of the AUL of productive fixed assets is the gross book value of these assets, which is based on their acquisition cost. We will still use the gross book value when the asset has been written off, just as we will use the aggregated depreciation of the asset. Thus, there is no need to assign a fictional value to a fully depreciated asset that is still in use for purposes of calculating the company-specific AUL.

The 1997 Proposed Regulations stated that, in administrative reviews, we would recalculate the AUL for non-recurring subsidies received after the period of investigation based upon updated information. One commenter labeled this approach as misguided and argued that there is no need to undertake such recalculation. Moreover, the commenter argued, this approach would lead to anomalous results, *e.g.*, in cases where a company that received two identical subsidies in two different years might face different countervailing duty rates based solely upon the company's financial structure and accounting practices.

We disagree that this approach would lead to anomalous results. Even if the subsidy amounts are identical, if they are provided in two different years, they will have different discount rates and, consequently, different benefit streams regardless of the allocation period. However, because we have limited experience in this area, we are continuing to evaluate whether we should recalculate the allocation period for new subsidies, and we will address this issue in the context of individual cases.

Calculation of the Benefit Stream

Once we have determined that a benefit is non-recurring and that it should not be expensed under the 0.5 percent rule under paragraph (b)(2), we will calculate the amount of the benefit that will be assigned to a particular year according to the formula described in paragraph (d)(1).

We noted in the 1997 Proposed Regulations that we had recently received comments on our allocation formula and that we intended to address the comments we had received in these Final Regulations. Those comments and our position follow.

One commenter, who argued that the Department's traditional calculation methodology is biased in favor of respondents, outlined four alternatives for determining when a grant is received: (1) In the beginning of the year of receipt, (2) at the end of the year of receipt, (3) on the actual date of receipt, or (4) in the middle of the year of receipt. The commenter maintained that because our traditional methodology is based on the implicit assumption that grants are received in the beginning of

the year of receipt, it favors respondents because it undervalues the benefit and artificially shortens the amortization period. The commenter also found our methodology to be inconsistent with commercial realities and with § 351.503(b) of the 1997 Proposed Regulations.

Regarding the second alternative (*i.e.*, basing the benefit calculation on the assumption that grants are received at the end of the year of receipt), the commenter stated that this would also be inconsistent with commercial realities and would unfairly favor petitioners. The third alternative (*i.e.*, using the actual date of receipt) was described as a neutral methodology that would favor neither petitioners nor respondents. According to the commenter, this approach is consistent with commercial reality, with the Department's past practice, and with § 351.503(b) of the 1997 Proposed Regulations. However, the commenter noted that this methodology would be burdensome and urged the Department to adopt the fourth alternative, *i.e.*, the mid-year methodology. The commenter maintained that this option is neutral, consistent with commercial realities, and would require only minor changes in the calculation formula. On average, the mid-year option would produce the same result as the actual date of receipt alternative and would thus be a fair methodology, according to the commenter. (A detailed explanation of how to calculate the annual benefit in accordance with the mid-year approach was also provided.)

A second commenter agreed with the previous argument that the Department's traditional calculation methodology favors respondents by undervaluing the benefit and preventing the Department from fully offsetting the benefit received. However, this commenter argued that the Department should change its calculation methodology to reflect the assumption that the benefit is received at the end of the year. The commenter asked that this underlying assumption should control unless respondents can establish the actual date of receipt.

We have not adopted any of the proposed alternatives to our current formula. Our current formula for allocating non-recurring benefits over time, which is shown in paragraph (d)(1), was developed as a result of the CIT's examination of our previous allocation method in *Michelin Tire Corp.* v. *United States*, 6 CIT 320 (1983). The formula first appeared in the Subsidies Appendix to Certain Cold-Rolled Carbon Steel Flat Products from Argentina, 49 FR 18006 (April 26, 1984) and has since been part of the Department's longstanding practice. This methodology has been uncontroversial and has worked well in past cases. We, therefore, do not see any compelling need to change it. Moreover, we disagree with the commenters' specific proposals, including the proposed calculation formula developed by the first commenter. We find this commenter's methodology unduly complicated because it involves three different calculation formulas to be used at different times during the allocation period. Furthermore, the commenter's formula is not consistent with the declining balance methodology, which has been an important part of the Department's past practice.

Selection of Discount Rate

Paragraph (d)(3) deals with the selection of a discount rate. Consistent with the GIA at 37227, paragraph (d)(3)(ii) provides that, in the case of an uncreditworthy firm, the Secretary will use as a discount rate an interest rate with a ''risk premium'' included.

Section 351.525

Section 351.525 deals with the calculation of the *ad valorem* subsidy rate and the attribution of a subsidy to a particular product. While § 351.525 is based roughly on § 355.47 of the 1989 Proposed Regulations, it contains changes that reflect further refinements in the Department's practice since 1989.

Paragraph (a) deals with the calculation of the *ad valorem* subsidy rate, and continues to provide that the Secretary will calculate the rate by dividing the amount of the subsidy benefit by the sales value of the product or products to which the subsidy is attributed. For example, if a firm receives an untied domestic subsidy for which the benefit in the period of investigation or review is $100 and the firm's total sales in that period amount to $1,000, the *ad valorem* subsidy rate would be 10 percent ($100 ÷ $1,000 = 10 percent).

The second and third sentences of paragraph (a) deal with the basis on which the Secretary will determine the sales value of a product. The Department's longstanding practice has been to determine the sales value for products that are exported on an f.o.b. (port) basis in order to correspond to the basis on which the Customs Service assesses duties. However, in the GIA, we announced that we would begin using sales values as recorded in a firm's financial statements. We did so with the belief that this approach would be more accurate, would reduce the burden on the firms involved, and would allow us to account for the fact that shipping expenses might be subsidized. However, in order to ensure that the Customs Service collected the correct amount of duties based on an f.o.b. (port) basis, we found it necessary to adjust the calculated *ad valorem* subsidy rate based on a ratio of the invoice value of exports to the United States to the f.o.b. value of exports to the United States. In the end, only one of the respondents in the 1993 steel investigations had the information needed to calculate this ratio. Therefore, for all other firms in those cases, the Department resorted to its traditional f.o.b. (port) methodology.

Because our experiment with a different basis was not successful, in the second sentence of paragraph (a) we have reverted to our standard practice of determining sales value on an f.o.b. (port) basis in the case of products that are exported. In the case of products that are sold for domestic consumption, we would determine sales value on an f.o.b. factory basis. While this method imposes a bit more work on firms than does a method that relies on booked values, we believe that the burden can be mitigated by relying on aggregate figures and reasonable allocations of those figures across markets (*e.g.*, subtracting total freight and insurance expenses—expenses that usually are maintained in ledgers that are separate from sales information).

In addition, there is no compelling reason for allocating subsidy benefits over sales values that include freight and other shipping costs. Although there may be rare instances where the movement component of a transaction is subsidized, we can deal with those instances on a case-by-case basis. Accordingly, the third sentence of paragraph (a) provides that the Secretary may make appropriate adjustments to the *ad valorem* subsidy rate to account for movement subsidies.

Paragraph (b) deals with the attribution of a subsidy to a particular product. Paragraphs (b)(2) through (b)(7) set forth general rules of attribution that the Secretary will apply to a given factual situation. We have taken this approach because, depending on the facts, several of the different rules may come into play at the same time. If we tried to account for all the possible permutations in advance, the result would be an extremely lengthy set of rules that might prove unduly rigid.

On the other hand, we appreciate that there needs to be a certain degree of predictability as to how the Department will attribute subsidies. We believe that the rules set forth in paragraph (b) are sufficiently precise that parties can

predict with a reasonable degree of certainty how we will attribute subsidies to particular products in a given factual scenario. In this regard, our intent is to apply these rules as harmoniously as possible, recognizing that unique and unforeseen factual situations may make complete harmony among these rules impossible.

With respect to the attribution rules themselves, they are consistent with the concept of ''benefit'' described in § 351.503, *i.e.,* that a benefit generally is conferred when a firm pays less than it otherwise would pay in the absence of the government-provided input or when a firm receives more revenue than it otherwise would earn. In light of this, subsidies are by these rules attributed, to the extent possible, to the sales for which costs are reduced (or revenues increased). For example, an export subsidy reduces the costs of a firm's exports and is, therefore, attributed only to export sales. Similarly, a subsidy provided by a government for a specific product is attributed only to sales of that product for which the subsidy was provided (and any downstream products produced from that product), as it reduces the costs of a firm's sales of those products. This attribution principle applies equally to the current benefit from non-recurring subsidies allocated over time. For example, the current benefit of an untied subsidy will be attributed to the firm's total sales, even if the products produced by the firm differ significantly from the time the subsidy was provided. We will not, therefore, examine whether product lines have been expanded or terminated, or whether and to what extent the corporate structure of the firm has changed over time.

The principle of attributing a subsidy to sales of a particular product or products is embodied in the Department's longstanding practice concerning the ''tying'' of subsidies. See, *e.g.,* § 355.47 of the 1989 Proposed Regulations. As discussed below, there are various ways in which a subsidy can be tied. However, regardless of the method, we attribute a subsidy to sales of the product or products to which it is tied. In this regard, one can view an ''untied'' subsidy as a subsidy that is tied to sales of all products produced by a firm. For example, we consider certain subsidies, such as payments for plant closures, equity infusions, debt forgiveness, and debt-to-equity conversions, to be untied because they benefit all production.

Paragraphs (b)(2) through (b)(7) set forth rules that we will apply to different types of tying situations. For example, paragraph (b)(2) contains an attribution rule regarding export subsidies. Because an export subsidy is, by definition, limited to exports, paragraph (b)(2) provides that the Secretary will attribute an export subsidy only to the sales of products exported by a firm.

As noted above, we intend to apply paragraphs (b)(2) through (b)(7) consistently with each other, to the extent practicable. As an example, assume that a government provides an export subsidy on exports of widgets to Country X. Here, three attribution rules come into play. Under paragraph (b)(2), the subsidy would be attributed to the export sales of a firm. Under paragraph (b)(4), the subsidy would be attributed to products sold by a firm to Country X. Under paragraph (b)(5), the subsidy would be attributed to widgets sold by a firm. Putting the three rules together, the subsidy in this example would be attributed to the firm's export sales of widgets to Country X.

Certain commenters have identified potential scenarios where the Department should allow itself the flexibility to deviate from these tying rules (*e.g.,* where subsidies allegedly ''tied'' to non-subject merchandise or markets are actually meant to benefit the overall operations of the company).

We recognize that there may be many scenarios where these attribution rules do not fit precisely the facts of a particular case. Furthermore, we are extremely sensitive to potential circumvention of the countervailing duty law. We intend to examine all tying claims closely to ensure that the attribution rules are not manipulated to reduce countervailing duties. If the Secretary determines as a factual matter that a subsidy is tied to a particular product, then the Secretary will attribute that subsidy to sales of that particular product, in accordance with paragraph (b)(5). If subsidies allegedly tied to a particular product are in fact provided to the overall operations of a company, the Secretary will attribute the subsidy to sales of all products by the company. This example illustrates that the rules as proposed, and as finalized here, do serve their intended purpose, but that the facts of each case must be carefully examined.

The rules set forth in paragraphs (b)(5) and (b)(6) warrant additional explanation because of the special nomenclature that is being used. In all other sections of these regulations, the term ''firm'' is used to describe the recipient of the subsidy. See § 351.102. However, for purposes of certain attribution rules, where we are describing how subsidies will be attributed within firms, ''firm'' is too broad. Therefore, for purposes of paragraphs (b)(5) and (b)(6), we are using the term ''corporation.'' In so doing, we are not intending to limit the application of these rules to firms that are organized as corporations. However, based on our experience, most of the firms we investigate are organized as corporations. Therefore, our use of the term ''corporation'' makes these attribution rules as clear as possible. If a respondent is not organized as a corporation, we will address any attribution issues covered by the rules in paragraphs (b)(5) and (b)(6) based on the facts of that case, while following as closely as possible the rules and principles set forth in paragraphs (b)(5) and (b)(6).

Paragraph (b)(5) sets out our rules regarding product tying. Paragraph (b)(5)(i) states our longstanding general rule that where a subsidy is tied to production of a particular product, the subsidy will be attributed to sales of that product. One commenter argued that the regulations should make clear that where a subsidy is provided to develop a specific model of a product (or to modernize a particular production facility), the subsidy should be attributed to sales of that model (or to production from that facility). We believe that this commenter's concerns may already be addressed by the proposed product-tying rule. If subsidies are provided for a specific model, they can be tied to that model. If a countervailing duty case is brought solely against that model, the subsidy would be attributed to that model, and a model-specific rate will, in effect, be calculated. However, if the case is brought against several models that comprise the subject merchandise, we would normally blend the model-specific rates to arrive at a single rate to apply to all merchandise covered by the countervailing duty order.

Our 1997 Proposed Regulations contained an exception to the general product tying rule which provided that, if an input product is produced within the same corporation, subsidies tied to the input product would be attributed to sales of both the input and the downstream products. Our stated intention was to limit this exception to situations where production of the input and downstream product occur within the same corporation. We took the position that if the input product is produced by a separately incorporated company, regardless of the level of affiliation or ''cross-ownership'' (as discussed further below), subsidies to the input product would only be considered in the context of an upstream subsidy investigation initiated

on the basis of a sufficient allegation from the petitioner.

We received numerous comments objecting to such an approach, arguing that the rule elevates form over substance. These commenters suggested that the rule creates a loophole whereby vertically integrated businesses could avoid countervailing duty exposure for input subsidies simply by separately incorporating the division that makes the input. In their opinion, where there is cross-ownership between the input supplier and the downstream product, subsidies to the input supplier should be automatically attributed to the downstream product. In situations where the cross-ownership standard is not met, but the corporations are nonetheless affiliated, the Department should determine whether to attribute the subsidies between the two companies according to the particular facts of the case.

Paragraph (b)(5)(ii) of these Final Regulations maintains the exception to the product tying rule whereby we will attribute a subsidy tied to the input product to the sales of both the input and downstream products where the production of the input and downstream products occurs within the same corporation. However, upon consideration of the comments received and a careful review of the upstream subsidy provision of the statute, we have decided to modify our practice regarding separately incorporated input and downstream producers.

The main concern we have tried to address is the situation where a subsidy is provided to an input producer whose production is dedicated almost exclusively to the production of a higher value added product—the type of input product that is merely a link in the overall production chain. This was the case with stumpage subsidies on timber that was primarily dedicated to lumber production and subsidies to semolina primarily dedicated to pasta production. (See Certain Softwood Lumber Products from Canada, 57 FR 22570, 22578 (May 28, 1992) and Certain Pasta from Italy, 61 FR 30287–309 (June 14, 1996).) We believe that in situations such as these, the purpose of a subsidy provided to the input producer is to benefit the production of both the input and downstream products. Accordingly, where the input and downstream production takes place in separately incorporated companies with cross-ownership (see discussion below defining cross-ownership) and the production of the input product is primarily dedicated to the production of the downstream product, paragraph (b)(6)(iv) requires the Department to attribute the subsidies received by the input producer to the combined sales of the input and downstream products (excluding the sales between the two corporations).

Where we are dealing with input products that are not primarily dedicated to the downstream products, however, it is not reasonable to assume that the purpose of a subsidy to the input product is to benefit the downstream product. For example, it would not be appropriate to attribute subsidies to a plastics company to the production of cross-owned corporations producing appliances and automobiles. Where we are investigating products such as appliances and automobiles, we will rely on the upstream subsidy provision of the statute to capture any plastics benefits which are passed to the downstream producer. Moreover, we believe that the upstream subsidy provision is still applicable when dealing with lower levels of affiliation. Therefore, if the relationship between the input and downstream producers meets the affiliation standard but falls short of cross-ownership, even if the input product is primarily dedicated to the downstream product, we will only consider subsidies to the input producer in the context of an upstream subsidy investigation.

Paragraph (b)(6) deals with situations where cross-ownership exists between corporations. We have decided to codify the definition of cross-ownership outlined in the preamble to the 1997 Proposed Regulations. Accordingly, paragraph (b)(6)(vi) makes clear that the relationships captured by the cross-ownership definition include those where the interests of two corporations have merged to such a degree that one corporation can use or direct the individual assets (or subsidy benefits) of the other corporation in essentially the same ways it can use its own assets (or subsidy benefits). For example, cross-ownership exists where corporation A owns corporation B (or *vice versa*), or where A and B are both owned by corporation C. Cross-ownership does not require one corporation to own 100 percent of the other corporation. Normally, cross-ownership will exist where there is a majority voting ownership interest between two corporations or through common ownership of two (or more) corporations. In certain circumstances, a large minority voting interest (for example, 40 percent) or a ''golden share'' may also result in cross-ownership.

As we noted in the 1997 Proposed Regulations, the term ''cross-ownership'' as it is used here clearly differs from ''affiliation,'' as that term is defined in section 771(33) of the Act. In response to this, one commenter protested that reliance upon cross-ownership for attribution purposes will unlawfully limit the affiliated party standard as outlined in section 771(33) of the Act. Another commenter asked the Department to revise the definition of cross-ownership such that cross-ownership will be found when one ''affiliated'' company exercises control over another.

We believe that the definition of cross-ownership in these Final Regulations is a more useful basis than mere affiliation for identifying the types of relationships where it is reasonable to presume that subsidies to one corporation could benefit another corporation. The underlying rationale for attributing subsidies between two separate corporations is that the interests of those two corporations have merged to such a degree that one corporation can use or direct the individual assets (or subsidy benefits) of the other corporation in essentially the same ways it can use its own assets (or subsidy benefits). The affiliation standard does not sufficiently limit the relationships we would examine to those where corporations have reached such a commonality of interests. Therefore, reliance upon the affiliated party definition would result in the Department expending unnecessary resources collecting information from corporations about subsidies which are not benefitting the production of the subject merchandise, or diluting subsidies more properly attributed to input producers by allocating such subsidies over the production of remotely related and affected downstream producers. In response to the second comment, we note that varying degrees of control can exist in any relationship. Therefore, we believe the more precise definition of cross-ownership that we have adopted in these Final Regulations is more appropriate.

Contrary to the assertions of the commenters, in limiting our attribution rules to situations where there is cross-ownership, we are not reading ''affiliated'' out of the CVD law—we simply do not find the affiliation standard to be a helpful basis for attributing subsidies. Nowhere in the statute or the SAA is there any indication that the affiliated party definition was intended to be used for subsidy attribution purposes. Rather, it identifies the broadest category of relationships which might be relevant to either an antidumping or a countervailing duty analysis. Therefore,

we intend to include in our questionnaires a request for respondents to identify all affiliated parties. Also, persons affiliated with companies that shipped during the period of investigation will not be entitled to request a new shipper review under section 751(a)(2)(B) of the Act. However, we do not intend to investigate subsidies to affiliated parties unless cross-ownership exists or other information, such as a transfer of subsidies, indicates that such subsidies may in fact benefit the subject merchandise produced by the corporation under investigation.

Paragraph (b)(6) begins by stating a general rule, which is followed by four exceptions to that rule deriving from the rationale described above. Paragraph (b)(6)(i) states that the Secretary will normally attribute a subsidy received by a corporation to the products produced by that corporation. Hence, for example, if corporation A receives a subsidy, then that subsidy will normally be attributed to the sales of products produced by corporation A.

However, under paragraph (b)(6)(ii), if two (or more) corporations with cross-ownership produce the subject merchandise, then subsidies received by either or both of those corporations will be attributed to the combined sales of the two corporations. Thus, for example, if corporation A and corporation B are both owned by corporation C and both A and B produce widgets, benefits to A and B will be combined to determine the subsidy on widgets and the subsidy will be attributed to the combined production of A and B.

Paragraph (b)(6)(iii) addresses a second instance where subsidies received by one corporation might be attributed to sales of another corporation with cross-ownership. This is where the subsidy is received by a holding company. The term ''holding company'' is intended to mean any company that owns or controls subsidiaries through the ownership of voting stock or other means. In paragraph (b)(6)(iii) of these Final Regulations, we have clarified that the term ''holding company'' includes investment companies with no business of their own (commonly referred to as holding companies) as well as companies with their own operations (commonly referred to as parent companies). Under paragraph (b)(6)(iii), subsidies to a holding company will normally be attributed to the consolidated sales of the holding company (including the sales of subsidiaries). However, if the Department determines that the holding company is merely serving as a conduit for government-provided funds to one (or more) of its subsidiaries, then the subsidy will be attributed to the production of that subsidiary.

Analogous to the situation of a holding or parent company is the situation where a government provides a subsidy to a non-producing subsidiary (*e.g.*, a financial subsidiary) and there are no conditions on how the money is to be used. Consistent with our treatment of subsidies to holding companies, we would attribute a subsidy to a non-producing subsidiary to the consolidated sales of the corporate group that includes the non-producing subsidiary. *See, e.g., Certain Steel Products from Belgium*, 58 FR 37273, 37282 (July 9, 1993) (''*Certain Steel from Belgium*'').

Paragraph (b)(6)(iv) incorporates the change in practice with regard to separately incorporated input producers discussed previously. This rule allows the Department to attribute the subsidies received by the input producer to the input and downstream products produced by both corporations when the input is primarily dedicated to the production of the downstream product.

Finally, where the exceptions contained in paragraphs (b)(6)(i)–(iv) have not been met, subsidies received by one corporation may still be attributed to sales of another corporation with cross-ownership if the Secretary determines under paragraph (b)(6)(v) that the corporation receiving the subsidy transfers it to the corporation producing the subject merchandise. Such a transferral could be shown by some form of extraordinary transaction between the two companies, *e.g.*, a transfer of assets, an assumption of debt, or a significant loan. Where we find such transfer mechanisms, we will attribute the subsidy to the combined sales of the two corporations.

Although cross-ownership is broadly defined, permitting us to include corporations under common government ownership, we expect that common government ownership will not normally be viewed as cross-ownership. Instead, we intend to continue our longstanding practice of treating most government-owned corporations as the government itself, and not as corporations that transfer subsidies received from the government to other government-owned corporations through loans or other financial transactions. For example, where a government-owned corporation producing the product under investigation purchases electricity from a government-owned utility, a subsidy is conferred if the utility does not receive adequate remuneration. However, given the complexity and variety of the government-owned corporate structures that we have encountered, the nature of the allegation may determine the nature of the analysis and the level at which the analysis should be applied. The situations where we would normally expect to apply the cross-ownership rules to common government ownership are: (1) Government-owned corporations producing the same product (*see* § 351.525(b)(6)(ii)) and (2) government-owned corporations producing different products where the corporations are under the control of the same ministry or within a corporate group containing producers of similar products (*see* § 351.525(b)(6)(v)).

Although the rules described in paragraphs (b)(2)—(b)(7) of § 351.525 deal with tying, § 351.525 does not contain a definition of ''tied.'' In the past, the Department has described this concept in a variety of ways. For example, in Appendix 2 to *Certain Steel Products from Belgium*, 47 FR 39304, 39317 (September 7, 1982), we stated that ''a grant is 'tied' when the intended use is known to the subsidy giver and so acknowledged prior to or concurrent with the bestowal of the subsidy.'' In the preamble to the 1989 Proposed Regulations at 23374, we stated that a ''tied'' subsidy benefit is ''*e.g.*, a benefit bestowed specifically to promote the production of a particular product.''

Given the wide variety of factual scenarios that we have encountered in the past, and are likely to encounter in the future, we are not promulgating an all-encompassing definition of ''tied.'' Moreover, the absence of a definition of ''tied'' has not proven to be a problem in practice, and Annex IV to the SCM Agreement, which refers to ''tied'' subsidies in paragraph 3, also lacks a definition of this term. While the preamble to the 1997 Proposed Regulations requested comments regarding what factors are relevant to the Department's determination of whether benefits are tied, we received no such comments. For these reasons, at this time we intend to apply the term ''tied'' on a case-by-case basis, using the guidelines in this section.

Virtually every comment submitted on attribution-related issues included a reference to the fungibility of money. Certain commenters argued that because money is fungible, the Department should not allow subsidies to be tied to particular products or to particular export markets. In their view, the only distinction that should be made is between export and domestic subsidies. Other commenters invoked the

fungibility principle in support of their position that untied capital infusions to companies with multinational production should be attributed to worldwide sales of the firm.

While we agree with these commenters that money is fungible, these comments are somewhat misplaced. Fungibility has to do with the issue of whether we could, or should, trace the use of specific funds to determine whether such funds were used for their stated purpose, or the purpose that we evince from record evidence. We have generally stated that we will not trace the use of subsidies through a firm's books and records. Rather we analyze the purpose of the subsidy based on information available at the time of bestowal. Once the firm receives the funds, it does not matter whether the firm used the government funds, or *some of its own funds that were freed up as a result of the subsidy*, for the stated purpose or the purpose that we evince. This is what we mean when we say that money is fungible. Fungibility does not mean that we cannot attribute subsidies to particular portions of a firm's activities. This interpretation of fungibility would undermine congressional intent to attribute subsidies to the products that directly benefit from the subsidy. *See, e.g.*, H.R. Rep. No. 96–317, at 74–75 (1979) (''[W]ith regard to subsidies which provide an enterprise with capital equipment or a plant * * * the net amount of the subsidy should be * * * assessed in relation to the products produced with such equipment or plant * * *.'').

For example, if we were to adopt some of the suggestions made by the commenters, there should be no distinction between export and domestic subsidies. Yet, this agency's consistent and, for the most part, non-controversial practice over the past 18 years has been to attribute export subsidies to the sales value of exported products and domestic subsidies to all products sold. As additional examples, over time, we also have adopted the practices of attributing subsidies that can be tied to particular products to sales of those products and attributing subsidies that can be tied to particular markets to products sold to those markets.

Our tying rules recognize that a government subsidy may not benefit all products or corporate entities equally. At the same time, they recognize that a subsidy may provide benefits to persons, products, or entities, not specifically named in a government program. Our tying rules are an attempt at a simple, rational set of guidelines for reasonably attributing the benefit from a subsidy based on the stated purpose of the subsidy or the purpose we evince from record evidence at the time of bestowal.

Section 351.525(b)(7) addresses the attribution of subsidies received by companies with multinational production. As we stated in the 1997 Proposed Regulations, it is our continued position, based upon our past administrative experience, that:

> The government of a country normally provides subsidies for the general purpose of promoting the economic and social health of that country and its people, and for the specific purposes of supporting, assisting or encouraging domestic manufacturing or production and related activities (including, for example, social policy activities such as the employment of its people).

GIA at 37231. Moreover, a government normally will not provide subsidies to firms that refuse to use them as the government wants, and firms receiving subsidies will not use them in a way that would contravene the government's purposes, as they otherwise risk losing future subsidies. Consistent with this, § 351.525(b)(7) states that we normally will attribute subsidies to sales of merchandise produced within the jurisdiction of the granting authority. However, where a respondent can demonstrate that the purpose of the subsidy was to benefit more than domestic production (*i.e.*, the subsidy was tied to more than domestic production), the subsidy will be attributed to multinational sales.

One commenter argued that it is inappropriate to assume that untied subsidies received by a multinational holding company benefit only the national operations of the company because such subsidies release resources for international as well as domestic operations. This argument, however, rests on the principle that money is fungible and, as discussed above, we do not believe that fungibility should be the guiding principle for attributing subsidies. Moreover, the presumption that domestic subsidies benefit domestic production has been a well-established practice since the *Certain Steel* investigations and has been upheld by the CIT. See GIA at 37231; *see also British Steel plc* v. *United States*, 929 F. Supp. 426, 453–55 (CIT 1996), *appeal pending sub nom. Inland Steel Industries, Inc.* v. *United States*, Nos. 98–1230, 1259 (Fed. Cir.).

The same commenter objected to the change from the rebuttable presumption adopted in 1993. We note that under the 1993 practice, a respondent was required to show that a subsidy was *not tied* to domestic production. If a respondent successfully demonstrated this, the subsidy would be attributed to multinational production. Under the proposed paragraph (b)(7), however, respondents were required to demonstrate that the subsidies were tied to foreign production. If we found the subsidy to be tied to foreign production, it would not be countervailed. The final rule, which is worded slightly differently, still requires affirmative evidence that the purpose of the subsidy was to benefit more than domestic production. We continue to believe that the shift in emphasis will bring our practice with respect to multinational companies more in line with the other attribution rules that require evidence of tying, as opposed to evidence that a subsidy is not tied.

Another commenter, while not objecting to the proposed change in the formulation of the presumption, objected to our statement that, if the Department found a subsidy tied to foreign production, it would not be countervailed. This commenter argued that if the Department maintains a countervailing duty order covering exports from the country in which the foreign production occurred, it should countervail those subsidies.

We have not adopted this suggestion because the statute permits countervailing subsidies provided by one government for the benefit of production in another country only in limited circumstances. See § 351.527 (transnational subsidies). However, this comment did prompt a closer examination of the proposed rule. Recognizing that governments are not likely to provide subsidies solely for the benefit of foreign production, we believe that the purpose, even of subsidies which may be tied to foreign production, is in fact to benefit multinational operations, including those in the subsidizing jurisdiction. Therefore, we have revised the rule so that if a respondent demonstrates that a subsidy is tied to more than domestic production, the subsidy will be attributed to multinational sales including sales in the subsidizing jurisdiction. We will examine such claims closely to ensure that the subsidy was, in fact, tied to more than domestic production. Respondents must show that, in the authorization and/or approval documents, the government explicitly stated that the subsidy was being provided for more than domestic production. Simply approving a loan to a company with multinational production, or providing an equity infusion to the company, is not sufficient to demonstrate that the subsidy was tied to more than domestic

production. The documentation must show that, at the point of bestowal, one of the express purposes of the subsidy was to provide assistance to the firm's foreign subsidiaries. Absent such a demonstration, all subsidies, whether tied or untied, will be attributed to the appropriate category of domestically-produced sales as mandated by the rules contained in paragraphs (b)(1) through (b)(6).

We received one comment requesting the Department to include language in its Final Regulations which would allow the agency to tie regional subsidies to production in a particular region—essentially to calculate factory-specific subsidy rates. This commenter points to *Live Swine from Canada,* 61 FR 26879 (May 29, 1996) (''*Live Swine from Canada*'') in support of this proposal. In that case, the Department allocated regional benefits over regional production and then calculated a single country-wide rate based on each region's exports to the United States.

We have not adopted this suggestion. The calculation methodology employed in Live Swine from Canada was particular to the facts of that case '' an aggregate case in which the majority of subsidy programs examined were regionally provided. If such a methodology were to be universally applied, foreign companies could easily escape payment of countervailing duties by selling the production of a subsidized region domestically, while exporting from a facility in an unsubsidized region.

Another commenter argued that if it were true that governments normally will not provide subsidies to firms that refuse to use them as the government wants, then even ''untied'' subsidies are worth less than their face value by virtue of the fact that the subsidy is inherently ''restricted'' in its use. This commenter appears to be seeking to have the Department reduce the value of the subsidy because of potential constraints placed on its receipt. We note that such a reduction is not an allowable offset under the statute.

Finally, we note that we have added a paragraph to this section which codifies our longstanding practice regarding the attribution of subsidies to trading companies. *See, e.g., Certain Stainless Steel Cooking Ware from the Republic of Korea,* 51 FR 42867 (November 26, 1986) and *Certain Steel Wire Nails from Thailand,* 52 FR 36987 (October 2, 1987). Although we did not receive any comments on this issue and our practice has been non-controversial, we believe it is important to codify those practices that we intend to continue. Therefore, paragraph (c) has been added which states that benefits from subsidies provided to trading companies (or any firm that only sells and does not produce subject merchandise) will be cumulated with benefits from subsidies provided to the producer of subject merchandise, regardless of whether the trading company and the producer are affiliated.

Section 351.526

Section 351.526 deals with program-wide changes, and is almost identical to § 355.50 of the 1989 Proposed Regulations.

One commenter suggested that the Department should add specific language to the regulation stating that the cash deposit rate will not be adjusted for a terminated program, unless the respondent has presented positive evidence demonstrating that no residual benefits will be bestowed and that no transitional program has been, or will be enacted. The commenter further suggested that the regulation also clearly set forth that the Department will not adjust the cash deposit rate based on mere assertion or announcement of a government's intent to terminate a program.

We agree with the commenter that program-wide changes must be documented by the respondent, beyond mere assertion. However, we do not feel that it is necessary to codify this position through an amended regulation. Given the general nature of this policy and our current practice, to which the commenter does not object, there is no reason to amend the current regulation.

A second commenter argued that § 351.526 should allow for the possibility that evidence of a program-wide change received subsequent to the period of investigation or review, but before the preliminary determination or preliminary results of an administrative review, may change the final determination or final results of the review. For example, when a program has been terminated and no residual benefits exist, the Department's final determination or final results should be negative (assuming that there is only one program). The commenter asserted that the 1997 Proposed Regulations, which would require the Department to render an affirmative determination with a zero cash deposit rate, is inconsistent with the overall purpose of the U.S. countervailing duty law. The commenter further argued that the Department should not have the discretion to determine that a ''substitute program'' continues to provide benefits; a substitute program must be considered only in a new investigation or upon an allegation in an administrative review.

We have not adopted the suggested changes of this commenter. It has been our longstanding practice to impose (or not to impose) a CVD order based exclusively on the subsidy rate in effect during the period of investigation. In *Pipe and Tube from Malaysia,* where the period of investigation rate was zero, we rendered a negative determination, even though we knew other benefits existed after the period of investigation. *See, Standard Pipe, Line Pipe, Light-Walled Rectangular Tubing and Heavy-Walled Rectangular Tubing from Malaysia,* 53 FR 46904, 46906 (November 21, 1988). If a subsidy exists during the period of investigation, we will issue a CVD order (where any required injury determination is affirmative) regardless of whether the program and the subsidy are eliminated after the period of investigation, but before our final determination. In regard to substitute programs, it is our practice to consider whether such programs exist when adjusting deposit rates. If we did not have such discretion to determine whether a substitute program offers the same benefits as a terminated program, then governments could terminate investigated or reviewed programs and replace them with other programs to obtain a lower deposit rate.

Section 351.527

Section 351.527, which is based on § 355.44(o) of the 1989 Proposed Regulations, provides that so-called ''transnational subsidies'' are not countervailable. Subsidies of this type include situations where the funding for the subsidy is provided (a) by the government of a country other than the country in which the recipient firm is located, of (2) by an international lending or development institution. Except for the addition of the phrase '' * * * supplied in accordance with, and as part of, a program or project funded,'' which we discuss below, § 351.527 is the same as the provision in the 1997 Proposed Regulations and § 355.44(o) of the 1989 Proposed Regulations.

Paragraph (o)(2) of § 355.44(o) of the 1989 Proposed Regulations essentially duplicated what is now section 701(d) of the Act, a provision that deals with subsidies to international consortia. In light of our decision to avoid regulations that merely repeat the statute, § 351.527 merely references, but does not repeat, section 701(d).

One commenter stated that paragraph (a) in the 1997 Proposed Regulations should be clarified to apply solely to

foreign aid; otherwise any subsidy provided by the government of one country to a recipient located in another country would be not countervailable. The commenter argued that, as written, the regulation would prevent the Department from conducting an upstream analysis in a case where a subsidy is provided by the government of one country to an input producer in that country, that producer sells the input to a firm in another country, and this last firm ultimately sells subject merchandise to the United States. Another commenter stated that the statutory basis for not countervailing subsidies provided by one country to an entity producing or manufacturing the subject merchandise in another country no longer exists following the repeal of section 303 by the URAA and, prior to the URAA, did not exist for Subsidies Code members covered by section 701, notwithstanding previous assertions by the Department to the contrary. Therefore this commenter suggests striking paragraph (a) in its entirety. Both commenters supported paragraph (b), which addresses subsidies funded by international lending or development institutions.

Section 351.527 derives from prior section 303(a)(l) of the Act (now repealed), which stated:

> Whenever any country * * * shall pay or bestow, directly or indirectly, any bounty of grant upon the manufacture or production or export of any article * * * manufactured or produced in such country * * * there shall be levied a duty equal to the net amount of such bounty or grant * * * .

19 U.S.C. section 1303(a)(1)(1994)(emphasis added).

In our view, neither the successorship of section 701 for Subsidies Code members, nor the repeal of section 303 by the URAA, eliminated the transnational subsidies rule, and there is no other indication that Congress intended to eliminate this rule. In addition, § 351.527 does not preclude the Department from conducting an upstream analysis in a case where a subsidy is provided by the government of one country to an input producer in that country, that producer sells the input to a firm in another country, and this last firm ultimately sells subject merchandise to the United States. As explained in the preamble to § 351.523, section 701(d), the international consortia provision of the statute, allows the Department to countervail such subsidies where both countries are ''members (or other participating entities)'' in an international consortium and the subsidy on the input product ''assisted, permitted, or otherwise enabled'' the participation of that producer in the consortium. Furthermore, section 771A, the upstream subsidies provision of the statute, allows the Department to reach subsidies provided by one country that is a member in a customs union to an input produced in that country for incorporation into subject merchandise produced in another country that is a member of the same customs union.

With respect to § 351.527(b), we agree with the commenters that a subsidy does not exist if the funding for the subsidy is provided by an international lending or development institution. Common examples of this type of international funding include the construction of a dam, a hydroelectric plant, or some other large infrastructure project. The exemption in § 351.527 applies if sufficient evidence is provided showing that the funding for the subsidy is supplied in accordance with, and as part of, a program or project funded by another government or by an international lending or development institution. If, however, the recipient government decides on its own, outside of such a program or project, to provide a subsidy, that subsidy will be subject to the countervailing duty law. At the same time, the provision of transnational funds to a government does not in and of itself create a presumption of subsidization. We have amended § 351.527 to reflect the limited application of this exemption and to clarify that national government subsidy programs, if they meet the statutory criteria for a countervailable subsidy, will not escape countervailing duties.

Comments Relating to Procedural Regulations

We received comments arguing that remand determinations, like other determinations, should be published in the **Federal Register**. Although this issue was addressed in *Antidumping Duties; Countervailing Duties; Final rule*, 62 FR 27295, 27330 (May 19, 1997) (''*Procedural Regulations*''), these commenters assert that the alternatives described therein do not provide sufficient access to remand determinations. The commenters argue that the publication of remand determinations is crucial as they correct previously published determinations found to be unsupported by substantial evidence or not in accordance with the law. Moreover, remand decisions often include new analysis or expanded discussions of the Department's methodology which is not included in published decisions.

While we understand the concerns of the commenters, given the high cost of publishing notices in the **Federal Register**, we do not agree that remand determinations should be published in the **Federal Register**. At this time, we will continue the current plan of posting final remand determinations on the Import Administration web site (http://www.ita.doc.gov/import_admin/). After this system has been in place for a reasonable period of time, we will evaluate whether this system provides adequate distribution of the determinations, or if another system would provide better public access.

We also received a comment encouraging the Department to codify and follow all procedures relating to the issuance of deposit instructions to Customs. Under § 351.211(b) of the Department's *Procedural Regulations,* the Department is obligated to issue deposit instructions within seven days of a final affirmative ITC determination, and promptly after final review results. However, the commenter stated that the Department frequently misses these deadlines, and parties have no remedy. Also, the commenter noted that the regulations do not address changes resulting from remands. The commenter stated that in some cases, deposit rates are not amended until all appeals are exhausted, and that this harms petitioners. According to the commenter, a fair rule would be to issue amended deposit rates immediately after the remand results are approved by the Court, if the amended rate is higher than the rate calculated in the previous segment. If that higher rate is eventually determined to be incorrect, then the difference can be refunded.

We agree that we should issue deposit instructions promptly. With regard to changes in deposit rates after remand results are affirmed, our policy has been to follow the decision in *Timken* v. *United States*, 893 F.2d 337 (Fed. Cir. 1990). Pursuant to our interpretation of this case, we do not change deposit instructions following a remand determination until all appeals are exhausted. If, however, the remand changes a negative determination to an affirmative determination, we will instruct Customs to suspend liquidation at a zero rate until all appeals are exhausted.

Subpart G—Effective Dates

Subpart G currently consists of a single § 351.701, which established the dates on which the new substantive AD and procedural AD and CVD regulations published on May 19, 1997, became effective. Section 701 also explains the extent to which the previous AD and procedural regulations govern segments of proceedings to which the new

regulations do not apply and the limited role of the new regulations in such proceedings.

We are now adding a new § 351.702 to establish effective dates for the new CVD substantive regulations. Because the procedural regulations published on May 19, 1997, apply to CVD proceedings, the effective dates in the substantive CVD regulations are structured as an exception to the effective dates in the procedural regulations.

Section 351.702(a) provides that the new substantive CVD regulations will apply to all investigations initiated pursuant to petitions filed more than 30 days after the date on which they are published. In addition, § 351.702(a) provides that the new regulations will apply to all administrative reviews initiated on the basis of requests filed in the month following the month in which the date 30 days after publication of this notice falls (in other words, the month following the month in which the regulations otherwise become effective). The slight difference in effective dates for requested administrative reviews is to avoid confusion over whether the new regulations apply to administrative reviews requested by different parties on different days during the month in which the new regulations become effective. Finally § 351.702(a) applies to all investigations or reviews that the Department self-initiates more than 30 days after the date on which the new regulations are published.

Section 351.702(b) provides that investigations and reviews to which the substantive CVD regulations do not apply will continue to be governed by the Department's previous CVD methodology, except to the extent that the previous methodology was invalidated by the URAA. Although there are no previous CVD substantive regulations, the Department's previous methodology generally is described in the proposed substantive CVD regulations published May 31, 1989. In situations where the previous methodology was invalidated by the URAA, the new regulations will serve as a restatement of the Department's interpretation of the Act as amended by the URAA. The 1997 Proposed Regulations have no role as precedent for any CVD determinations.

Classification

E.O. 12866

This final rule has been determined to be significant under E.O. 12866.

Regulatory Flexibility Act

The Assistant General Counsel for Legislation and Regulation of the Department of Commerce certified to the Chief Counsel for Advocacy of the Small Business Administration that this final rule will not have a significant economic impact on a substantial number of small entities. The Department does not believe that there will be any substantive effect on the outcome of AD and CVD proceedings as a result of the streamlining and simplification of their administration. With respect to the substantive amendments implementing the URAA, the Department believes that these regulations benefit both petitioners and respondents without favoring either, and, therefore, would not have a significant economic effect. As such, an initial regulatory flexibility analysis was not prepared.

Paperwork Reduction Act

Notwithstanding any other provision of law, no person is required to respond to nor shall a person be subject to a penalty for failure to comply with a collection of information subject to the requirements of the Paperwork Reduction Act unless that collection of information displays a currently valid OMB Control Number. This final rule does not contain any new reporting or recording requirements subject to the Paperwork Reduction Act.

There are three separate collections of information contained in this rule. Each is currently approved by the Office of Management and Budget. The *Petition Format for Requesting Relief Under U.S. Antidumping Laws,* OMB Control No. 0625–0105, is estimated to impose an average public reporting burden of 40 hours. The information submitted is used to assess the petitioner's allegations of unfair trade practices and to determine whether an investigation is warranted. The information requested relates to the existence of sales at less than fair value and injury to the affected U.S. industry. Second, the *Format for Petition Requesting Relief Under the Countervailing Duty Law* is approved under OMB Control No. 0625–0148. This format is used to elicit the information required by the Tariff Act of 1930, as amended, and its implementing regulations, for the initiation of a CVD investigation. Specifically, the *Format* requests information about the imported product, a description of the alleged subsidies to the imported product, and the extent to which the domestic industry is being injured by the imported product. Finally, OMB Control No. 0625–0200, *Antidumping and Countervailing Duties, Procedures for Initiation of Downstream Product Monitoring,* provides for the filing of a petition requesting the review of a ''downstream'' product. A downstream product is one that has incorporated as a component part, a part that is covered by a U.S. antidumping or countervailing duty finding. To be eligible to file a petition, the petitioner must produce a product like the component part or the downstream product. It is estimated to require 15 hours per petition.

These estimates include the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collections of information. Send comments regarding these burden estimates or any other aspect of these collections of information, including suggestions for reducing the burden, to the Department of Commerce, 14th Street and Constitution Avenue, NW, Washington, DC. 20230, or to OMB Desk Officer, New Executive Office Building, Washington, DC. 20503.

E.O. 12612

This final rule does not contain federalism implications warranting the preparation of a Federalism Assessment.

List of Subjects

19 CFR Part 351

Administrative practice and procedure, Antidumping, Business and industry, Cheese, Confidential business information, Countervailing duties, Investigations, Reporting and recordkeeping requirements.

19 CFR Part 353

Administrative practice and procedure, Antidumping, Business and industry, Confidential business information, Investigations, Reporting and recordkeeping requirements.

19 CFR Part 355

Administrative practice and procedure, Business and industry, Cheese, Confidential business information, Countervailing duties, Freedom of Information, Investigations, Reporting and recordkeeping requirements.

Dated: November 10, 1998.

Robert S. LaRussa,

Assistant Secretary for Import Administration.

For the reasons stated, 19 CFR part 351 is amended as follows:

PART 351—ANTIDUMPING AND COUNTERVAILING DUTIES

The authority citation for part 351 continues to read as follows:

Authority: 5 U.S.C. 301; 19 U.S.C. 1202 note; 19 U.S.C. 1303 note; 19 U.S.C. 1671 *et seq.* and 19 U.S.C. 3538.

2. Section 351.102 (Definitions) is amended by adding new definitions to read as follows:

§ 351.102 Definitions

* * * * *

(b) * * *

Consumed in the production process. Inputs ''consumed in the production process'' are inputs physically incorporated, energy, fuels and oil used in the production process and catalysts which are consumed in the course of their use to obtain the product.

Cumulative indirect tax. ''Cumulative indirect tax'' means a multi-staged tax levied where there is no mechanism for subsequent crediting of the tax if the goods or services subject to tax at one stage of production are used in a succeeding stage of production.

* * * * *

Direct tax. ''Direct tax'' means a tax on wages, profits, interests, rents, royalties, and all other forms of income, a tax on the ownership of real property, or a social welfare charge.

* * * * *

Export insurance. ''Export insurance'' includes, but is not limited to, insurance against increases in the cost of exported products, nonpayment by the customer, inflation, or exchange rate risks.

Firm. For purposes of subpart E (Identification and Measurement of Countervailable Subsidies), ''firm'' is used to refer to the recipient of an alleged countervailable subsidy, including any individual, company, partnership, corporation, joint venture, association, organization, or other entity.

* * * * *

Government-provided. ''Government-provided'' is a shorthand expression for an act or practice that is alleged to be a countervailable subsidy. The use of the term ''government-provided'' is not intended to preclude the possibility that a government may provide a countervailable subsidy indirectly in a manner described in section 771(5)(B)(iii) of the Act (indirect financial contribution).

Import charge. ''Import charge'' means a tariff, duty, or other fiscal charge that is levied on imports, other than an indirect tax.

* * * * *

Indirect tax. ''Indirect tax'' means a sales, excise, turnover, value added, franchise, stamp, transfer, inventory, or equipment tax, a border tax, or any other tax other than a direct tax or an import charge.

* * * * *

Loan. ''Loan'' means a loan or other form of debt financing, such as a bond.

Long-term loan. ''Long-term loan'' means a loan, the terms of repayment for which are greater than one year.

Prior-stage indirect tax. ''Prior-stage indirect tax'' means an indirect tax levied on goods or services used directly or indirectly in making a product.

* * * * *

Short-term loan. ''Short-term loan'' means a loan, the terms of repayment for which are one year or less.

* * * * *

3. A new subpart E is added to 19 CFR part 351, to read as follows:

Subpart E—Identification and Measurement of Countervailable Subsidies

Sec.

Subpart E—Identification and Measurement of Countervailable Subsidies

§ 351.501 Scope.

The provisions of this subpart E set forth rules regarding the identification and measurement of countervailable subsidies. Where this subpart E does not expressly deal with a particular type of alleged subsidy, the Secretary will identify and measure the subsidy, if any, in accordance with the underlying principles of the Act and this subpart E.

§ 351.502 Specificity of domestic subsidies.

(a) *Sequential analysis.* In determining whether a subsidy is *de facto* specific, the Secretary will examine the factors contained in section 771(5A)(D)(iii) of the Act sequentially in order of their appearance. If a single factor warrants a finding of specificity, the Secretary will not undertake further analysis.

(b) *Characteristics of a ''group.''* In determining whether a subsidy is being provided to a ''group'' of enterprises or industries within the meaning of section 751(5A)(D) of the Act, the Secretary is not required to determine whether there are shared characteristics among the enterprises or industries that are eligible for, or actually receive, a subsidy.

(c) *Integral linkage.* Unless the Secretary determines that two or more programs are integrally linked, the Secretary will determine the specificity of a program under section 771(5A)(D) of the Act solely on the basis of the availability and use of the particular program in question. The Secretary may find two or more programs to be integrally linked if:

(1) The subsidy programs have the same purpose;

(2) The subsidy programs bestow the same type of benefit;

(3) The subsidy programs confer similar levels of benefits on similarly situated firms; and

(4) The subsidy programs were linked at inception.

(d) *Agricultural subsidies.* The Secretary will not regard a subsidy as being specific under section 771(5A)(D) of the Act solely because the subsidy is limited to the agricultural sector (domestic subsidy).

(e) *Subsidies to small-and medium-sized businesses.* The Secretary will not regard a subsidy as being specific under section 771(5A)(D) of the Act solely because the subsidy is limited to small firms or small-and medium-sized firms.

(f) *Disaster relief.* The Secretary will not regard disaster relief as being specific under section 771(5A)(D) of the

Act if such relief constitutes general assistance available to anyone in the area affected by the disaster.

§ 351.503 Benefit.

(a) *Specific rules.* In the case of a government program for which a specific rule for the measurement of a benefit is contained in this subpart E, the Secretary will measure the extent to which a financial contribution (or income or price support) confers a benefit as provided in that rule. For example, § 351.504(a) prescribes the specific rule for measurement of the benefit of grants.

(b) *Other subsidies.*—(1) *In general.* For other government programs, the Secretary normally will consider a benefit to be conferred where a firm pays less for its inputs (*e.g.*, money, a good, or a service) than it otherwise would pay in the absence of the government program, or receives more revenues than it otherwise would earn.

(2) *Exception.* Paragraph (b)(1) of this section is not intended to limit the ability of the Secretary to impose countervailing duties when the facts of a particular case establish that a financial contribution (or income or price support) has conferred a benefit, even if that benefit does not take the form of a reduction in input costs or an enhancement of revenues. When paragraph (b)(1) of this section is not applicable, the Secretary will determine whether a benefit is conferred by examining whether the alleged program or practice has common or similar elements to the four illustrative examples in sections 771(5)(E)(i) through (iv) of the Act.

(c) *Distinction from effect of subsidy.* In determining whether a benefit is conferred, the Secretary is not required to consider the effect of the government action on the firm's performance, including its prices or output, or how the firm's behavior otherwise is altered.

(d) *Varying financial contribution levels.*—(1) *In general.* Where a government program provides varying levels of financial contributions based on different eligibility criteria, and one or more of such levels is not specific within the meaning of § 351.502, a benefit is conferred to the extent that a firm receives a greater financial contribution than the financial contributions provided at a non-specific level under the program. The preceding sentence shall apply only to the extent the Secretary determines that the varying levels of financial contributions are set forth in a statute, decree, regulation, or other official act; that the levels are clearly delineated and identifiable; and that the firm would have been eligible for the non-specific level of contributions.

(2) *Exception.* Paragraph (d)(1) of this section shall not apply where the statute specifies a commercial test for determining the benefit.

(e) *Tax consequences.* In calculating the amount of a benefit, the Secretary will not consider the tax consequences of the benefit.

§ 351.504 Grants.

(a) *Benefit.* In the case of a grant, a benefit exists in the amount of the grant.

(b) *Time of receipt of benefit.* In the case of a grant, the Secretary normally will consider a benefit as having been received on the date on which the firm received the grant.

(c) *Allocation of a grant to a particular time period.* The Secretary will allocate the benefit from a grant to a particular time period in accordance with § 351.524.

§ 351.505 Loans.

(a) *Benefit.*—(1) *In general.* In the case of a loan, a benefit exists to the extent that the amount a firm pays on the government-provided loan is less than the amount the firm would pay on a comparable commercial loan(s) that the firm could actually obtain on the market. *See* section 771(5)(E)(ii) of the Act. In making the comparison called for in the preceding sentence, the Secretary normally will rely on effective interest rates.

(2) *''Comparable commercial loan'' defined.*—(i) *''Comparable'' defined.* In selecting a loan that is ''comparable'' to the government-provided loan, the Secretary normally will place primary emphasis on similarities in the structure of the loans (*e.g.*, fixed interest rate v. variable interest rate), the maturity of the loans (*e.g.*, short-term v. long-term), and the currency in which the loans are denominated.

(ii) *''Commercial'' defined.* In selecting a ''commercial'' loan, the Secretary normally will use a loan taken out by the firm from a commercial lending institution or a debt instrument issued by the firm in a commercial market. Also, the Secretary will treat a loan from a government-owned bank as a commercial loan, unless there is evidence that the loan from a government-owned bank is provided on non-commercial terms or at the direction of the government. However, the Secretary will not consider a loan provided under a government program, or a loan provided by a government-owned special purpose bank, to be a commercial loan for purposes of selecting a loan to compare with a government-provided loan.

(iii) *Long-term loans.* In selecting a comparable loan, if the government-provided loan is a long-term loan, the Secretary normally will use a loan the terms of which were established during, or immediately before, the year in which the terms of the government-provided loan were established.

(iv) *Short-term loans.* In making the comparison required under paragraph (a)(1) of this section, if the government-provided loan is a short-term loan, the Secretary normally will use an annual average of the interest rates on comparable commercial loans during the year in which the government-provided loan was taken out, weighted by the principal amount of each loan. However, if the Secretary finds that interest rates fluctuated significantly during the period of investigation or review, the Secretary will use the most appropriate interest rate based on the circumstances presented.

(3) *''Could actually obtain on the market'' defined.*—(i) *In general.* In selecting a comparable commercial loan that the recipient ''could actually obtain on the market,'' the Secretary normally will rely on the actual experience of the firm in question in obtaining comparable commercial loans for both short-term and long-term loans.

(ii) *Where the firm has no comparable commercial loans.* If the firm did not take out any comparable commercial loans during the period referred to in paragraph (a)(2)(iii) or (a)(2)(iv) of this section, the Secretary may use a national average interest rate for comparable commercial loans.

(iii) *Exception for uncreditworthy companies.* If the Secretary finds that a firm that received a government-provided long-term loan was uncreditworthy, as defined in paragraph (a)(4) of this section, the Secretary normally will calculate the interest rate to be used in making the comparison called for by paragraph (a)(1) of this section according to the following formula:

$$i_b = [(1 - q_n)(1+i_f)^n/(1 - p_n)]^{1/n} - 1,$$

where:

n = the term of the loan;

i_b = the benchmark interest rate for uncreditworthy companies;

i_f = the long-term interest rate that would be paid by a creditworthy company;

p_n = the probability of default by an uncreditworthy company within n years; and

q_n = the probability of default by a creditworthy company within n years.

''Default'' means any missed or delayed payment of interest and/or principal,

bankruptcy, receivership, or distressed exchange. For values of p_n, the Secretary will normally rely on the average cumulative default rates reported for the Caa to C-rated category of companies in Moody's study of historical default rates of corporate bond issuers. For values of q_n, the Secretary will normally rely on the average cumulative default rates reported for the Aaa to Baa-rated categories of companies in Moody's study of historical default rates of corporate bond issuers.

(4) *Uncreditworthiness.*—(i) *In general.* The Secretary will consider a firm to be uncreditworthy if the Secretary determines that, based on information available at the time of the government-provided loan, the firm could not have obtained long-term loans from conventional commercial sources. The Secretary will determine uncreditworthiness on a case-by-case basis, and may, in appropriate circumstances, focus its creditworthiness analysis on the project being financed rather than the company as a whole. In making the creditworthiness determination, the Secretary may examine, among other factors, the following:

(A) The receipt by the firm of comparable commercial long-term loans;

(B) The present and past financial health of the firm, as reflected in various financial indicators calculated from the firm's financial statements and accounts;

(C) The firm's recent past and present ability to meet its costs and fixed financial obligations with its cash flow; and

(D) Evidence of the firm's future financial position, such as market studies, country and industry economic forecasts, and project and loan appraisals prepared prior to the agreement between the lender and the firm on the terms of the loan.

(ii) *Significance of long-term commercial loans.* In the case of firms not owned by the government, the receipt by the firm of comparable long-term commercial loans, unaccompanied by a government-provided guarantee, will normally constitute dispositive evidence that the firm is not uncreditworthy.

(iii) *Significance of prior subsidies.* In determining whether a firm is uncreditworthy, the Secretary will ignore current and prior subsidies received by the firm.

(iv) *Discount rate.* When the creditworthiness of a firm is considered in connection with the allocation of non-recurring benefits, the Secretary will rely on information available in the year in which the government agreed to provide the subsidy conferring a non-recurring benefit.

(5) *Long-term variable rate loans.*—(i) *In general.* In the case of a long-term variable rate loan, the Secretary normally will make the comparison called for by paragraph (a)(1) of this section by relying on a comparable commercial loan with a variable interest rate. The Secretary then will compare the variable interest rates on the comparable commercial loan and the government-provided loan for the year in which the terms of the government-provided loan were established. If the comparison shows that the interest rate on the government-provided loan was equal to or higher than the interest rate on the comparable commercial loan, the Secretary will not consider the government-provided loan as having conferred a benefit. If the comparison shows that the interest rate on the government-provided loan was lower, the Secretary will consider the government-provided loan as having conferred a benefit, and, if the other criteria for a countervailable subsidy are satisfied, will calculate the amount of the benefit in accordance with paragraph (c)(4) of this section.

(ii) *Exception.* If the Secretary is unable to make the comparison described in paragraph (a)(5)(i) of this section or if the comparison described in paragraph (a)(5)(i) of this section would yield an inaccurate measure of the benefit, the Secretary may modify the method described in paragraph (a)(5)(i) of this section.

(6) *Allegations.*— (i) *Allegation of uncreditworthiness required.* Normally, the Secretary will not consider the uncreditworthiness of a firm absent a specific allegation by the petitioner that is supported by information establishing a reasonable basis to believe or suspect that the firm is uncreditworthy.

(ii) *Government-owned banks.* The Secretary will not investigate a loan provided by a government-owned bank absent a specific allegation that is supported by information reasonably available to petitioners indicating that:

(A) The loan meets the specificity criteria in accordance with section 771(5A) of the Act; and

(B) A benefit exists within the meaning of paragraph (a)(1) of this section.

(b) *Time of receipt of benefit.* In the case of loans described in paragraphs (c)(1), (c)(2), and (c)(4) of this section, the Secretary normally will consider a benefit as having been received in the year in which the firm otherwise would have had to make a payment on the comparable commercial loan. In the case of a loan described in paragraph (c)(3) of this section, the Secretary normally will consider the benefit as having been received in the year in which the firm receives the proceeds of the loan.

(c) *Allocation of benefit to a particular time period.*—(1) *Short-term loans.* The Secretary will allocate (expense) the benefit from a short-term loan to the year(s) in which the firm is due to make interest payments on the loan. In no event may the present value (in the year of receipt of the loan) of the amounts calculated under the preceding sentence exceed the principal of the loan.

(2) *Long-term fixed-rate loans with concessionary interest rates.* Except as provided in paragraph (c)(3) of this section, the Secretary normally will calculate the subsidy amount to be assigned to a particular year by calculating the difference in interest payments for that year, i.e., the difference between the interest paid by the firm in that year on the government-provided loan and the interest the firm would have paid on the comparison loan. However, in no event may the present value (in the year of receipt of the loan) of the amounts calculated under the preceding sentence exceed the principal of the loan.

(3) *Long-term fixed-rate loans with different repayment schedules.*—(i) *Calculation of present value of benefit.* Where the government-provided loan and the loan to which it is compared under paragraph (a) of this section are both long-term, fixed-interest rate loans, but have different grace periods or maturities, or where the shapes of the repayment schedules differ, the Secretary will determine the total benefit by calculating the present value, in the year that repayment would begin on the comparable commercial loan, of the difference between the amount that the firm is to pay on the government-provided loan and the amount that the firm would have paid on the comparison loan. In no event may the total benefit calculated under the preceding sentence exceed the principal of the loan.

(ii) *Calculation of annual benefit.* With respect to the benefit calculated under paragraph (c)(3)(i) of this section, the Secretary will determine the portion of that benefit to be assigned to a particular year by using the formula set forth in § 351.524(d)(1) and the following parameters:

A_k = the amount countervailed in year k,

y = the present value of the benefit (*see* paragraph (c)(3)(i) of this section),

n = the number of years in the life of the loan,
d = the interest rate on the comparison loan selected under paragraph (a) of this section, and
k = the year of allocation, where the year that repayment would begin on the comparable commercial loan = 1.

(4) *Long-term variable interest rate loans.* In the case of a government-provided long-term variable-rate loan, the Secretary normally will determine the amount of the benefit attributable to a particular year by calculating the difference in payments for that year, *i.e.*, the difference between the amount paid by the firm in that year on the government-provided loan and the amount the firm would have paid on the comparison loan. However, in no event may the present value (in the year of receipt of the loan) of the amounts calculated under the preceding sentence exceed the principal of the loan.

(d) *Contingent liability interest-free loans.*—(1) *Treatment as loans.* In the case of an interest-free loan, for which the repayment obligation is contingent upon the company taking some future action or achieving some goal in fulfillment of the loan's requirements, the Secretary normally will treat any balance on the loan outstanding during a year as an interest-free, short-term loan in accordance with paragraphs (a), (b), and (c)(1) of this section. However, if the event upon which repayment of the loan depends will occur at a point in time more than one year after the receipt of the contingent liability loan, the Secretary will use a long-term interest rate as the benchmark in accordance with paragraphs (a), (b), and (c)(2) of this section. In no event may the present value (in the year of receipt of the contingent liability loan) of the amounts calculated under this paragraph exceed the principal of the loan.

(2) *Treatment as grants.* If, at any point in time, the Secretary determines that the event upon which repayment depends is not a viable contingency, the Secretary will treat the outstanding balance of the loan as a grant received in the year in which this condition manifests itself.

§ 351.506 Loan guarantees.

(a) *Benefit.*—(1) *In general.* In the case of a loan guarantee, a benefit exists to the extent that the total amount a firm pays for the loan with the government-provided guarantee is less than the total amount the firm would pay for a comparable commercial loan that the firm could actually obtain on the market absent the government-provided guarantee, including any difference in guarantee fees. *See* section 771(5)(E)(iii) of the Act. The Secretary will select a comparable commercial loan in accordance with § 351.505(a).

(2) *Government acting as owner.* In situations where a government, acting as the owner of a firm, provides a loan guarantee to that firm, the guarantee does not confer a benefit if the respondent provides evidence demonstrating that it is normal commercial practice in the country in question for shareholders to provide guarantees to their firms under similar circumstances and on comparable terms.

(b) *Time of receipt of benefit.* In the case of a loan guarantee, the Secretary normally will consider a benefit as having been received in the year in which the firm otherwise would have had to make a payment on the comparable commercial loan.

(c) *Allocation of benefit to a particular time period.* In allocating the benefit from a government-provided loan guarantee to a particular time period, the Secretary will use the methods set forth in § 351.505(c) regarding loans.

§ 351.507 Equity.

(a) *Benefit.*—(1) *In general.* In the case of a government-provided equity infusion, a benefit exists to the extent that the investment decision is inconsistent with the usual investment practice of private investors, including the practice regarding the provision of risk capital, in the country in which the equity infusion is made. *See* section 771(5)(E)(i) of the Act.

(2) *Private investor prices available.*—(i) *In general.* Except as provided in paragraph (a)(2)(iii) of this section, the Secretary will consider an equity infusion as being inconsistent with usual investment practice (*see* paragraph (a)(1) of this section) if the price paid by the government for newly issued shares is greater than the price paid by private investors for the same (or similar form of) newly issued shares.

(ii) *Timing of private investor prices.* In selecting a private investor price under paragraph (a)(2)(i) of this section, the Secretary will rely on sales of newly issued shares made reasonably concurrently with the newly issued shares purchased by the government.

(iii) *Significant private sector participation required.* The Secretary will not use private investor prices under paragraph (a)(2)(i) of this section if the Secretary concludes that private investor purchases of newly issued shares are not significant.

(iv) *Adjustments for ''similar'' form of equity.* Where the Secretary uses private investor prices for a form of shares that is similar to the newly issued shares purchased by the government (*see* paragraph (a)(2)(i) of this section), the Secretary, where appropriate, will adjust the prices to reflect the differences in the forms of shares.

(3) *Actual private investor prices unavailable.*—(i) *In general.* If actual private investor prices are not available under paragraph (a)(2) of this section, the Secretary will determine whether the firm funded by the government-provided equity was equityworthy or unequityworthy at the time of the equity infusion (*see* paragraph (a)(4) of this section). If the Secretary determines that the firm was equityworthy, the Secretary will apply paragraph (a)(5) of this section to determine whether the equity infusion was inconsistent with the usual investment practice of private investors. A determination by the Secretary that the firm was unequityworthy will constitute a determination that the equity infusion was inconsistent with usual investment practice of private investors, and the Secretary will apply paragraph (a)(6) of this section to measure the benefit attributable to the equity infusion.

(4) *Equityworthiness.*—(i) *In general.* The Secretary will consider a firm to have been equityworthy if the Secretary determines that, from the perspective of a reasonable private investor examining the firm at the time the government-provided equity infusion was made, the firm showed an ability to generate a reasonable rate of return within a reasonable period of time. The Secretary may, in appropriate circumstances, focus its equityworthiness analysis on a project rather than the company as a whole. In making the equityworthiness determination, the Secretary may examine the following factors, among others:

(A) Objective analyses of the future financial prospects of the recipient firm or the project as indicated by, *inter alia,* market studies, economic forecasts, and project or loan appraisals prepared prior to the government-provided equity infusion in question;

(B) Current and past indicators of the recipient firm's financial health calculated from the firm's statements and accounts, adjusted, if appropriate, to conform to generally accepted accounting principles;

(C) Rates of return on equity in the three years prior to the government equity infusion; and

(D) Equity investment in the firm by private investors.

(ii) *Significance of a pre-infusion objective analysis.* For purposes of making an equityworthiness determination, the Secretary will request and normally require from the respondents the information and analysis completed prior to the infusion, upon which the government based its decision to provide the equity infusion (*see,* paragraph (a)(4)(i)(A) of this section). Absent the existence or provision of an objective analysis, containing information typically examined by potential private investors considering an equity investment, the Secretary will normally determine that the equity infusion received provides a countervailable benefit within the meaning of paragraph (a)(1) of this section. The Secretary will not necessarily make such a determination if the absence of an objective analysis is consistent with the actions of reasonable private investors in the country in question.

(iii) *Significance of prior subsidies.* In determining whether a firm was equityworthy, the Secretary will ignore current and prior subsidies received by the firm.

(5) *Benefit where firm is equityworthy.* If the Secretary determines that the firm or project was equityworthy (*see* paragraph (a)(4) of this section), the Secretary will examine the terms and the nature of the equity purchased to determine whether the investment was otherwise inconsistent with the usual investment practice of private investors. If the Secretary determines that the investment was inconsistent with usual private investment practice, the Secretary will determine the amount of the benefit conferred on a case-by-case basis.

(6) *Benefit where firm is unequityworthy.* If the Secretary determines that the firm or project was unequityworthy (*see* paragraph (a)(4) of this section), a benefit to the firm exists in the amount of the equity infusion.

(7) *Allegations.* The Secretary will not investigate an equity infusion in a firm absent a specific allegation by the petitioner which is supported by information establishing a reasonable basis to believe or suspect that the firm received an equity infusion that provides a countervailable benefit within the meaning of paragraph (a)(1) of this section.

(b) *Time of receipt of benefit.* In the case of a government-provided equity infusion, the Secretary normally will consider the benefit to have been received on the date on which the firm received the equity infusion.

(c) *Allocation of benefit to a particular time period.* The benefit conferred by an equity infusion shall be allocated over the same time period as a non-recurring subsidy. *See* § 351.524(d).

§ 351.508 Debt forgiveness.

(a) *Benefit.* In the case of an assumption or forgiveness of a firm's debt obligation, a benefit exists equal to the amount of the principal and/or interest (including accrued, unpaid interest) that the government has assumed or forgiven. In situations where the entity assuming or forgiving the debt receives shares in a firm in return for eliminating or reducing the firm's debt obligation, the Secretary will determine the existence of a benefit under § 351.507 (equity infusions).

(b) *Time of receipt of benefit.* In the case of a debt or interest assumption or forgiveness, the Secretary normally will consider the benefit as having been received as of the date on which the debt or interest was assumed or forgiven.

(c) *Allocation of benefit to a particular time period.*—(1) *In general.* The Secretary will treat the benefit determined under paragraph (a) of this section as a non-recurring subsidy, and will allocate the benefit to a particular year in accordance with § 351.524(d).

(2) *Exception.* Where an interest assumption is tied to a particular loan and where a firm can reasonably expect to receive the interest assumption at the time it applies for the loan, the Secretary will normally treat the interest assumption as a reduced-interest loan and allocate the benefit to a particular year in accordance with § 351.505(c) (loans).

§ 351.509 Direct taxes.

(a) *Benefit.*—(1) *Exemption or remission of taxes.* In the case of a program that provides for a full or partial exemption or remission of a direct tax (*e.g.,* an income tax), or a reduction in the base used to calculate a direct tax, a benefit exists to the extent that the tax paid by a firm as a result of the program is less than the tax the firm would have paid in the absence of the program.

(2) *Deferral of taxes.* In the case of a program that provides for a deferral of direct taxes, a benefit exists to the extent that appropriate interest charges are not collected. Normally, a deferral of direct taxes will be treated as a government-provided loan in the amount of the tax deferred, according to the methodology described in § 351.505. The Secretary will use a short-term interest rate as the benchmark for tax deferrals of one year or less. The Secretary will use a long-term interest rate as the benchmark for tax deferrals of more than one year.

(b) *Time of receipt of benefit.*—(1) *Exemption or remission of taxes.* In the case of a full or partial exemption or remission of a direct tax, the Secretary normally will consider the benefit as having been received on the date on which the recipient firm would otherwise have had to pay the taxes associated with the exemption or remission. Normally, this date will be the date on which the firm filed its tax return.

(2) *Deferral of taxes.* In the case of a tax deferral of one year or less, the Secretary normally will consider the benefit as having been received on the date on which the deferred tax becomes due. In the case of a multi-year deferral, the Secretary normally will consider the benefit as having been received on the anniversary date(s) of the deferral.

(c) *Allocation of benefit to a particular time period.* The Secretary normally will allocate (expense) the benefit of a full or partial exemption, remission, or deferral of a direct tax to the year in which the benefit is considered to have been received under paragraph (b) of this section.

§ 351.510 Indirect taxes and import charges (other than export programs).

(a) *Benefit.*—(1) *Exemption or remission of taxes.* In the case of a program, other than an export program, that provides for the full or partial exemption or remission of an indirect tax or an import charge, a benefit exists to the extent that the taxes or import charges paid by a firm as a result of the program are less than the taxes the firm would have paid in the absence of the program.

(2) *Deferral of taxes.* In the case of a program, other than an export program, that provides for a deferral of indirect taxes or import charges, a benefit exists to the extent that appropriate interest charges are not collected. Normally, a deferral of indirect taxes or import charges will be treated as a government-provided loan in the amount of the taxes deferred, according to the methodology described in § 351.505. The Secretary will use a short-term interest rate as the benchmark for tax deferrals of one year or less. The Secretary will use a long-term interest rate as the benchmark for tax deferrals of more than one year.

(b) *Time of receipt of benefit.*—(1) *Exemption or remission of taxes.* In the case of a full or partial exemption or remission of an indirect tax or import charge, the Secretary normally will consider the benefit as having been received at the time the recipient firm

otherwise would be required to pay the indirect tax or import charge.

(2) *Deferral of taxes.* In the case of the deferral of an indirect tax or import charge of one year or less, the Secretary normally will consider the benefit as having been received on the date on which the deferred tax becomes due. In the case of a multi-year deferral, the Secretary normally will consider the benefit as having been received on the anniversary date(s) of the deferral.

(c) *Allocation of benefit to a particular time period.* The Secretary normally will allocate (expense) the benefit of a full or partial exemption, remission, or deferral described in paragraph (a) of this section to the year in which the benefit is considered to have been received under paragraph (b) of this section.

§ 351.511 Provision of goods or services.

(a) *Benefit.*—(1) *In general.* In the case where goods or services are provided, a benefit exists to the extent that such goods or services are provided for less than adequate remuneration. *See* section 771(5)(E)(iv) of the Act.

(2) *''Adequate Remuneration'' defined.*—(i) *In general.* The Secretary will normally seek to measure the adequacy of remuneration by comparing the government price to a market-determined price for the good or service resulting from actual transactions in the country in question. Such a price could include prices stemming from actual transactions between private parties, actual imports, or, in certain circumstances, actual sales from competitively run government auctions. In choosing such transactions or sales, the Secretary will consider product similarity; quantities sold, imported, or auctioned; and other factors affecting comparability.

(ii) *Actual market-determined price unavailable.* If there is no useable market-determined price with which to make the comparison under paragraph (a)(2)(i) of this section, the Secretary will seek to measure the adequacy of remuneration by comparing the government price to a world market price where it is reasonable to conclude that such price would be available to purchasers in the country in question. Where there is more than one commercially available world market price, the Secretary will average such prices to the extent practicable, making due allowance for factors affecting comparability.

(iii) *World market price unavailable.* If there is no world market price available to purchasers in the country in question, the Secretary will normally measure the adequacy of remuneration by assessing whether the government price is consistent with market principles.

(iv) *Use of delivered prices.* In measuring adequate remuneration under paragraph (a)(2)(i) or (a)(2)(ii) of this section, the Secretary will adjust the comparison price to reflect the price that a firm actually paid or would pay if it imported the product. This adjustment will include delivery charges and import duties.

(b) *Time of receipt of benefit.* In the case of the provision of a good or service, the Secretary normally will consider a benefit as having been received as of the date on which the firm pays or, in the absence of payment, was due to pay for the government-provided good or service.

(c) *Allocation of benefit to a particular time period.* In the case of the provision of a good or service, the Secretary will normally allocate (expense) the benefit to the year in which the benefit is considered to have been received under paragraph (b) of this section. In the case of the provision of infrastructure, the Secretary will normally treat the benefit as non-recurring and will allocate the benefit to a particular year in accordance with § 351.524(d).

(d) *Exception for general infrastructure.* A financial contribution does not exist in the case of the government provision of general infrastructure. General infrastructure is defined as infrastructure that is created for the broad societal welfare of a country, region, state or municipality.

§ 351.512 Purchase of goods. [Reserved]

§ 351.513 Worker-related subsidies.

(a) *Benefit.* In the case of a program that provides assistance to workers, a benefit exists to the extent that the assistance relieves a firm of an obligation that it normally would incur.

(b) *Time of receipt of benefit.* In the case of assistance provided to workers, the Secretary normally will consider the benefit as having been received by the firm on the date on which the payment is made that relieves the firm of the relevant obligation.

(c) *Allocation of benefit to a particular time period.* Normally, the Secretary will allocate (expense) the benefit from assistance provided to workers to the year in which the benefit is considered to have been received under paragraph (b) of this section.

§ 351.514 Export subsidies.

(a) *In general.* The Secretary will consider a subsidy to be an export subsidy if the Secretary determines that eligibility for, approval of, or the amount of, a subsidy is contingent upon export performance. In applying this section, the Secretary will consider a subsidy to be contingent upon export performance if the provision of the subsidy is, in law or in fact, tied to actual or anticipated exportation or export earnings, alone or as one of two or more conditions.

(b) *Exception.* In the case of export promotion activities of a government, a benefit does not exist if the Secretary determines that the activities consist of general informational activities that do not promote particular products over others.

§ 351.515 Internal transport and freight charges for export shipments.

(a) *Benefit.*—(1) *In general.* In the case of internal transport and freight charges on export shipments, a benefit exists to the extent that the charges paid by a firm for transport or freight with respect to goods destined for export are less than what the firm would have paid if the goods were destined for domestic consumption. The Secretary will consider the amount of the benefit to equal the difference in amounts paid.

(2) *Exception.* For purposes of paragraph (a)(1) of this section, a benefit does not exist if the Secretary determines that:

(i) Any difference in charges is the result of an arm's-length transaction between the supplier and the user of the transport or freight service; or

(ii) The difference in charges is commercially justified.

(b) *Time of receipt of benefit.* In the case of internal transport and freight charges for export shipments, the Secretary normally will consider the benefit as having been received by the firm on the date on which the firm paid, or in the absence of payment was due to pay, the charges.

(c) *Allocation of benefit to a particular time period.* Normally, the Secretary will allocate (expense) the benefit from internal transport and freight charges for export shipments to the year in which the benefit is considered to have been received under paragraph (b) of this section.

§ 351.516 Price preferences for inputs used in the production of goods for export.

(a) *Benefit.*—(1) *In general.* In the case of a program involving the provision by governments or their agencies, either directly or indirectly through government-mandated schemes, of imported or domestic products or services for use in the production of exported goods, a benefit exists to the extent that the Secretary determines that

the terms or conditions on which the products or services are provided are more favorable than the terms or conditions applicable to the provision of like or directly competitive products or services for use in the production of goods for domestic consumption unless, in the case of products, such terms or conditions are not more favorable than those commercially available on world markets to exporters.

(2) *Amount of benefit.* In the case of products provided under such schemes, the Secretary will determine the amount of the benefit by comparing the price of products used in the production of exported goods to the commercially available world market price of such products, inclusive of delivery charges.

(3) *Commercially available.* For purposes of paragraph (a)(2) of this section, *commercially available* means that the choice between domestic and imported products is unrestricted and depends only on commercial considerations.

(b) *Time of receipt of benefit.* In the case of a benefit described in paragraph (a)(1) of this section, the Secretary normally will consider the benefit to have been received as of the date on which the firm paid, or in the absence of payment was due to pay, for the product.

(c) *Allocation of benefit to a particular time period.* Normally, the Secretary will allocate (expense) benefits described in paragraph (a)(1) of this section to the year in which the benefit is considered to have been received under paragraph (b) of this section.

§ 351.517 Exemption or remission upon export of indirect taxes.

(a) *Benefit.* In the case of the exemption or remission upon export of indirect taxes, a benefit exists to the extent that the Secretary determines that the amount remitted or exempted exceeds the amount levied with respect to the production and distribution of like products when sold for domestic consumption.

(b) *Time of receipt of benefit.* In the case of the exemption or remission upon export of an indirect tax, the Secretary normally will consider the benefit as having been received as of the date of exportation.

(c) *Allocation of benefit to a particular time period.* Normally, the Secretary will allocate (expense) the benefit from the exemption or remission upon export of indirect taxes to the year in which the benefit is considered to have been received under paragraph (b) of this section.

§ 351.518 Exemption, remission, or deferral upon export of prior-stage cumulative indirect taxes.

(a) *Benefit.*—(1) *Exemption of prior-stage cumulative indirect taxes.* In the case of a program that provides for the exemption of prior-stage cumulative indirect taxes on inputs used in the production of an exported product, a benefit exists to the extent that the exemption extends to inputs that are not consumed in the production of the exported product, making normal allowance for waste, or if the exemption covers taxes other than indirect taxes that are imposed on the input. If the Secretary determines that the exemption of prior-stage cumulative indirect taxes confers a benefit, the Secretary normally will consider the amount of the benefit to be the prior-stage cumulative indirect taxes that otherwise would have been paid on the inputs not consumed in the production of the exported product, making normal allowance for waste, and the amount of charges other than import charges covered by the exemption.

(2) *Remission of prior-stage cumulative indirect taxes.* In the case of a program that provides for the remission of prior-stage cumulative indirect taxes on inputs used in the production of an exported product, a benefit exists to the extent that the amount remitted exceeds the amount of prior-stage cumulative indirect taxes paid on inputs that are consumed in the production of the exported product, making normal allowance for waste. If the Secretary determines that the remission of prior-stage cumulative indirect taxes confers a benefit, the Secretary normally will consider the amount of the benefit to be the difference between the amount remitted and the amount of the prior-stage cumulative indirect taxes on inputs that are consumed in the production of the export product, making normal allowance for waste.

(3) *Deferral of prior-stage cumulative indirect taxes.* In the case of a program that provides for a deferral of prior-stage cumulative indirect taxes on an exported product, a benefit exists to the extent that the deferral extends to inputs that are not consumed in the production of the exported product, making normal allowance for waste, and the government does not charge appropriate interest on the taxes deferred. If the Secretary determines that a benefit exists, the Secretary will normally treat the deferral as a government-provided loan in the amount of the tax deferred, according to the methodology described in § 351.505. The Secretary will use a short-term interest rate as the benchmark for tax deferrals of one year or less. The Secretary will use a long-term interest rate as the benchmark for tax deferrals of more than one year.

(4) *Exception.* Notwithstanding the provisions in paragraphs (a)(1), (a)(2), and (a)(3) of this action, the Secretary will consider the entire amount of the exemption, remission or deferral to confer a benefit, unless the Secretary determines that:

(i) The government in question has in place and applies a system or procedure to confirm which inputs are consumed in the production of the exported products and in what amounts, and to confirm which indirect taxes are imposed on these inputs, and the system or procedure is reasonable, effective for the purposes intended, and is based on generally accepted commercial practices in the country of export; or

(ii) If the government in question does not have a system or procedure in place, if the system or procedure is not reasonable, or if the system or procedure is instituted and considered reasonable, but is found not to be applied or not to be applied effectively, the government in question has carried out an examination of actual inputs involved to confirm which inputs are consumed in the production of the exported product, in what amounts, and which indirect taxes are imposed on the inputs.

(b) *Time of receipt of benefit.* In the case of the exemption, remission, or deferral of priorstage cumulative indirect taxes, the Secretary normally will consider the benefit as having been received:

(1) In the case of an exemption, as of the date of exportation;

(2) In the case of a remission, as of the date of exportation;

(3) In the case of a deferral of one year or less, on the date the deferred tax became due; and

(4) In the case of a multi-year deferral, on the anniversary date(s) of the deferral.

(c) *Allocation of benefit to a particular time period.* The Secretary normally will allocate (expense) the benefit of the exemption, remission or deferral of prior-stage cumulative indirect taxes to the year in which the benefit is considered to have been received under paragraph (b) of this section.

§ 351.519 Remission or drawback of import charges upon export.

(a) *Benefit.*—(1) *In general.* The term ''remission or drawback'' includes full or partial exemptions and deferrals of import charges.

(i) *Remission or drawback of import charges.* In the case of the remission or

drawback of import charges upon export, a benefit exists to the extent that the Secretary determines that the amount of the remission or drawback exceeds the amount of import charges on imported inputs that are consumed in the production of the exported product, making normal allowances for waste.

(ii) *Exemption of import charges.* In the case of an exemption of import charges upon export, a benefit exists to the extent that the exemption extends to inputs that are not consumed in the production of the exported product, making normal allowances for waste, or if the exemption covers charges other than import charges that are imposed on the input.

(iii) *Deferral of import charges.* In the case of a deferral, a benefit exists to the extent that the deferral extends to inputs that are not consumed in the production of the exported product, making normal allowance for waste, and the government does not charge appropriate interest on the import charges deferred.

(2) *Substitution drawback.* ''Substitution drawback'' involves a situation in which a firm uses a quantity of home market inputs equal to, and having the same quality and characteristics as, the imported inputs as a substitute for them. Substitution drawback does not necessarily result in the conferral of a benefit. However, a benefit exists if the Secretary determines that:

(i) The import and the corresponding export operations both did not occur within a reasonable time period, not to exceed two years; or

(ii) The amount drawn back exceeds the amount of the import charges levied initially on the imported inputs for which drawback is claimed.

(3) *Amount of the benefit.*—(i) *Remission or drawback of import charges.* If the Secretary determines that the remission or drawback, including substitution drawback, of import charges confers a benefit under paragraph (a)(1) or (a)(2) of this section, the Secretary normally will consider the amount of the benefit to be the difference between the amount of import charges remitted or drawn back and the amount paid on imported inputs consumed in production for which remission or drawback was claimed.

(ii) *Exemption of import charges.* If the Secretary determines that the exemption of import charges upon export confers a benefit, the Secretary normally will consider the amount of the benefit to be the import charges that otherwise would have been paid on the inputs not consumed in the production of the exported product, making normal allowance for waste, and the amount of charges other than import charges covered by the exemption.

(iii) *Deferral of import charges.* If the Secretary determines that the deferral of import charges upon export confers a benefit, the Secretary will normally treat a deferral as a government-provided loan in the amount of the import charges deferred on the inputs not consumed in the production of the exported product, making normal allowance for waste, according to the methodology described in § 351.505. The Secretary will use a short-term interest rate as the benchmark for deferrals of one year or less. The Secretary will use a long-term interest rate as the benchmark for deferrals of more than one year.

(4) *Exception.* Notwithstanding paragraph (a)(3) of this section, the Secretary will consider the entire amount of an exemption, deferral, remission or drawback to confer a benefit, unless the Secretary determines that:

(i) The government in question has in place and applies a system or procedure to confirm which inputs are consumed in the production of the exported products and in what amounts, and the system or procedure is reasonable, effective for the purposes intended, and is based on generally accepted commercial practices in the country of export; or

(ii) If the government in question does not have a system or procedure in place, if the system or procedure is not reasonable, or if the system or procedure is instituted and considered reasonable, but is found not to be applied or not to be applied effectively, the government in question has carried out an examination of actual inputs involved to confirm which inputs are consumed in the production of the exported product, and in what amounts.

(b) *Time of receipt of benefit.* In the case of the exemption, deferral, remission or drawback, including substitution drawback, of import charges, the Secretary normally will consider the benefit as having been received:

(1) In the case of remission or drawback, as of the date of exportation;

(2) In the case of an exemption, as of the date of the exportation;

(3) In the case of a deferral of one year or less, on the date the import charges became due; and (4) In the case of a multi-year deferral, on the anniversary date(s) of the deferral.

(c) *Allocation of benefit to a particular time period.* The Secretary normally will allocate (expense) the benefit from the exemption, deferral, remission or drawback of import charges to the year in which the benefit is considered to have been received under paragraph (b) of this section.

§ 351.520 Export insurance.

(a) *Benefit.*—(1) *In general.* In the case of export insurance, a benefit exists if the premium rates charged are inadequate to cover the long-term operating costs and losses of the program.

(2) *Amount of the benefit.* If the Secretary determines under paragraph (a)(1) of this section that premium rates are inadequate, the Secretary normally will calculate the amount of the benefit as the difference between the amount of premiums paid by the firm and the amount received by the firm under the insurance program during the period of investigation or review.

(b) *Time of receipt of benefit.* In the case of export insurance, the Secretary normally will consider the benefit as having been received in the year in which the difference described in paragraph (a)(2) of this section occurs.

(c) *Allocation of benefit to a particular time period.* The Secretary normally will allocate (expense) the benefit from export insurance to the year in which the benefit is considered to have been received under paragraph (b) of this section.

§ 351.521 Import substitution subsidies. [Reserved]

§ 351.522 Green light and green box subsidies.

(a) *Certain agricultural subsidies.* The Secretary will treat as non-countervailable domestic support measures that are provided to certain agricultural products (*i.e.*, products listed in Annex 1 of the WTO Agreement on Agriculture) and that the Secretary determines conform to the criteria of Annex 2 of the WTO Agreement on Agriculture. *See* section 771(5B)(F) of the Act. The Secretary will determine that a particular domestic support measure conforms fully to the provisions of Annex 2 if the Secretary finds that the measure:

(1) Is provided through a publicly-funded government program (including government revenue foregone) not involving transfers from consumers;

(2) Does not have the effect of providing a price support to producers; and (3) Meets the relevant policy-specific criteria and conditions set out in paragraphs 2 through 13 of Annex 2.

(b) *Research subsidies.* In accordance with section 771(5B)(B)(iii)(II) of the Act, the Secretary will examine the total eligible costs to be incurred over the

duration of a particular project to determine whether a subsidy for research activities exceeds 75 percent of the costs of industrial research, 50 percent of the costs of precompetitive development activity, or 62.5 percent of the costs for a project that includes both industrial research and precompetitive activity. If the Secretary determines that, at some point over the life of a particular project, these relevant thresholds will be exceeded, the Secretary will treat the entire amount of the subsidy as countervailable.

(c) *Subsidies for adaptation of existing facilities to new environmental requirements.* If the Secretary determines that a subsidy is given to upgrade existing facilities to environmental standards in excess of minimum statutory or regulatory requirements, the subsidy will not qualify for non-countervailable treatment under section 771(5B)(D) of the Act and the Secretary will treat the entire amount of the subsidy as countervailable.

§ 351.523 Upstream subsidies.

(a) *Investigation of upstream subsidies.*—(1) *In general.* Before investigating the existence of an upstream subsidy (*see* section 771A of the Act), the Secretary must have a reasonable basis to believe or suspect that all of the following elements exist:

(i) A countervailable subsidy, other than an export subsidy, is provided with respect to an input product;

(ii) One of the following conditions exists:

(A) The supplier of the input product and the producer of the subject merchandise are affiliated;

(B) The price for the subsidized input product is lower than the price that the producer of the subject merchandise otherwise would pay another seller in an arm's-length transaction for an unsubsidized input product; or

(C) The government sets the price of the input product so as to guarantee that the benefit provided with respect to the input product is passed through to producers of the subject merchandise; and

(iii) The *ad valorem* countervailable subsidy rate on the input product, multiplied by the proportion of the total production costs of the subject merchandise accounted for by the input product, is equal to, or greater than, one percent.

(b) *Input product.* For purposes of this section, ''input product'' means any product used in the production of the subject merchandise.

(c) *Competitive benefit.*—(1) *In general.* In evaluating whether a competitive benefit exists under section 771A(b) of the Act, the Secretary will determine whether the price for the subsidized input product is lower than the benchmark input price. For purposes of this section, the Secretary will use as a benchmark input price the following, in order of preference:

(i) The actual price paid by, or offered to, the producer of the subject merchandise for an unsubsidized input product, including an imported input product;

(ii) An average price for an unsubsidized input product, including an imported input product, based upon publicly available data;

(iii) The actual price paid by, or offered to, the producer of the subject merchandise for a subsidized input product, including an imported input product, that is adjusted to account for the countervailable subsidy;

(iv) An average price for a subsidized input product, including an imported input product, based upon publicly available data, that is adjusted to account for the countervailable subsidy; or

(v) An unadjusted price for a subsidized input product or any other surrogate price deemed appropriate by the Secretary.

For purposes of this section, such prices must be reflective of a time period that reasonably corresponds to the time of the purchase of the input.

(2) *Use of delivered prices.* The Secretary will use a delivered price whenever the Secretary uses the price of an input product under paragraph (c)(1) of this section.

(d) *Significant effect.*—(1) *Presumptions.* In evaluating whether an upstream subsidy has a significant effect on the cost of manufacturing or producing the subject merchandise (*see* section 771A(a)(3) of the Act), the Secretary will multiply the *ad valorem* countervailable subsidy rate on the input product by the proportion of the total production cost of the subject merchandise that is accounted for by the input product. If the product of that multiplication exceeds five percent, the Secretary will presume the existence of a significant effect. If the product is less than one percent, the Secretary will presume the absence of a significant effect. If the product is between one and five percent, there will be no presumption.

(2) *Rebuttal of presumptions.* A party to the proceeding may present information to rebut these presumptions. In evaluating such information, the Secretary will consider the extent to which factors other than price, such as quality differences, are important determinants of demand for the subject merchandise.

§ 351.524 Allocation of benefit to a particular time period.

Unless otherwise specified in §§ 351.504–351.523, the Secretary will allocate benefits to a particular time period in accordance with this section.

(a) *Recurring benefits.* The Secretary will allocate (expense) a recurring benefit to the year in which the benefit is received.

(b) *Non-recurring benefits.* (1) *In general.* The Secretary will normally allocate a non-recurring benefit to a firm over the number of years corresponding to the average useful life (''AUL'') of renewable physical assets as defined in paragraph (d)(2) of this section.

(2) *Exception.* The Secretary will normally allocate (expense) non-recurring benefits provided under a particular subsidy program to the year in which the benefits are received if the total amount approved under the subsidy program is less than 0.5 percent of relevant sales (*e.g.*, total sales, export sales, the sales of a particular product, or the sales to a particular market) of the firm in question during the year in which the subsidy was approved.

(c) *''Recurring'' versus ''non-recurring'' benefits.*—(1) *Non-binding iIllustrative lists of recurring and non-recurring benefits.* The Secretary normally will treat the following types of subsidies as providing recurring benefits: Direct tax exemptions and deductions; exemptions and excessive rebates of indirect taxes or import duties; provision of goods and services for less than adequate remuneration; price support payments; discounts on electricity, water, and other utilities; freight subsidies; export promotion assistance; early retirement payments; worker assistance; worker training; wage subsidies; and upstream subsidies. The Secretary normally will treat the following types of subsidies as providing non-recurring benefits: equity infusions, grants, plant closure assistance, debt forgiveness, coverage for operating losses, debt-to-equity conversions, provision of non-general infrastructure, and provision of plant and equipment.

(2) *The test for determining whether a benefit is recurring or non-recurring.* If a subsidy is not on the illustrative lists, or is not addressed elsewhere in these regulations, or if a party claims that a subsidy on the recurring list should be treated as non-recurring or a subsidy on the non-recurring list should be treated as recurring, the Secretary will consider the following criteria in determining whether the benefits from the subsidy

should be considered recurring or non-recurring:

(i) Whether the subsidy is exceptional in the sense that the recipient cannot expect to receive additional subsidies under the same program on an ongoing basis from year to year;

(ii) Whether the subsidy required or received the government's express authorization or approval (*i.e.*, receipt of benefits is not automatic), or

(iii) Whether the subsidy was provided for, or tied to, the capital structure or capital assets of the firm.

(d) *Process for allocating non-recurring benefits over time.*—(1) *In general.* For purposes of allocating a non-recurring benefit over time and determining the annual benefit amount that should be assigned to a particular year, the Secretary will use the following formula:

$$A_k = \frac{y/n + [y - (y/n)(k-1)]d}{1+d}$$

Where:

A_k = the amount of the benefit allocated to year k,

y = the face value of the subsidy,

n = the AUL (see paragraph (d)(2) of this section),

d = the discount rate (see paragraph (d)(3) of this section), and

k = the year of allocation, where the year of receipt = 1 and $1 \leq k \leq n$.

(2) *AUL.*—(i) *In general.* The Secretary will presume the allocation period for non-recurring subsidies to be the AUL of renewable physical assets for the industry concerned as listed in the Internal Revenue Service's (''IRS'') 1977 Class Life Asset Depreciation Range System (Rev. Proc. 77–10, 1977–1, C.B. 548 (RR–38)), as updated by the Department of Treasury. The presumption will apply unless a party claims and establishes that the IRS tables do not reasonably reflect the company-specific AUL or the country-wide AUL for the industry under investigation, subject to the requirement, in paragraph (d)(2)(ii) of this section, that the difference between the company-specific AUL or country-wide AUL for the industry under investigation and the AUL in the IRS tables is significant. If this is the case, the Secretary will use company-specific or country-wide AULs to allocate non-recurring benefits over time (*see* paragraph (d)(2)(iii) of this section).

(ii) *Definition of ''significant.''* For purposes of this paragraph (d), *significant* means that a party has demonstrated that the company-specific AUL or country-wide AUL for the industry differs from AUL in the IRS tables by one year or more.

(iii) *Calculation of a company-specific or country-wide AUL.* A calculation of a company-specific AUL will not be accepted by the Secretary unless it satisfies the following requirements: the company must base its depreciation on an estimate of the actual useful lives of assets and it must use straight-line depreciation or demonstrate that its calculation is not distorted through irregular or uneven additions to the pool of fixed assets. A company-specific AUL is calculated by dividing the aggregate of the annual average gross book values of the firm's depreciable productive fixed assets by the firm's aggregated annual charge to accumulated depreciation, for a period considered appropriate by the Secretary, subject to appropriate normalizing adjustments. A country-wide AUL for the industry under investigation will not be accepted by the Secretary unless the respondent government demonstrates that it has a system in place to calculate AULs for its industries, and that this system provides a reliable representation of AUL.

(iv) *Exception.* Under certain extraordinary circumstances, the Secretary may consider whether an allocation period other than AUL is appropriate or whether the benefit stream begins at a date other than the date the subsidy was bestowed.

(3) *Selection of a discount rate.* (i) *In general.* The Secretary will select a discount rate based upon data for the year in which the government agreed to provide the subsidy. The Secretary will use as a discount rate the following, in order of preference:

(A) The cost of long-term, fixed-rate loans of the firm in question, excluding any loans that the Secretary has determined to be countervailable subsidies;

(B) The average cost of long-term, fixed-rate loans in the country in question; or

(C) A rate that the Secretary considers to be most appropriate.

(ii) *Exception for uncreditworthy firms.* In the case of a firm considered by the Secretary to be uncreditworthy (*see* § 351.505(a)(4)), the Secretary will use as a discount rate the interest rate described in § 351.505(a)(3)(iii).

§ 351.525 Calculation of ad valorem subsidy rate and attribution of subsidy to a product.

(a) *Calculation of ad valorem subsidy rate.* The Secretary will calculate an *ad valorem* subsidy rate by dividing the amount of the benefit allocated to the period of investigation or review by the sales value during the same period of the product or products to which the Secretary attributes the subsidy under paragraph (b) of this section. Normally, the Secretary will determine the sales value of a product on an f.o.b. (port) basis (if the product is exported) or on an f.o.b. (factory) basis (if the product is sold for domestic consumption). However, if the Secretary determines that countervailable subsidies are provided with respect to the movement of a product from the port or factory to the place of destination (*e.g.*, freight or insurance costs are subsidized), the Secretary may make appropriate adjustments to the sales value used in the denominator.

(b) *Attribution of subsidies.* (1) *In general.* In attributing a subsidy to one or more products, the Secretary will apply the rules set forth in paragraphs (b)(2) through (b)(7) of this section.

(2) *Export subsidies.* The Secretary will attribute an export subsidy only to products exported by a firm.

(3) *Domestic subsidies.* The Secretary will attribute a domestic subsidy to all products sold by a firm, including products that are exported.

(4) *Subsidies tied to a particular market.* If a subsidy is tied to sales to a particular market, the Secretary will attribute the subsidy only to products sold by the firm to that market.

(5) *Subsidies tied to a particular product.* (i) *In general.* If a subsidy is tied to the production or sale of a particular product, the Secretary will attribute the subsidy only to that product.

(ii) *Exception.* If a subsidy is tied to production of an input product, then the Secretary will attribute the subsidy to both the input and downstream products produced by a corporation.

(6) *Corporations with cross-ownership.* (i) *In general.* The Secretary normally will attribute a subsidy to the products produced by the corporation that received the subsidy.

(ii) *Corporations producing the same product.* If two (or more) corporations with cross-ownership produce the subject merchandise, the Secretary will attribute the subsidies received by either or both corporations to the products produced by both corporations.

(iii) *Holding or parent companies.* If the firm that received a subsidy is a holding company, including a parent company with its own operations, the Secretary will attribute the subsidy to the consolidated sales of the holding company and its subsidiaries. However, if the Secretary finds that the holding company merely served as a conduit for the transfer of the subsidy from the government to a subsidiary of the holding company, the Secretary will attribute the subsidy to products sold by the subsidiary.

(iv) *Input suppliers.* If there is cross-ownership between an input supplier and a downstream producer, and production of the input product is primarily dedicated to production of the downstream product, the Secretary will attribute subsidies received by the input producer to the combined sales of the input and downstream products produced by both corporations (excluding the sales between the two corporations).

(v) *Transfer of subsidy between corporations with cross-ownership producing different products.* In situations where paragraphs (b)(6)(i) through (iv) of this section do not apply, if a corporation producing non-subject merchandise received a subsidy and transferred the subsidy to a corporation with cross-ownership, the Secretary will attribute the subsidy to products sold by the recipient of the transferred subsidy.

(vi) *Cross-ownership defined.* Cross-ownership exists between two or more corporations where one corporation can use or direct the individual assets of the other corporation(s) in essentially the same ways it can use its own assets. Normally, this standard will be met where there is a majority voting ownership interest between two corporations or through common ownership of two (or more) corporations.

(7) *Multinational firms.* If the firm that received a subsidy has production facilities in two or more countries, the Secretary will attribute the subsidy to products produced by the firm within the country of the government that granted the subsidy. However, if it is demonstrated that the subsidy was tied to more than domestic production, the Secretary will attribute the subsidy to multinational production.

(c) *Trading companies.* Benefits from subsidies provided to a trading company which exports subject merchandise shall be cumulated with benefits from subsidies provided to the firm which is producing subject merchandise that is sold through the trading company, regardless of whether the trading company and the producing firm are affiliated.

§ 351.526 Program-wide changes.

(a) *In general.* The Secretary may take a program-wide change into account in establishing the estimated countervailing duty cash deposit rate if:

(1) The Secretary determines that subsequent to the period of investigation or review, but before a preliminary determination in an investigation (*see* § 351.205) or a preliminary result of an administrative review or a new shipper review (*see* §§ 351.213 and 351.214), a program-wide change has occurred; and

(2) The Secretary is able to measure the change in the amount of countervailable subsidies provided under the program in question.

(b) *Definition of program-wide change.* For purposes of this section, ''program-wide change'' means a change that:

(1) Is not limited to an individual firm or firms; and

(2) Is effectuated by an official act, such as the enactment of a statute, regulation, or decree, or contained in the schedule of an existing statute, regulation, or decree.

(c) *Effect limited to cash deposit rate.*—(1) *In general.* The application of paragraph (a) of this section will not result in changing, in an investigation, an affirmative determination to a negative determination or a negative determination to an affirmative determination.

(2) *Example.* In a countervailing duty investigation, the Secretary determines that during the period of investigation a countervailable subsidy existed in the amount of 10 percent *ad valorem*. Subsequent to the period of investigation, but before the preliminary determination, the foreign government in question enacts a change to the program that reduces the amount of the subsidy to a *de minimis* level. In a final determination, the Secretary would issue an affirmative determination, but would establish a cash deposit rate of zero.

(d) *Terminated programs.* The Secretary will not adjust the cash deposit rate under paragraph (a) of this section if the program-wide change consists of the termination of a program and:

(1) The Secretary determines that residual benefits may continue to be bestowed under the terminated program; or

(2) The Secretary determines that a substitute program for the terminated program has been introduced and the Secretary is not able to measure the amount of countervailable subsidies provided under the substitute program.

§ 351.527 Transnational subsidies.

Except as otherwise provided in section 701(d) of the Act (subsidies provided to international consortia) and section 771A of the Act (upstream subsidies), a subsidy does not exist if the Secretary determines that the funding for the subsidy is supplied in accordance with, and as part of, a program or project funded:

(a) By a government of a country other than the country in which the recipient firm is located; or

(b) By an international lending or development institution.

4. Section 351.301 of subpart C is amended by adding the following paragraphs (d)(6) and (7) to read as follows:

§ 351.301(d) Time limits for submission of factual information.

* * * * *

(d) * * *

(6) *Green light and Green box claims.* (i) *In general.* A claim that a particular subsidy or subsidy program should be accorded non-countervailable status under section 771(5B),(C), or (D) of the Act (''green light subsidies'') or under section 771(5B)(F) of the Act (''green box subsidies'' must be made by the competent government with the full participation of the government authority responsible for funding and/or administering the program. Such claims are due no later than:

(i) In a countervailing duty investigation, 40 days before the scheduled date of the preliminary determination, or

(ii) In an administrative review, new shipper review, or changed circumstance review, 20 days afer all responses to the initial questionnaires are filed with the Department, unless the Secretary alters this time limit.

(7) *Investigation of notified subsidies.* If the Secretary determines that there is insufficient evidence to demonstrate that an alleged subsidy or subsidy program has been notified under Article 8.3 of the WTO Subsidies and Countervailing Measures Agreement, the alleged subsidy or subsidy program will be included in the countervailing duty investigation or administrative, new shipper, or changed circumstance review. If the government authority claiming green light status establishes to the Secretary's satisfaction that the alleged subsidy or subsidy program has been notified, the Secretary will terminate the investigation of the notified subsidy.

5. Subpart G (Applicability Dates) is amended by adding the following § 351.702, to read as follows:

§ 351.702 Applicability dates for countervailing duty regulations.

(a) Notwithstanding § 351.701, the regulations in subpart E of this part apply to:

(1) All CVD investigations initiated on the basis of petitions filed after December 28, 1998;

(2) All CVD administrative reviews initiated on the basis of requests filed on

or after the first day of January 1999; and

(3) To all segments of CVD proceedings self-initiated by the Department after December 28, 1998.

(b) Segments of CVD proceedings to which subpart E of this part does not apply will continue to be guided by the Department's previous methodology (in particular, as described in the 1989 Proposed Regulations), except to the extent that the previous methodology was invalidated by the URAA, in which case the Secretary will treat subpart E of this part as a restatement of the Department's interpretation of the requirements of the Act as amended by the URAA.

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Part IV

Department of Defense

Office of the Secretary

32 CFR Part 286

DoD Freedom of Information Act Program Regulation; Final Rule

DEPARTMENT OF DEFENSE

Office of the Secretary

32 CFR Part 286

[DoD 5400.7–R]

RIN 0790–AG58

DoD Freedom of Information Act Program Regulation

AGENCY: Office of the Secretary, Department of Defense (DoD).

ACTION: Final rule.

SUMMARY: This final rule conforms to the requirements of the Electronic Freedom of Information Act Amendments of 1996. This revision reflects substantial and administrative changes since May 1997, as a result of DoD reorganization. This revision also provides guidance to DoD on implementation of the amends law.

EFFECTIVE DATE: September 4, 1998.

FOR FURTHER INFORMATION CONTACT: Mr. C. Talbott, 703–697–1171.

SUPPLEMENTARY INFORMATION:

Executive Order 12866, ''Regulatory Planning and Review''

It has been determined that 32 CFR part 286 is not a significant regulatory action. The rule does not:

(1) Have an annual effect to the economy of $100 million or more or adversely affect in a material way the economy; a section of the economy; productivity; completion; jobs; the environment; 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 this Executive Order.

Public Law 96–354, ''Regulatory Flexibility Act'' (5 U.S.C. 601)

It has been certified that this rule is not subject to the Regulatory Flexibility Act (5 U.S.C. 601) because it would not, if promulgated, have a significant economic impact on a substantial number of small entities. This rule implements the Freedom of Information Act (5 U.S.C. 552), a statute concerning the release of Federal Government records, and does no economically impact Federal Government relations with the private sector.

Public Law 96–511, ''Paperwork Reduction Act'' (44 U.S.C. Chapter 35)

It has been certified that this rule does not impose any reporting or recordkeeping requirements under the Paperwork Reduction Act of 1995.

List of Subjects in 32 CFR Part 286

Freedom of information.

Accordingly, 32 CFR part 286 is revised to read as follows:

PART 286—DOD FREEDOM OF INFORMATION ACT PROGRAM REGULATION

Subpart A—General Provisions

Subpart B—FOIA Reading Rooms

Subpart C—Exemptions

Subpart D—For Official Use Only

Subpart E—Release and Processing Procedures

Subpart F—Fee Schedule

Subpart G—Reports

Subpart H—Education and Training

Authority: 5 U.S.C. 552.

Subpart A—General Provisions

§ 286.1 Purpose and applicability.

(a) *Purpose.* This part provides policies and procedures for the DoD implementation of the Freedom of Information Act, as amended (5 U.S.C. 552), and DoD Directive 5400.7 [1], and promotes uniformity in the DoD Freedom of Information Act (FOIA) Program.

(b) *Applicability.* This part applies to the Office of the Secretary of Defense (OSD), the Military Departments, the Chairman of the Joint Chiefs of Staff, the Combatant Command, the Inspector General of the Department of Defense (IG DoD), the Defense Agencies, and the DoD Field Activities (hereafter referred to collectively as ''the DoD components''). This part takes precedence over all DoD Component publications that supplement and implement the DoD FOIA Program. A list of DoD Components is at appendix F.

§ 286.2 DoD public information.

(a) *Public information.* (1) The public has a right to information concerning the activities of its Government. DoD policy is to conduct its activities in an open manner and provide the public with a maximum amount of accurate and timely information concerning its activities, consistent always with the legitimate public and private interests of the American people. A record requested by a member of the public who follows rules established by proper authority in the Department of Defense shall not be withheld in whole or in part unless the record is exempt from mandatory partial or total disclosure under the FOIA. As a matter of policy,

[1] Copy may be viewed via internet at http://web7.whs.osd.mil/corres.htm.

DoD Components shall make discretionary disclosures of exempt records or information whenever disclosure would not foreseeably harm an interest protected by a FOIA exemption, but this policy does not create any right enforceable in court. In order that the public may have timely information concerning DoD activities, records requested through public information channels by news media representatives that would not be withheld if requested under the FOIA should be released upon request. Prompt responses to requests for information from news media representatives should be encouraged to eliminate the need for these requesters to invoke the provisions of the FOIA and thereby assist in providing timely information to the public. Similarly, requests from other members of the public for information that would not be withheld under the FOIA should continue to be honored through appropriate means without requiring the requester to involve the FOIA.

(2) Within the OSD, the Assistant Secretary of Defense for Command, Control, Communications, and Intelligence, as Chief Information Officer, in conjunction with the Assistant Secretary of Defense for Public Affairs, is responsible for ensuring preparation of reference material or a guide for requesting records or information from the Department of Defense, subject to the nine exemptions of the FOIA. This publication shall also include an index of all major information systems, and a description of major information and record locator systems, as defined by the Office of the Assistant Secretary of Defense for Command, Control, Communications, and Intelligence. DoD FOIA Components shall coordinate with the appropriate office(s) to insure that this is also accomplished within their department or organization.

(3) DoD Components shall also prepare, in addition to normal FOIA regulations, a handbook for the use of the public in obtaining information from their organization. This handbook should be a short, simple explanation to the public of what the FOIA is designed to do, and how a member of the public can use it to access government records. Each DoD Component should explain the types of records that can be obtained through FOIA requests, why some records cannot, by law, be made available, and how the DoD Component determines whether the record can be released. The handbook should also explain how to make a FOIA request, how long the requester can expect to wait for a reply, and explain the right of appeal. The handbook should supplement other information locator systems, such as the Government Information Locator Service (GILS), and explain how a requester can obtain more information about those systems. The handbook should be available on paper and through electronic means and contain the following additional information, complete with electronic links to the below elements; the location of reading room(s) within the Component and the types and categories of information available, the location of Component's World Wide Web page, a reference to the component's FOIA regulation and how to obtain a copy, a reference to the Component's FOIA annual report and how to obtain a copy and the location of the Component's GILS page. Also, the DoD Components' Freedom of Information Act Annual Reports should refer to the handbook and how to obtain it.

(b) *Control system.* A request for records that invokes the FOIA shall enter a formal control system designed to ensure accountability and compliance with the FOIA. Any request for DoD records that either explicitly or implicitly cites the FOIA shall be processed under the provisions of this part, unless otherwise required by § 286.4(m).

§ 286.3 Definitions.

As used in this part, the following terms and meanings shall be applicable:

Administrative appeal. A request by a member of the general public, made under the FOIA, asking the appellate authority of a DOD Component to reverse a decision: to withhold all or part of a requested record; to deny a fee category claim by a requester, to deny a request for waiver or reduction of fees; to deny a request to review an initial fee estimate; to deny a request for expedited processing due to demonstrated compelling need under § 286.4(d)(3) of this part; to confirm that no records were located during the initial search. Requesters also may appeal the failure to receive a response determination within the statutory time limits, and any determination that the requester believes is adverse in nature.

Agency record. (1) The products of data compilation, such as all books, papers, maps, and photographs, machine readable materials, inclusive of those in electronic form or format, or other documentary materials, regardless of physical form or characteristics, made or received by an agency of the United States Government under Federal law in connection with the transaction of public business and in Department of Defense possession and control at the time the FOIA request is made. Care should be taken not to exclude records from being considered agency records, unless they fall within one of the categories in paragraph (2) of this definition.

(2) The following age not included within the definition of the word ''record''.

(i) Objects or articles, such as structures, furniture, vehicles and equipment, whatever their historical value, or value as evidence.

(ii) Anything that is not a tangible or documentary record, such as an individual's memory or oral communication.

(iii) Personal records of an individual not subject to agency creation or retention requirements, created and maintained primarily for the convenience of an agency employee, and not distributed to other agency employees for their official use. Personal papers fall into three categories: those created before entering Government service; private materials brought into, created, or received in the office that were not created or received in the course of transacting Government business; and work-related personal papers that are not used in the transaction of Government business (see ''Personal Papers of Executive Branch Officials: A Management Guide'' [2]).

(3) A record must exist and be in the possession and control of the Department of Defense at the time of the request to be considered subject to this part and the FOIA. There is no obligation to create, compile, or obtain a record to satisfy a FOIA request. See § 286.4(g)(2) on creating a record in the electronic environment.

(4) Hard copy or electronic records, that are subject to FOIA requests under 5 U.S.C. 552(a)(3), and that are available to the public through an established distribution system, or through the **Federal Register**, the National Technical Information Service, or the Internet, normally need not be processed under the provisions of the FOIA. If a request is received for such information, DoD Components shall provide that requester with guidance inclusive of any written notice to the public, on how to obtain the information. However, if the requester insists that the request be processed under the FOIA, then the request shall be processed under the FOIA. If there is any doubt as to whether the request must be processed, contact the Directorate for Freedom of Information and Security Review.

[2] Available from the Records Administration Information Center, Agency Service Division (NIA), Washington, DC 20408.

Appellate authority. The Head of the DoD Component or the Component head's designee having jurisdiction for this purpose over the record, or any of the other adverse determinations outlined in definitions ''Initial denial authority (IDA)'' and ''Administrative appeal''.

DoD Component. An element of the Department of Defense, as defined in § 286.1(b), authorized to receive and act independently on FOIA requests. (See appendix F of this part.) A DoD Component has its own initial denial authority (IDA), appellate authority, and legal counsel.

Electronic record. Records (including e-mail) that are created, stored, and retrievable by electronic means.

Federal agency. As defined by 5 U.S.C. 552(f)(1), a Federal agency is any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency.

FOIA request. A written request for DoD records that reasonably describes the record(s) sought, made by any person, including a member of the public (U.S. or foreign citizen/entity), an organization, or a business, but not including a Federal Agency or a fugitive from the law, that either explicitly or implicitly invokes the FOIA, DoD Directive 5400.7, this part, or DoD Component supplementing regulations or instructions. Requesters should also indicate a willingess to pay fees associated with the processing of their request or, in the alternative, why a waiver of fees may be appropriate. Written requests may be received by postal service or other commercial delivery means, by fascimile, or electronically. Requests received by fascimile or electronically must have a postal mailing address included since it may be practical to provide a substantive response electrically. The request is considered properly received, or perfected, when the above conditions have been met and the request arrives at the FOIA office of the Component in possession of the records.

Initial denial authority (IDA). An official who has been granted authority by the head of DoD component to withhold records requested under the FOIA for one or more of the nine categories of records exempt from mandatory disclosure. IDA's may also deny a fee category claim by a requester; deny a request for expedited processing due to demonstrated compelling need under § 286.4(d)(3) of this part; deny a request for a waiver or reduction of fees; review a fee estimate; and confirm that no records were located in response to a request.

Public interest. The interest in obtaining official information that sheds light on an agency's performance of its statutory duties because the information falls within the statutory purpose of the FOIA to inform citizens about what their Government is doing. That statutory purpose, however, is not fostered by disclosure of information about private citizens accumulated in various governmental files that reveals nothing about an agency's or officials own conduct.

§ 286.4 Policy.

(a) *Compliance with the FOIA.* DoD personnel are expected to comply with the FOIA, this part, and DoD FOIA policy in both better and spirit. This strict adherence is necessary to provide uniformity in the implementation of the DoD FOIA Program and to create conditions that will promote public trust.

(b) *Openiness with the public.* The Department of Defense shall conduct its activities in an open manner consistent with the need for security and aherence to other requirements of law and regulation. Records not exempt from disclosure under the Act shall, upon request, be made readily accessible to the public in accordance with rules promulgated by competent authority, whether or not the Act is invoked.

(c) *Avoidance of procedural obstacles.* DoD Components shall ensure that procedural matters do not unnecessarily impede a requester from obtaining DoD records promptly. Components shall provide assistance to requesters to help them understand and comply with procedures established by this part and any supplemental regulations published by the DoD Components.

(d) *Prompt action on requests.* (1) Generally, when a member of the public complies with the procedures established in this part and DoD Component regulations or instructions for obtaining DoD records, and after the request is received by the official designated to respond, DoD Components shall endeavor to provide a final response determination within the statutory 20 working days. If a significant number of requests, or the complexity of the requests prevent a final response determination within the statutory time period, DoD Components shall advise the requester of this fact, and explain how the request will be responded to within its multitrack processing system (see § 286.4(d)(2)). A final response determination is notification to the requester that the records are released, or will be released on a certain date, or the records are denied under the appropriate FOIA exemption, or the records cannot be provided for one or more of the other reasons in § 286.23(b). Interim responses acknowledging receipt of the request, negotiations with the requester concerning the scope of the request, the response timeframe, and fee agreements are encouraged; however, such actions do not constitute a final response determination pursuant to the FOIA. If a request fails to meet minimum requirements as set forth in § 286.3, definition ''FOIA request'', Components shall inform the requester how to perfect or correct the request. The statutory 20 working day time limit applies upon receipt of a perfected or correct FOIA request which complies with the requirements outlined in § 286.3, definition ''FOIA request''.

(2) *Multitrack processing.* When a Component has a significant number of pending requests that prevents a response determination being made within 20 working days, the requests shall be processed in a multitrack processing system, based on the date of receipt, the amount of work and time involved in processing the requests, and whether the request qualifies for expedited processing as described in paragraph (d)(3) of this section. DoD Components may establish as many processing queues as they wish; however, as a minimum, three processing tracks shall be established, all based on a first-in, first-out concept, and rank ordered by the date of receipt of the request. One track shall be a processing queue for simple requests, one track for complex requests, and one track shall be a processing queue for expedited processing as described in paragraph (d)(3) of this section. Determinations as to whether a request is simple or complex shall be made by each DoD Component. DoD Components shall provide a requester whose request does not qualify for the fastest queue (except for expedited processing as described in paragraph (d)(3) of this section), an opportunity to limit in writing hard copy, facsimile, or electronically, the scope of the request in order to qualify for the fastest queue. This multitrack processing system does not obviate components' responsibility to exercise due diligence in processing requests in the most expeditious manner possible.

(3) *Expedited processing.* A separate queue shall be established for requests meeting the test for expedited processing. Expedited processing shall be granted to a requester after the requester requests such and

demonstrates a compelling need for the information. Notice of the determination as to whether to grant expedited processing in response to a requester's compelling need shall be provided to the requester within 10 calendar days after receipt of the request in the DoD Component's office that will determine whether to grant expedited processing. Once the DoD Component has determined to grant expedited processing, the request shall be processed as soon as practicable. Actions by DoD Components to initially deny or affirm the initial denial on appeal of a request for expedited processing, and failure to respond in a timely manner shall be subject to judicial review.

(i) Compelling need means that the failure to obtain the records on an expedited basis could reasonably be expected to pose an imminent threat to the life or physical safety of an individual.

(ii) Compelling need also means that the information is urgently needed by an individual primarily engaged in disseminating information in order to inform the public concerning actual or alleged Federal Government activity. An individual primarily engaged in disseminating information means a person whose primary activity involves publishing or otherwise disseminating information to the public. Representatives of the news media (see § 286.28(e)) would normally qualify as individuals primarily engaged in disseminating information. Other persons must demonstrate that their primary activity involves publishing or otherwise disseminating information to the public.

(A) Urgently needed means that the information has a particular value that will be lost if not disseminated quickly. Ordinarily this means a breaking news story of general public interest. However, information of historical interest only, or information sought for litigation or commercial activities would not qualify, nor would a news media publication or broadcast deadline unrelated to the news breaking nature of the information.

(b) [Reserved]

(iii) A demonstration of compelling need by a requester shall be made by a statement certified by the requester to be true and correct to the best of their knowledge. This statement must accompany the request in order to be considered and responded to within the 10 calendar days required for decisions on expedited access.

(iv) *Other reasons for expedited processing.* Other reasons that merit expedited processing by DoD Components are an imminent loss of substantial due process rights and humanitarian need. A demonstration of imminent loss of substantial due process rights shall be made by a statement certified by the requester to be true and correct to the best of his or her knowledge. Humanitarian need means that disclosing the information will promote the welfare and interest of mankind. A demonstration of humanitarian need shall be also made by a statement certified by the requester to be true and correct to the best of his or her knowledge. Both statements mentioned above must accompany the request in order to be considered and responded to within the 10 calendar days required for decisions on expedited access. Once the decision has been made to expedite the request for either of these reasons, the request may be processed in the expedited processing queue behind those requests qualifying for compelling need.

(v) These same procedures also apply to requests for expedited processing of administrative appeals.

(e) *Use of exemptions.* It is DoD policy to make records publicly available, unless the record qualifies for exemption under one or more of the nine exemptions. It is DoD policy that DoD Components shall make discretionary releases whenever possible; however, a discretionary release is normally not appropriate for records clearly exempt under exemptions 1, 3, 4, 6, 7(C) and 7(F) (see subpart C of this part). Exemptions 2, 5, and 7(A)(B)(D) and (E) (see subpart C of this part) are discretionary in nature, and DoD Components are encouraged to exercise discretionary releases whenever possible. Exemptions 4, 6 and 7(C) cannot be claimed when the requester is the submitter of the information.

(f) *Public domain.* Nonexempt records released under the authority of this part are considered to be in the public domain. Such records may also be made available in Components' reading rooms *in* paper form, as well as electronically, to facilitate public access. Discretionary releases to FOIA requesters constitute a waiver of the FOIA exemption that may otherwise apply. Disclosure to a properly constituted advisory committee, to Congress, or to other Federal Agencies does not waive the exemption. (See § 286.22(d).) Exempt records disclosed without authorization by the appropriate DoD official do not lose their exempt status. Also, while authority may exist to disclose records to individuals in their official capacity, the provisions of this Part apply if the same individual seeks the records in a private or personal capacity.

(g) *Creating a record.* (1) A record must exist and be in the possession and control of the Department of Defense at the time of the search to be considered subject to this part and the FOIA. There is no obligation to create, compile, or obtain a record to satisfy a FOIA request. A DoD Component, however, may compile a new record when so doing would result in a more useful response to the requester, or be less burdensome to the agency than providing existing records, and the requester does not object. Cost of creating or compiling such a record may not be charged to the requester unless the fee for creating the record is equal to or less than the fee which would be charged for providing the existing record. Fee assessments shall be in accordance with subpart F of this part.

(2) About electronic data, the issue of whether records are actually created or merely extracted from an existing database is not always readily apparent. Consequently, when responding to FOIA requests for electronic data where creation of a record, programming, or particular format are questionable, Components should apply a standard of reasonableness. In other words, if the capability exists to respond to the request, and the effort would be a business as usual approach, then the request should be processed. However, the request need not be processed where the capability to respond does not exist without a significant expenditure of resources, thus not being a normal business as usual approach. As used in this sense, a significant expenditure of resources in both time and manpower, that would cause a significant interference with the operation of the Component's automated information system would not be a business as usual approach.

(h) *Description of requested record.* (1) Identification of the record desired is the responsibility of the requester. The requester must provide a description of the desired record, that enables the Government to locate the record with a reasonable amount of effort. In order to assist DoD Components in conducting more timely searches, requesters should endeavor to provide as much identifying information as possible. When a DoD Component receives a request that does not reasonably describe the requested record, it shall notify the requester of the defect in writing. The requester should be asked to provide the type of information outlined in paragraph (h)(2) of this section. DoD Components are not obligated to act on the request until the requester responds to the specificity

letter. When practicable, DoD Components shall offer assistance to the requester in identifying the records sought and in reformulating the request to reduce the burden on the agency in complying with the Act.

(2) The following guidelines are provided to deal with generalized requests and are based on the principle of reasonable effort (Descriptive information about a record may be divided into two broad categories.):

(i) Category I is file-related and includes information such as type of record (for example, memorandum), title, index citation, subject area, date the record was created, and originator.

(ii) Category II is event-related and includes the circumstances that resulted in the record being created or the date and circumstances surrounding the event the record covers.

(3) Generally, a record is not reasonably described unless the description contains sufficient Category I information to permit the conduct of an organized, non-random search based on the DoD Component's filing arrangements and existing retrieval systems, or unless the record contains sufficient Category II information to permit inference of the Category I elements needed to conduct such a search.

(4) The following guidelines deal with requests for personal records: Ordinarily, when personal identifiers are provided only in connection with a request for records concerning the requester, only records in a Privacy Act System of records that can be retrieved by personal identifiers need be searched. However, if a DoD Component has reason to believe that records on the requester may exist in a record system other than a Privacy Act system, the DoD Component shall search that system under the provisions of the FOIA. In either case, DoD Components may request a reasonable description of the records desired before searching for such records under the provisions of the FOIA and the Privacy Act. If the record is required to be released under the FOIA, the Privacy Act does not bar its disclosure. See paragraph (m) of this section for the relationship between the FOIA and the Privacy Act.

(5) The previous guidelines notwithstanding, the decision of the DoD Component concerning reasonableness of description must be based on knowledge of its files. If the description enables DoD Component personnel to locate the record with reasonable effort, the description is adequate. The fact that a FOIA request is broad or burdensome in its magnitude does not, in and of itself, entitle a DoD Component to deny the request on the ground that it does not reasonably describe the records sought. The key factor is the ability of the DoD Component's staff to reasonably ascertain and locate which records are being requested.

(i) *Referrals.* (1) The DoD FOIA referral policy is based upon the concept of the originator of a record making a release determination on its information. If a DoD Component receives a request for records originated by another DoD Component, it should contact the DoD Component to determine if it also received the request, and if not, obtain concurrence from the other DoD Component to refer the request. In either situation, the requester shall be advised of the action taken, unless exempt information would be revealed. While referrals to originators of information result in obtaining the best possible decision on release of the information, the policy does not relieve DoD Components from the responsibility of making a release decision on a record should the requester object to referral of the request and the record. Should this situation occur, DoD Components should coordinate with the originator of the information prior to making a release determination. A request received by a DoD Component having no records responsive to a request shall be referred routinely to another DoD Component, if the other DoD Component has reason to believe it has the requested record. Prior to notifying a requester of a referral to another DoD Component, the DoD Component receiving the initial request shall consult with the other DoD Component to determine if that DoD Component's association with the material is exempt. If the association is exempt, the DoD Component receiving the initial request will protect the association and any exempt information without revealing the identity of the protected DoD Component. The protected DoD Component shall be responsible for submitting the justifications required in any litigation. Any DoD Component receiving a request that has been misaddressed shall refer the request to the proper address and advise the requester. DoD Components making referrals of requests or records shall include with the referral, a point of contact by name, a telephone number, and an e-mail address.

(2) A DoD Component shall refer for response directly to the requester, a FOIA request for a record that it holds to another DoD Component or agency outside the DoD, if the record originated in the other DoD Component or outside agency. Whenever a record or a portion of a record is referred to another DoD Component or to a Government Agency outside of the DoD for a release determination and direct response, the requester shall be informed of the referral, unless it has been determined that notification would reveal exempt information. Referred records shall only be identified to the extent consistent with security requirements.

(3) A DoD Component may refer a request for a record that it originated to another DoD Component or agency when the other DoD Component or agency has a valid interest in the record, or the record was created for the use of the other DoD Component or agency. In such situations, provide the record and a release recommendation on the record with the referral action. Ensure you include a point of contact with the telephone number. An example of such a situation is a request for audit reports prepared by the Defense Contract Audit Agency. These advisory reports are prepared for the use of contracting officers and their release to the audited contractor shall be at the discretion of the contracting officer. A FOIA request shall be referred to the appropriate DoD Component and the requester shall be notified of the referral, unless exempt information would be revealed. Another example is a record originated by a DoD Component or agency that involves foreign relations, and could affect a DoD Component or organization in a host foreign country. Such a request and any responsive records may be referred to the affected DoD Component or organization for consultation prior to a final release determination within the Department of Defense. See also § 286.22(e) of this part.

(4) Within the Department of Defense, a DoD Component shall ordinarily refer a FOIA request and a copy of the records it holds, but that was originated by other DoD Component or that contains substantial information obtained from another DoD Component, to that Component for direct response, after direct coordination and obtaining concurrence from the Component. The requester then shall be notified by such referral. DoD Components shall not, in any case, release or deny such records without prior consultation with the other DoD Component, except as provided in § 286.22(e) of this part.

(5) DoD Components that receive referred requests shall answer them in accordance with the time limits established by the FOIA, this part, and their multitrack processing queues, based upon the date of initial receipt of the request at the referring component or agency.

(6) Agencies outside the Department of Defense that are subject to the FOIA.

(i) A DoD Component may refer a FOIA request for any record that originated in an agency outside the Department of Defense or that is based on information obtained from an outside agency to the agency for direct response to the requester after coordination with the outside agency, if that agency is subject to FOIA. Otherwise, the DoD Component must respond to the request.

(ii) A DoD Component shall refer to the agency that provided the record any FOIA request for investigative, intelligence, or any other type of records that are on loan to the Department of Defense for a specific purpose, if the records are restricted from further release and so marked, However, if for investigative or intelligence purposes, the outside agency desires anonymity, a DoD Component may only respond directly to the requester after coordination with the outside agency.

(7) DoD Components that receive requests for records of the National Security Council (NSC), the White House, or the White House Military Office (WHMO) shall process the requests. DoD records in which the NSC or White House has a concurrent reviewing interest, and NSC, White House, or WHMO records discovered in DoD Components' files shall be forwarded to the Directorate for Freedom of Information and Security Review (DFOISR). The DFOISR shall coordinate with the NSC, White House, or WHMO and return the records to the originating agency after coordination.

(8) To the extent referrals are consistent with the policies expressed by this section, referrals between offices of the same DoD Component are authorized.

(9) On occasion, the Department of Defense receives FOIA requests for General Accounting Office (GAO) records containing DoD information. Even though the GAO is outside the executive Branch, and not subject to the FOIA, all FOIA requests for GAO documents containing DoD information received either from the public, or on referral from the GAO, shall be processed under the provisions of the FOIA.

(j) *Authentication.* Records provided under this part shall be authenticated with an appropriate seal, whenever necessary, to fulfill an official government or other legal function. This service, however, is in addition to that required under the FOIA and is not included in the FOIA fee schedule. DoD Components may charge for the service at a rate of $5.20 for each authentication.

(k) *Combatant Commands.* (1) The Combatant Commands are placed under the jurisdiction of the OSD, instead of the administering Military Department or the Chairman of the Joint Chiefs of Staff, only for the purpose of administering the DoD FOIA Program. This policy represents an exception to the policies directed in DoD Directive 5100.3;[3] it authorizes and requires the Combatant Commands to process FOIA requests in accordance with DoD Directive 5400.7 and this part. The Combatant Commands shall forward directly to the Director, Freedom of Information and Security Review all correspondence associated with the appeal of an initial denial for records under the provisions of the FOIA. Procedures to effect this administrative requirement are outlined in appendix A of this part.

(2) Combatant Commands shall maintain an electronic reading room for FOIA-processed 5 U.S.C. 552(a)(2)(D) records in accordance with subpart B of this part. Records qualifying for this means of public access also shall be maintained in hard copy for public access at Combatant Commands' respective locations.

(l) *Records management.* FOIA records shall be maintained and disposed of in accordance with the National Archives and Records Administration General Records Schedule, and DoD Component records schedules.

(m) *Relationship between the FOIA and the Privacy Act (PA).* Not all requesters are knowledgeable of the appropriate statutory authority to cite when requesting records, nor are all of them aware of appeal procedures. In some instances, they may cite neither Act, but will imply one or both Acts. For these reasons, the following guidelines are provided to ensure that requesters receive the greatest amount of access rights under both Acts. See also § 286.24 regarding appeal rights.

(1) If the record is required to be released under the FOIA, the Privacy Act does not bar its disclosure. Unlike the FOIA, the Privacy Act applies only to U.S. citizens and aliens admitted for permanent residence.

(2) Requesters who seek records about themselves contained in a Privacy Act system of records and who cite or imply only the Privacy Act, will have their requests processed under the provisions of both the Privacy Act and the FOIA. If the Privacy Act system of records is exempt from the provisions of 5 U.S.C. 552a(d)(1) and if the records, or any portion thereof, are exempt under the FOIA, the requester shall be so advised with the appropriate Privacy Act and FOIA exemption. Appeals shall be processed under both Acts.

(3) Requesters who seek records about themselves that are not contained in a Privacy Act system of records and who cite or imply the Privacy Act will have their requests processed under the provisions of the FOIA, since the Privacy Act does not apply to these records. Appeals shall be processed under the FOIA.

(4) Requesters who seek records about themselves that are contained in a Privacy Act system of records and who cite or imply the FOIA or both Acts will have their requests processed under the provisions of both the Privacy Act and the FOIA. If the Privacy Act system of records is exempt from the provisions of 5 U.S.C. 552a(d)(1) and if the records or any portion thereof, are exempt under the FOIA, the requester shall be so advised with the appropriate Privacy Act and FOIA exemption. Appeals shall be processed under both Acts.

(5) Requesters who seek access to agency records that are not part of a Privacy Act system of records, and who cite or imply the Privacy Act and FOIA, will have their requests processed under the FOIA since the Privacy Act does not apply to these records. Appeals shall be processed under the FOIA.

(6) Requesters who seek access to agency records and who cite or imply the FOIA will have their requests an appeals processed under the FOIA.

(7) Requesters shall be advised in the final response letter which Act(s) was (were) used, inclusive of appeal rights as outlined in paragraphs (m)(1) through (m)(6) of this section.

(n) *Non-responsive information in responsive records.* DoD Components shall interpret FOIA requests liberally when determining which records are responsive to the requests, and may release non-responsive information. However, should DoD Components desire to withhold non-responsive information, the following steps shall be accomplished:

(1) Consult with the requester, and ask if the requester views the information as responsive, and if not, seek the requester's concurrence to deletion of non-responsive information without a FOIA exemption. Reflect this concurrence in the response letter.

(2) If the responsive record is unclassified, and the requester does not agree to deletion of non-responsive information without a FOIA exemption, release all non-responsive and responsive information which is not exempt. For non-responsive information that is exempt, notify the requester that

[3] See footnote 1 to § 286.1(a).

even if the information were determined responsive, it would likely be exempt under (state appropriate exemption(s)). Advise the requester of the right to request this information under a separate FOIA request. The separate request shall be placed in the same location within the processing queue as the original request.

(3) If the responsive record is classified, and the requester does not agree to deletion of non-responsive information without a FOIA exemption, release all unclassified responsive and non-responsive information which is not exempt. If the non-responsive information is exempt, follow the procedures in paragraph (n)(2) of this section. The classified, non-responsive information need not be reviewed for declassification at this point. Advise the requester that even if the classified information were determined responsive, it would likely be exempt under 5 U.S.C. 552(b)(1), and other exemptions if appropriate. Advise the requester of the right to request this information under a separate FOIA request. The separate request shall be placed in the same location within the processing queue as the original request.

(o) *Honoring form or format requests.* DoD Components shall provide the record in any form or format requested by the requester if the record is readily reproducible in that form or format. DoD Components shall make reasonable efforts to maintain their records in forms or formats that are reproducible. In responding to requests for records, DoD Components shall make reasonable efforts to search for records in electronic form or format, except when such efforts would significantly interfere with the operation of the DoD Components' automated information system. Such determinations shall be made on a case by case basis. See also paragraph (g)(2) of this section.

Subpart B—FOIA Reading Rooms

§ 286.7 Requirements.

(a) *Reading room.* Each DoD Component shall provide an appropriate facility or facilities where the public may inspect and copy or have copied the records described in paragraph (b) of this section and § 286.8(a). In addition to the records described in paragraph (b) of this section and § 286.8(a), DoD Components may elect to place other records in their reading room, and also make them electronically available to the public. DoD Components may share reading room facilities if the public is not unduly inconvenienced, and also may establish decentralized reading rooms. When appropriate, the cost of copying may be imposed on the person requesting the material in accordance with the provisions of subpart F of this part.

(b) *Record availability.* The FOIA requires that records described in 5 U.S.C. 552(a)(2) (A), (B), (C), and (D) created on or after November 1, 1996, shall be made available electronically by November 1, 1997, as well as in hard copy in the FOIA reading room for inspection and copying, unless such records are published and copies are offered for sale. Personal privacy information, that if disclosed to a third party requester, would result in an invasion of the first party's personal privacy, and contractor submitted information, that if disclosed to a competing contractor, would result in competitive harm to the submitting contractor shall be deleted from all 5 U.S.C. 552(A)(2) records made available to the general public. In every case, justification for the deletion must be fully explained in writing, and the extent of such deletion shall be indicated on the record which is made publicly available, unless such indication would harm an interest protected by an exemption under which the deletion was made. If technically feasible, the extent of the deletion in electronic records or any other form of record shall be indicated at the place in the record where the deletion was made. However, a DoD Component may publish in the **Federal Register** a description of the basis upon which it will delete identifying details of particular types of records to avoid clearly unwarranted invasions of privacy, or competitive harm to business submitters. In appropriate cases, the DoD Component may refer to this description rather than write a separate justification for each deletion. 5 U.S.C. 552(a)(2) (A), (B), (C) and (D) records are:

(1) *(a)(2)(A) records.* Final opinions, including concurring and dissenting opinions, and orders made in the adjudication of cases, as defined in 5 U.S.C. 551, that may be cited, used, or relied upon as precedents in future adjudications.

(2) *(a)(2)(B) records.* Statements of policy and interpretations that have been adopted by the agency and are not published in the **Federal Register**.

(3) *(a)(2)(C) records.* Administrative staff manuals and instructions, or portions therefo, that establish DoD policy or interpretations of policy that affect a member of the public. This provision does not apply to instructions for employees on tactics and techniques to be used in performing their duties, or to instructions relating only to the internal management of the DoD Component. Examples of manuals and instructions not normally made available are:

(i) Those issued for audit, investigation, and inspection purposes, or those that prescribe operational tactics, standards of performance, or criterial for defense, prosecution, or settlement of cases.

(ii) Operations and maintenance manuals and technical information concerning munitions, equipment, systems, and intelligence activities.

(4) *(a)(2)(D) records.* Those 5 U.S.C. 552(a)(3) records, which because of the nature of the subject matter, have become or are likely to become the subject of subsequent requests for substantially the same records. These records are referred to as FOIA-processed (a)(2) records.

(i) DoD Components shall decide on a case by case basis whether records fall into this category, based on the following factors:

(A) Previous experience of the DoD Component with simular records.

(B) Particular circumstances of the records involved, including their nature and the type of information contained in them.

(C) The identify and number of requesters and whether there is widespread press, historic, or commercial interest in the records.

(ii) This provision is intended for situations where public access in a timely manner is important, and it is not intended to apply where there may be a limited number of requests over a short period of time from a few requesters. DoD Components may remove the records from this access medium when the appropriate officials determine that access is no longer necessary.

(iii) Should a requester submit a FOIA request for FOIA-processed (a)(2) records, and insist that the request be processed, DoD Components shall process the FOIA request. However, DoD Components have no obligation to process a FOIA request for 5 U.S.C. 552(a)(2) (A), (B), and (C) records because these records are required to be made public and not FOIA-processed under paragraph (a)(3) of the FOIA.

§ 286.8 Indexes.

(a) *''(a)(2)'' materials.* (1) Each DoD Component shall maintain in each facility prescribed in § 286.7(a), an index of materials described in § 286.7(b) that are issued, adopted, or promulgated, after July 4, 1967. No ''(a)(2)'' materials issued, promulgated, or adopted after July 4, 1967, that are not indexed and either made available or

published may be relied upon, used or cited as precedent against any individual unless such individual has actual and-timely notice of the contents of such materials. Such materials issued, promulgated, or adopted before July 4, 1967, need not be indexed, but must be made available upon request if not exempted under this part.

(2) Each DoD Component shall promptly publish quarterly or more frequently, and distribute, by sale or otherwise, copies of each index of ''(a)(2)'' materials or supplements thereto unless it publishes in the **Federal Register** an order containing a determination that publication is unnecessary and impracticable. A copy of each index or supplement not published shall be provided to a requester at a cost not to exceed the direct cost of duplication as set forth in subpart F of this part.

(3) Each index of ''(a)(2)'' materials or supplement thereto shall be arranged topical or by descriptive words rather than by case name or numbering system so that members of the public can readily locate material. Case name and numbering arrangements, however, may also be included for DoD Component convenience.

(4) A general index of FOIA-processed (a)(2) records referred to in § 286.7(b)(4), shall be made available to the public, both in hard copy and electronically by December 31, 1999.

(b) *Other materials.* (1) Any available index of DoD Component material published in the Federal Register, such as material required to be published by Section 552(a)(1) of the FOIA, shall be made available in DoD Component FOIA reading rooms, and electronically to the public.

(2) Although not required to be made available in response to FOIA requests or made available in FOIA Reading Rooms, ''(a)(1)'' materials shall, when feasible, be made available to the public in FOIA reading rooms for inspection and copying, and by electronic means. Examples of ''(a)(1)'' materials are: descriptions of any agency's central and field organization, and to the extent they affect the public, rules of procedures, descriptions of forms available, instruction as to the scope and contents of papers, reports, or examinations, and any amendment, revision, or report of the aforementioned.

Subpart C—Exemptions

§ 286.11 General provisions.

Records that meet the exemption criteria of the FOIA may be withheld from public disclosure and need not be published in the **Federal Register,** made available in a library reading room, or provided in response to a FOIA request.

§ 286.12 Exemptions.

The following types of records may be withheld in whole or in part from public disclosure under the FOIA, unless otherwise prescribed by law: A discretionary release of a record (see also § 286.4(e)) to one requester shall prevent the withholding of the same record under a FOIA exemption if the record is subsequently requested by someone else. However, a FOIA exemption may be invoked to withhold information that is similar or related that has been the subject of a discretionary release. In applying exemptions, the identity of the requester and the purpose for which the record is sought are irrelevant with the exception that an exemption may not be invoked where the particular interest to be protected is the requester's interest. However, if the subject of the record is the requester for the record and the record is contained in a Privacy Act system of records, it may only be denied to the requester if withholding is both authorized by DoD 5400.11–R[4] and by a FOIA exemption.

(a) *Number 1 (5 U.S.C. 552(b)(1)).* Those properly and currently classified in the interest of national defense or foreign policy, as specifically authorized under the criteria established by Executive Order and implemented by regulations, such as DoD 5200.1–R.[5] Although material is not classified at the time of the FOIA request, a classification review may be undertaken to determine whether the information should be classified. The procedures in DoD 5200.1–R apply. If the information qualifies as exemption 1 information, there is no discretion regarding its release. In addition, this exemption shall be invoked when the following situations are apparent:

(1) The fact of the existence or nonexistence of a record would itself reveal classified information. In this situation, Components shall neither confirm nor deny the existence or nonexistence of the record being requested. A ''refusal to confirm or deny'' response must be used consistently, not only when a record exists, but also when a record does not exist. Otherwise, the pattern of using a ''no record'' response when a record does not exist, and a ''refusal to confirm or deny'' when a record does exist will itself disclose national security information.

(2) Compilations of items of information that are individually unclassified may be classified if the compiled information reveals additional association or relationship that meets the standard for classification under an existing executive order for classification and DoD 5200.R–1, and is not otherwise revealed in the individual items of information.

(b) *Number 2 (5 U.S.C. 552(b)(2)).* Those related solely to the internal personnel rules and practices of the Department of Defense or any of its Components. This exemption is entirely discretionary. This exemption has two profiles, high (b)(2) and low (b)(2). Paragraph (b)(2) of this section contains a brief discussion on the low (b)(2) profile; however, that discussion is for information purposes only. When only a minimum Government interest would be affected (administrative burden), there is a great potential for discretionary disclosure of the information. Consequently, DoD Components shall not invoke the low (b)(2) profile.

(1) Records qualifying under high (b)(2) are those containing or constituting statues, rules, regulations, orders, manuals, directives, instructions, and security classification guides, the release of which would allow circumvention of these records thereby substantially hindering the effective performance of a significant function of the Department of Defense. Examples include:

(i) Those operating rules, guidelines, and manuals for DoD investigators, inspectors, auditors, and examiners that must remain privileged in order for the DoD Component to fulfill a legal requirement.

(ii) Personnel and other administrative matters, such as examination questions and answers used in training courses or in the determination of the qualifications of candidates for employment, entrance on duty, advancement, or promotion.

(iii Computer software, the release of which would allow circumvention of a statute or DoD rules, regulations, orders, manuals, directives, or instructions. In this situation, the use of the software must be closely examined to ensure a circumvention possibility exists.

(2) Records qualifying under the low (b)(2) profile are those that are trivial and housekeeping in nature for which there is no legitimate public interest or benefit to be gained by release, and it would constitute an administrative burden to process the request in order to disclose the records. Examples include rules of personnel's use of parking facilities or regulation of lunch

[4] See footnote 1 to § 286.1(a).

[5] See footnote 1 to § 286.1(a).

hours, statements of policy as to sick leave, and administrative data such as file numbers, mail routing stamps, initials, data processing notations, brief references to previous communications, and other like administrative markings. DoD Components shall not invoke the low (b)(2) profile.

(c) *Number 3 (5 U.S.C. 552(b)(3)).* Those concerning matters that a statute specifically exempts from disclosure by terms that permit no discretion on the issue, or in accordance with criteria established by that statute for withholding or referring to particular types of matters to be withheld. The Directorate for Freedom of Information and Security Review maintains a list of (b)(3) statutes used within the Department of Defense, and provides updated lists of these statutes to DoD Components on a periodic basis. A few examples of such statutes are:

(1) *Patent Secrecy, 35 U.S.C. 181–188.* Any records containing information relating to inventions that are the subject of patent applications on which Patent Secrecy Orders have been issued.

(2) Restricted Data and Formerly Restricted Data, 42 U.S.C. 2162.

(3) Communication Intelligence, 18 U.S.C. 798.

(4) Authority to Withhold From Public Disclosure Certain Technical Data, 10 U.S.C. 130 and DoD Directive 5230.25.[6]

(5) Confidentiality of Medical Quality Assurance Records: Qualified Immunity for Participants, 10 U.S.C. 1102f.

(6) Physical Protection of Special Nuclear Material: Limitation on Dissemination of Unclassified Information, 10 U.S.C. 128.

(7) Protection of Intelligence Sources and Methods, 50 U.S.C. 403–3(c)(6).

(8) Protection of Contractor Submitted Proposals, 10 U.S.C. 2305(g).

(9) Procurement Integrity, 41 U.S.C. 423.

(d) *Number 4 (5 U.S.C. 552(b)(4)).* Those containing trade secrets or commercial or financial information that a DoD Component receives from a person or organization outside the Government with the understanding that the information or record will be retained on a privileged or confidential basis in accordance with the customary handling of such records. Records within the exemption must contain trade secrets, or commercial or financial records, the disclosure of which is likely to cause substantial harm to the competitive position of the source providing the information; impair the Government's ability to obtain necessary information in the future; or impair some other legitimate Government interest. Commercial or financial information submitted on a voluntary basis, absent any exercised authority prescribing criteria for submission is protected without any requirement to show competitive harm (see paragraph (d)(8) of this section). If the information qualifies as exemption 4 information, there is no discretion in its release. Examples include:

(1) Commercial or financial information received in confidence in connection with loans, bids, contracts, or proposals set forth in or incorporated by reference in a contract entered into between the DoD Component and the offeror that submitted the proposal, as well as other information received in confidence or privileged, such as trade secrets, inventions, discoveries, or other proprietary data. See also § 286.23(h)(2) of this part. Additionally, when the provisions of 10 U.S.C. 2305(g), and 41 U.S.C. 423 are met, certain proprietary and source selection information may be withheld under exemption 3.

(2) Statistical data and commercial or financial information concerning contract performance, income, profits, losses, and expenditures, if offered and received in confidence from a contractor or potential contractor.

(3) Personal statements given in the course of inspections, investigations, or audits, when such statements are received in confidence from the individual and retained in confidence because they reveal trade secrets or commercial or financial information normally considered confidential or privileged.

(4) Financial data provided in confidence by private employers in connection with locality wage surveys that are used to fix and adjust pay schedules applicable to the prevailing wage rate of employees within the Department of Defense.

(5) Scientific and manufacturing processes or developments concerning technical or scientific data or other information submitted with an application for a research grant, or with a report while research is in progress.

(6) Technical or scientific data developed by a contractor or subcontractor exclusively at private expense, and technical or scientific data developed in part with Federal funds and in part at private expense, wherein the contractor or subcontractor has retained legitimate proprietary interests in such data in accordance with 10 U.S.C. 2320–2321 and DoD Federal Acquisition Regulation Supplement (DFARS), Chapter 2 of 48 CFR, Subpart 227.71–227.72. Technical data developed exclusively with Federal funds may be withheld under Exemption Number 3 if it meets the criteria of 10 U.S.C. 130 and DoD Directive 5230.25 (see paragraph (c)(4) of this section).

(7) Computer software which is copyrighted under the Copyright Act of 1976 (17 U.S.C. 106), the disclosure of which would have an adverse impact on the potential market value of a copyrighted work.

(8) Proprietary information submitted strictly on a voluntary basis, absent any exercised authority prescribing criteria for submission. Examples of exercised authorities prescribing criteria for submission are statutes, Executive Orders, regulations, invitations for bids, requests for proposals, and contracts. Submission of information under these authorities is not voluntary. (See also §286.23(h)(3).)

(e) *Number 5 (5 U.S.C. 552(b)(5)).* Those containing information considered privileged in litigation, primarily under the deliberative process privilege. Except as provided in paragraphs (e)(2) through (e)(5) of this section, internal advice, recommendations, and subjective evaluations, as contrasted with factual matters, that are reflected in deliberative records pertaining to the decision-making process of an agency, whether within or among agencies (as defined in 5 U.S.C. 552(e)), or within or among DoD Components. In order to meet the test of this exemption, the record must be both deliberative in nature, as well as part of a decision-making process. Merely being an internal record is insufficient basis for withholding under this exemption. Also potentially exempted are records pertaining to the attorney-client privilege and the attorney work-product privilege. This exemption is entirely discretionary.

(1) Examples of the deliberative process include:

(i) The non factual portions of staff papers, to include after-action reports, lessons learned, and situation reports containing staff evaluations, advice, opinions, or suggestions.

(ii) Advice, suggestions, or evaluations prepared on behalf of the Department of Defense by individual consultants or by boards, committees, councils, groups, panels, conferences, commissions, task forces, or other similar groups that are formed for the purpose of obtaining advice and recommendations.

(iii) Those non factual portions of evaluations by DoD Component personnel of contractors and their products.

(iv) Information of a speculative, tentative, or evaluative nature or such

[6] See footnote 1 to § 286.1(a).

matters as proposed plans to procure, lease or otherwise acquire and dispose of materials, real estate, facilities or functions, when such information would provide undue or unfair competitive advantage to private personal interests or would impede legitimate government functions.

(v) Trade secret or other confidential research development, or commercial information owned by the Government, where premature release is likely to affect the Government's negotiating position or other commercial interest.

(vi) Those portions of official reports of inspection, reports of the Inspector General, audits, investigations, or surveys pertaining to safety, security, or the internal management, administration, or operation of one or more DoD Components, when these records have traditionally been treated by the courts as privileged against disclosure in litigation.

(vii) Planning, programming, and budgetary information that is involved in the defense planning and resource allocation process.

(2) If any such intra- or inter-agency record or reasonably segregable portion of such record hypothetically would be made available routinely through the discovery process in the course of litigation with the Agency, then it should not be withheld under the FOIA. If, however, the information hypothetically would not be released at all, or would only be released in a particular case during civil discovery where a party's particularized showing of need might override a privilege, then the record may be withheld. Discovery is the formal process by which litigants obtain information from each other for use in the litigation. Consult with legal counsel to determine whether exemption 5 material would be routinely made available through the discovery process.

(3) Intra- or inter-agency memoranda or letters that are factual, or those reasonably segregable portions that are factual, are routinely made available through discovery, and shall be made available to a requester, unless the factual material is otherwise exempt from release, inextricably intertwined with the exempt information, so fragmented as to be uninformative, or so redundant of information already available to the requester as to provide no new substantive information.

(4) A direction or order from a superior to a subordinate, though contained in an internal communication, generally cannot be withheld from a requester if it constitutes policy guidance or a decision, as distinguished from a discussion of preliminary matters or a request for information or advice that would compromise the decision-making process.

(5) An internal communication concerning a decision that subsequently has been made a matter of public record must be made available to a requester when the rationale for the decision is expressly adopted or incorporately by reference in the record containing the decision.

(f) *Number 6 (5 U.S.C. 552(b)(6)).* Information in personnel and medical files, as well as similar personal information in other files, that, if disclosed to a requester, other than the person about whom the information is about, would result in a clearly unwarranted invasion of personal privacy. Release of information about an individual contained in a Privacy Act System of records that would constitute a clearly unwarranted invasion of privacy is prohibited, and could subject the releaser to civil and criminal penalties. If the information qualifies as exemption 6 information, there is no discretion in its release.

(1) Examples of other files containing personal information similar to that contained in personnel and medical files include:

(i) Those compiled to evaluate or adjudicate the suitability of candidates for civilian employment or membership in the Armed Forces, and the eligibility of individuals (civilian, military, or contractor employees) for security clearances, or for access to particularly sensitive classified information.

(ii) Files containing reports, records, and other material pertaining to personnel matters in which administrative action, including disciplinary action, may be taken.

(2) Home addresses, including private e-mail addresses, are normally not releasable without the consent of the individuals concerned. This includes lists of home addresses and military quarters' addresses without the occupant's name. Additionally, the names and duty addresses (postal and/or e-mail) of DoD military and civilian personnel who are assigned to units that are sensitive, routinely deployable, or stationed in foreign territories can constitute a clearly unwarranted invasion of personal privacy.

(i) *Privacy interest.* A privacy interest may exist in personal information even though the information has been disclosed at some place and time. If personal information is not freely available from sources other than the Federal Government, a privacy interest exists in its nondisclosure. The fact that the Federal Government expended funds to prepare, index and maintain records on personal information, and the fact that a requester invokes FOIA to obtain these records indicates the information is not freely available.

(ii) Names and duty addresses (postal and/or e-mail) published in telephone directories, organizational charts, rosters and similar materials for personnel assigned to units that are sensitive, routinely deployable, or stationed in foreign territories are withholdable under this exemption.

(3) This exemption shall not be used in an attempt to protect the privacy of a deceased person, but it may be used to protect the privacy of the deceased person's family if disclosure would rekindle grief, anguish, pain, embarrassment, or even disruption of peace of mind of surviving family members. In such situations, balance the surviving family members' privacy against the public's right to know to determine if disclosure is in the public interest. Additionally, the deceased's social security number should be withheld since it is used by the next of kin to receive benefits. Disclosures may be made to the immediate next of kin as defined in DoD Directive 5154.24.[7]

(4) A clearly unwarranted invasion of the privacy of third parties identified in a personnel, medical or similar record constitutes a basis for deleting those reasonably segregable portions of that record. When withholding third party personal information from the subject of the record and the record is contained in a Privacy Act system of records, consult with legal counsel.

(5) This exemption also applies when the fact of the existence or nonexistence of a responsive record would itself reveal personally private information, and the public interest in disclosure is not sufficient to outweigh the privacy interest. In this situation, DoD Components shall neither confirm nor deny the existence or nonexistence of the record being requested. This is a Glomar response, and exemption 6 must be cited in the response. Additionally, in order to insure personal privacy is not violated during referrals, DoD Components shall coordinate with other DoD Components or Federal Agencies before referring a record that is exempt under the Glomar concept.

(i) A ''refusal to confirm or deny'' response must be used consistently, not only when a record exists, but also when a record does not exist. Otherwise, the pattern of using a ''no records'' response when a record does not exist and a ''refusal to confirm or deny'' when a record does exist will

[7] See footnote 1 to § 286.1(a).

itself disclose personally private information.

(ii) Refusal to confirm or deny should not be used when:

(A) The person whose personal privacy is in jeopardy has provided the requester a waiver of his or her privacy rights.

(B) The person initiated or directly participated in an investigation that lead to the creation of any agency record seeks access to that record.

(C) The person whose personal privacy is in jeopardy is deceased, the Agency is aware of that fact, and disclosure would not invade the privacy of the deceased's family. See paragraph (f)(3) of this section.

(g) *Number 7 (5 U.S.C. 552(b)(7)).* Records or information complied for law enforcement purposes; i.e., civil, criminal, or military law, including the implementation of Executive orders or regulations issued pursuant to law. This exemption may be invoked to prevent disclosure of documents not originally created for, but later gathered for law enforcement purposes. With the exception of parts (C) and (F) (see paragraph (g)(1)(iii) of this section) of this exemption, this exemption is discretionary. If information qualifies as exemption (7)(C) or (7)(F) (see paragraph (g)(1)(iii) of this section) information, there is no discretion in its release.

(1) This exemption applies, however, only to the extent that production of such law enforcement records or information could result in the following:

(i) Could reasonably be expected to interfere with enforcement proceedings (5 U.S.C. 552(b)(7)(A)).

(ii) Would deprive a person of the right to a fair trial or to an impartial adjudication (5 U.S.C. 552(b)(7)(B)).

(iii) Could reasonably be expected to constitute an unwarranted invasion of personal privacy of a living person, including surviving family members of an individual identified in such a record (5 U.S.C. 552(b)(7)(C)).

(A) this exemption also applies when the fact of the existence or nonexistence of a responsive record would itself reveal personally private information, and the public interest in disclosure is not sufficient to outweigh the privacy interest. In this situation, Components shall neither confirm nor deny the existence or nonexistence of the record being requested. This a Glomar response, and exemption (7)(C) must be cited in the response. Additionally, in order to insure personal privacy is not violated during referrals, DoD Components shall coordinate with other DoD Components or Federal Agencies before referring a record that is exempt under the Glomar concept.

(B) A ''refusal to confirm or deny'' response must be used consistently, not only when a record exists, but also when a record does not exist. Otherwise, the pattern of using a ''no records'' response when a record does not exist and a ''refusal to confirm or deny'' when a record does exist will itself disclose personally private information.

(C) Refusal to confirm or deny should not be used when:

(*1*) The person whose personal privacy is in jeopardy has provided the requester with a waiver of his or her privacy rights.

(*2*) The person whose personal privacy is in jeopardy is deceased, and the Agency is aware of that fact.

(D) Could reasonably be expected to disclose the identity of a confidential source, including a source within the Department of Defense; a State, local, or foreign agency or authority; or any private institution that furnishes the information on a confidential basis; and could disclose information furnished from a confidential source and obtained by a criminal law enforcement authority in a criminal investigation or by an agency conducting a lawful national security intelligence investigation (5 U.S.C. 552(b)(7)(D)).

(E) Would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law (5 U.S.C. 552(b)(7)(E)).

(F) Could reasonably be expected to endanger the life or physical safety of any individual (5 U.S.C. 552(b)(7)(F)).

(2) Some examples of exemption 7 are:

(i) Statements of witnesses and other material developed during the course of the investigation and all materials prepared in connection with related Government litigation or adjudicative proceedings.

(ii) The identify of firms or individuals being investigated for alleged irregularities involving contracting with the Department of Defense when no indictment has been obtained nor any civil action filed against them by the United States.

(iii) Information obtained in confidence, expressed or implied, in the course of a criminal investigation by a criminal law enforcement agency or office within a DoD Component, or a lawful national security intelligence investigation conducted by an authorized agency or office with a DoD Component. National security intelligence investigations include background security investigations and those investigations conducted for the purpose of obtaining affirmative or counterintelligence information.

(3) The right of individual litigants to investigative records currently available by law (such as, the Jencks Act, 18 U.S.C. 3500)) is not diminished.

(4) *Exclusions.* Excluded from exemption 7 are the following two situations applicable to the Department of Defense. (Components considering invoking an exclusion should first consult with the Department of Justice, Office of Information and Privacy.):

(i) Whenever a request is made that involves access to records or information compiled for law enforcement purposes, and the investigation or proceeding involves a possible violation of criminal law where there is reason to believe that the subject of the investigation or proceeding is unaware of its pendency, and the disclosure of the existence of the records could reasonably be expected to interfere with enforcement proceedings, Components may, during only such times as that circumstances continues, treat the records of information as not subject to the FOIA. In such situation, the response to the requester will state that no records were found.

(ii) Whenever informant records maintained by a criminal law enforcement organization within a DoD Component under the informant's name or personal identifier are requested by a third party using the informant's name or personal identifier, the Component may treat the records as not subject to the FOIA, unless the informant's status as an informant has been officially confirmed. If it is determined that the records are not subject to 5 U.S.C. 552(b)(7), the response to the request will state that no records were found.

(h) *Number 8 (U.S.C. 552 (b)(8)).* Those contained in or related to examination, operation or condition reports prepared by, on behalf of, or for the use of any agency responsible for the regulation or supervision of financial institutions.

(i) *Number 9 (5 U.S.C. 552(b)(9)).* Those containing geological and geophysical information and data (including maps) concerning wells.

Subpart D—For Official Use Only

§ 286.15 General provisions.

(a) *General.* Information that has not been given a security classification pursuant to the criteria of an Executive Order, but which may be withheld from the public because disclosure would

cause a foreseeable harm to an interest protected by one or more FOIA exemptions 2 through 9 (see subpart C of this part) shall be considered as being for official use only (FOUO). No other material shall be considered FOUO, and FOUO is not authorized as an anemic form of classification to protect national security interests. Additional information on FOUO and other controlled, unclassified information may be found in DoD 5200. 1–R or by contacting the Directorate for Security, Office of the Assistant Secretary of Defense (Command, Control, Communications, and Intelligence).

(b) *Prior FOUO application.* The prior application of FOUO markings is not a conclusive basis for withholding a record that is requested under the FOIA. When such a record is requested, the information in it shall be evaluated to determine whether disclosure would result in a foreseeable harm to an interest protected by one or more FOIA exemptions 2 through 9. Even if any exemptions apply, the record shall be released as a discretionary matter when it is determined that there is no foreseeable harm to an interest protected by the exemptions.

(c) *Historical papers.* Records such as notes, working papers, and drafts retained as historical evidence of DoD Component actions enjoy no special apart from the exemptions under the FOIA.

(d) *Time to mark records.* The marking of records at the time of their creation provides notice of FOUO content and facilitates review when a record is requested under the FOIA. Records requested under the FOIA that do not bear such markings shall not be assumed to be releasable without examination for the presence of information that requires continued protection and qualifies as exempt from public release.

(e) *Distribution statement.* Information in a technical document that requires a distribution statement pursuant to DoD Directive 5230.24 [8] shall bear that statement and may be marked FOUO, as appropriate.

§ 286.16 Markings.

(a) *Location of markings.* (1) An unclassified document containing FOUO information shall be marked ''For Official Use Only'' at the bottom on the outside of the front cover (if any), on each page containing FOUO information, and on the outside of the back cover (if any). Each paragraph containing FOUO information shall be marked as such.

(2) Within a classified document, an individual page that contains both FOUO and classified information shall be marked at the top and bottom with the highest security classification of information appearing on the page. Individual paragraphs shall be marked at the appropriate classification level, as well as unclassified or FOUO, as appropriate.

(3) Within a classified document, an individual page that contains FOUO information but no classified information shall be marked ''For Official Use Only'' at the top and bottom of the page, as well as each paragraph that contains FOUO information.

(4) Other records, such as photographs, films, tapes, or slides, shall be marked ''For Official Use Only'' or ''FOUO'' in a manner that ensures that a recipient or viewer is aware of the status of the information therein.

(5) FOUO material transmitted outside the Department of Defense requires application of an expanded marking to explain the significance of the FOUO marking. This may be accomplished by typing or stamping the following statement on the record prior to transfer:

This document contains information EXEMPT FROM MANDATORY DISCLOSURE under the FOIA. Exemption(s) _____ applies/apply.

(b) [Reserved]

§ 286.17 Dissemination and transmission.

(a) *Release and transmission procedures.* Until FOUO status is terminated, the release and transmission instructions that follow apply:

(1) FOUO information may be disseminated within DoD Components and between officials of DoD Components and DoD contractors, consultants, and grantees to conduct official business for the Department of Defense. Recipients shall be made aware of the status of such information, and transmission shall be by means that preclude unauthorized public disclosure. Transmittal documents shall call attention to the presence of FOUO attachments.

(2) DoD holders of FOUO information are authorized to convey such information to officials in other Departments and Agencies of the Executive and Judicial Branches to fulfill a government function, except to the extent prohibited by the Privacy Act. Records thus transmitted shall be marked ''For Official Use Only,'' and the recipient shall be advised that the information may qualify for exemption from public disclosure, pursuant to the FOIA, and that special handling instructions do or do not apply.

(3) Release of FOUO information to Members of Congress is governed by DoD Directive 5400.4. [9] Release to the GAO is governed by DoD Directive 7650.1. [10] Records released to the Congress or GAO should be reviewed to determine whether the information warrants FOUO status. If not, prior FOUO markings shall be removed or effaced. If withholding criteria are met, the records shall be marked FOUO and the recipient provided an explanation for such exemption and marking. Alternatively, the recipient may be requested, without marking the record, to protect against its public disclosure for reasons that are explained.

(b) *Transporting FOUO information.* Records containing FOUO information shall be transported in a manner that prevents disclosure of the contents. When not commingled with classified information, FOUO information may be sent via first-class mail or parcel post. Bulky shipments, such as distributions of FOUO Directives or testing materials, that otherwise qualify under postal regulations, may be sent by fourth-class mail.

(c) *Electronically and facsimile transmitted messages.* Each part of electronically and facsimile transmitted messages containing FOUO information shall be marked appropriately. Unclassified messages containing FOUO information shall contain the abbreviation ''FOUO'' before the beginning of the text. Such messages and facsimiles shall be transmitted in accordance with communications security procedures whenever practicable.

§ 286.18 Safeguarding FOUO information.

(a) *During duty hours.* During normal working hours, records determined to be FOUO shall be placed in an out-of-sight location if the work area is accessible to nongovernment personnel.

(b) *During nonduty hours.* At the close of business, FOUO records shall be stored so as to prevent unauthorized access. Filing such material with other unclassified records in unlocked files or desks, etc., is adequate when normal U.S. Government or Government-contractor internal building security is provided during nonduty hours. When such internal security control is not exercised, locked buildings or rooms normally provide adequate after-hours protection. If such protection is not considered adequate, FOUO material shall be stored in locked receptacles

[8] See footnote 1 to § 286.1(a).

[9] See footnote 1 to § 286.1(a).

[10] See footnote 1 to § 286.1(a).

such as file cabinets, desks, or bookcases. FOUO records that are subject to the provisions of the National Security Act of 1959 shall meet the safeguards outlined for that group of records.

§ 286.19 Termination, disposal and unauthorized disclosure.

(a) *Termination.* The originator or other competent authority; e.g., initial denial and appellate authorities, shall terminate ''For Official Use Only'' markings or status when circumstances indicate that the information no longer requires protection from public disclosure. When FOUO status is terminated, all known holders shall be notified, to the extent practical. Upon notification, holders shall efface or remove the ''For Official Use Only'' markings, but records in file or storage need not be retrieved solely for that purpose.

(b) *Disposal.* (1) Nonrecord copies of FOUO materials may be destroyed by tearing each copy into pieces to prevent reconstructing, and placing them in regular trash containers. When local circumstances or experience indicates that this destruction method is not sufficiently protective of FOUO information, local authorities may direct other methods but must give due consideration to the additional expense balanced against the degree of sensitivity of the type of FOUO information contained in the records.

(2) Record copies of FOUO documents shall be disposed of in accordance with the disposal standards established under 44 U.S.C. 3301–3314, as implemented by DoD Component instructions concerning records disposal.

(c) *Unauthorized disclosure.* The unauthorized disclosure of FOUO records does not constitute an unauthorized disclosure of DoD information classified for security purposes. Appropriate administrative action shall be taken, however, to fix responsibility for unauthorized disclosure whenever feasible, and appropriate disciplinary action shall be taken against those responsible. Unauthorized disclosure of FOUO information that is protected by the Privacy Act may also result in civil and criminal sanctions against responsible persons. The DoD Component that originated the FOUO information shall be informed of its unauthorized disclosure.

Subpart E—Release and Processing Procedures

§ 282.22 General provisions.

(a) *Public information.* (1) Since the policy of the Department of Defense is to make the maximum amount of information available to the public consistent with its other responsibilities, written requests for a DoD record made under the provisions of 5 U.S.C. 552(a)(3) of the FOIA may be denied only when:

(i) Disclosure would result in a foreseeable harm to an interest protected by a FOIA exemption, and the record is subject to one or more of the exemptions of FOIA.

(ii) The record has not been described well enough to enable the DoD Component to locate it with a reasonable amount of effort by an employee familiar with the files.

(iii) The requester has failed to comply with the procedural requirements, including the written agreement to pay or payment of any required fee imposed by the instructions of the DoD Component concerned. When personally identifiable information in a record is requested by the subject of the record or the subject's attorney, notarization of the request, or a statement certifying under the penalty of perjury that their identity is true and correct may be required. Additionally, written consent of the subject of the record is required for disclosure from a Privacy Act System of records, even to the subject's attorney.

(2) Individuals seeking DoD information should address their FOIA requests to one of the addresses listed in appendix B of this part.

(b) *Requests from private parties.* The provisions of the FOIA are reserved for persons with private interest as opposed to U.S. Federal Agencies seeking official information. Requests from private persons will be made in writing, and should clearly show all other addressees within the Federal Government to which the request was also sent. This procedure will reduce processing time requirements, and ensure better inter- and intra-agency coordination. However, if the requester does not show all other addressees to which the request was also sent, DoD Components shall still process the request. DoD Components should encourage requesters to send requests by mail, facsimile, or by electronic means. Disclosure of records to individuals under the FOIA is considered public release of information, except as provided for in § 286.4(f) and § 286.12.

(c) *Requests from government officials.* Requests from officials of State or local Governments for DoD Component records shall be considered the same as any other requester. Requests from members of Congress not seeking records on behalf of a Congressional Committee, Subcommittee, either House sitting as a whole, or made on behalf of their constituents shall be considered the same as any other requester (see also § 286.4(f) and paragraph (d) of this section). Requests from officials of foreign governments shall be considered the same as any other requester. Requests from officials of foreign governments that do not invoke the FOIA shall be referred to appropriate foreign disclosure channels and the requester so notified.

(d) *Privileged release outside of the FOIA to U.S. Government officials.* (1) Records exempt from release to the public under the FOIA may be disclosed in accordance with DoD Component regulations to agencies of the Federal Government, whether legislative, executive, or administrative, as follows:

(i) In response to a request of a Committee or Subcommittee of Congress, or to either House sitting as a whole in accordance with DoD Directive 5400.4.

(ii) To other Federal Agencies, both executive and administrative, as determined by the head of a DoD Component or designee.

(iii) In response to an order of a Federal court, DoD Components shall release information along with a description of the restrictions on its release to the public.

(2) DoD Components shall inform officials receiving records under the provisions of this paragraph that those records are exempt from public release under the FOIA. DoD Components also shall advise officials of any special handling instructions. Classified information is subject to the provisions of DoD 5200.1–R, and information contained in Privacy Act systems of records is subject to DoD 5400.11–R.

(e) *Consultation with affected DoD component.* (1) When a DoD Component receives a FOIA request for a record in which an affected DoD organization (including a Combatant Command) has a clear and substantial interest in the subject matter, consultation with that affected DoD organization is required. As an example, where a DoD Component receives a request for records related to DoD operations in a foreign country, the cognizant Combatant Command for the area involved in the request shall be consulted before a release is made. Consultations may be telephonic, electronic, or in hard copy.

(2) The affected DoD Component shall review the circumstances of the request for host-nation relations, and provide, where appropriate, FOIA processing assistance to the responding DoD Component regarding release of information. Responding DoD Components shall provide copies of responsive records to the affected DoD Component when requested by the affected DoD Component. The affected DoD Component shall receive a courtesy copy of all releases in such circumstances.

(3) Nothing in paragraphs (e)(1) and (e)(2) of this section shall impede the processing of the FOIA request initially received by a DoD Component.

§ 286.23 Initial determinations.

(a) *Initial denial authority.* (1) Components shall limit the number of IDAs appointed. In designating its IDAs, a DoD Component shall balance the goals of centralization of authority to promote uniform decisions and decentralization to facilitate responding the each request within the time limitations of the FOIA.

(2) The initial determination whether to make a record available upon request may be made by any suitable official designated by the DoD Component in published regulations. The presence of the marking ''For Official Use Only'' does not relieve the designated official of the responsibility to review the requested record for the purpose of determining whether an exemption under the FOIA is applicable.

(3) The officials designated by DoD Components to make initial determinations should consult with public affairs officers (PAOs) to become familiar with subject matter that is considered to be newsworthy, and advise PAOs of all requests from news media representatives. In addition, the officials should inform PAOs in advance when they intend to withhold or partially withhold a record, if it appears that the withholding action may be challenged in the media.

(b) *Reasons for not releasing a record.* The following are reasons for not complying with a request for a record under 5 U.S.C. 552(a)(3):

(1) *No records.* A reasonable search of files failed to identify responsive records.

(2) *Referrals.* The request is transferred to another DoD Component, or to another Federal Agency.

(3) *Request withdrawn.* The request is withdrawn by the requester.

(4) *Fee-related reason.* The requester is unwilling to pay fees associated with a request; the requester is past due in the payment of fees from a previous FOIA request; or the requester disagrees with the fee estimate.

(5) *Records not reasonably described.* A record has not been described with sufficient particularity to enable the DoD Component to locate it by conducting a reasonable search.

(6) *Not a proper FOIA request for some other reason.* The requester has failed unreasonably to comply with procedural requirements, other than fee-related, imposed by this part or DoD Component supplementing regulations.

(7) *Not an agency record.* The information requested is not a record within the meaning of the FOIA and this part.

(8) *Duplicate request.* The request is a duplicate request (e.g., a requester asks for the same information more than once). This includes identical requests received via different means (e.g., electronic mail, facsimile, mail, courier) at the same or different times.

(9) *Other (specify).* Any other reason a requester does not comply with published rules other than those outlined paragraphs (b)(1) through (b)(8) of this section.

(10) *Partial or total denial.* The record is denied in whole or in part in accordance with procedures set forth in the FOIA.

(c) *Denial tests.* To deny a requested record that is in the possession and control of a DoD Component, it must be determined that disclosure of the record would result in a foreseeable harm to an interest protected by a FOIA exemption, and the record is exempt under one or more of the exemptions of the FOIA. An outline of the FOIA's exemptions is contained in subpart C of this part.

(d) *Reasonably segregable portions.* Although portions of some records may be denied, the remaining reasonably segregable portions must be released to the requester when it reasonably can be assumed that a skillful and knowledgeable person could not reconstruct the excised information. Unless indicating the extent of the deletion would harm an interest protected by an exemption, the amount of deleted information shall be indicated on the released portion of paper records by use of brackets or darkened areas indicating removal of information. In no case shall the deleted areas be left ''white'' without the use of brackets to show the bounds of deleted information. In the case of electronic deletion, or deletion in audiovisual or microfiche records, if technically feasible, the amount of redacted information shall be indicated at the place in the record such deletion was made, unless including the indication would harm an interest protected by the exemption under which the deletion is made. This may be done by use of brackets, shaded areas, or some other identifiable technique that will clearly show the limits of the deleted information. When a record is denied in whole, the responsive advising the requester of that determination will specifically state that it is not reasonable to segregate portions of the record for release.

(e) *Response to requester.* (1) Whenever possible, initial determinations to release or deny a record normally shall be made and the decision reported to the requester within 20 working days after receipt of the request by the official designated to respond. When a DoD Component has a significant number of pending requests which prevent a response determination within the 20 working day period, the requester shall be so notified in an interim response, and advised whether their request qualifies for the fast track or slow track within the DoD Components' multitrack processing system. Requesters who do not meet the criteria for fast track processing shall be given the opportunity to limit the scope of their request in order to qualify for fast track processing. See also § 286.4(d)(2), for greater detail on multitrack processing and compelling need meriting expedited processing.

(2) When a decision is made to release a record, a copy should be made available promptly to the requester once he has complied with preliminary procedural requirements.

(3) When a request for a record is denied in whole or in part, the official designated to respond shall inform the requester in writing of the name and title or position of the official who made the determination, and shall explain to the requester the basis for the determination in sufficient detail to permit the requester to make a decision concerning appeal. The requester specifically shall be informed of the exemptions on which the denial is based, inclusive of a brief statement describing what the exemption(s) cover. When the initial denial is based in whole or in part on a security classification, the explanation should include a summary of the applicable Executive Order criteria for classification, as well as an explanation, to the extent reasonably feasible, of how those criteria apply to the particular record in question. The requester shall also be advised of the opportunity and procedures for appealing an unfavorable determination to a higher final authority within the DoD Component.

(4) The final response to the requester should contain information concerning

the fee status of the request, consistent with the provisions of subpart F of this part. When a requester is assessed fees for processing a request, the requester's fee category shall be specified in the response letter. Components also shall provide the requester with a complete cost breakdown (e.g., 15 pages of office reproduction at $0.15 per page; 5 minutes of computer search time at $43.50 per minute, 2 hours of professional level search at $25 per hour, etc.) in the response letter.

(5) The explanation of the substantive basis for a denial shall include specific citation of the statutory exemption applied under provisions of this part; e.g., 5 U.S.C. 552(b)(1). Merely referring to a classification; to a ''For Official Use Only'' marking on the requested record; or to this part or a DoD Component's regulation does not constitute a proper citation or explanation of the basis for invoking an exemption.

(6) When the time for response becomes an issue, the official responsible for replying shall acknowledge to the requester the date of the receipt of the request.

(7) When denying a request for records, in whole or in a part, a DoD Component shall make a reasonable effort to estimate the volume of the records denied and provide this estimate to the requester, unless providing such an estimate would harm an interest protected by an exemption of the FOIA. This estimate should be in number of pages or in some other reasonable form of estimation, unless the volume is otherwise indicated through deletions on records disclosed in part.

(8) When denying a request for records in accordance with a statute qualifying as a FOIA exemption 3 statute, DoD Components shall, in addition to sitting the particular statute relied upon to deny the information, also state whether a court has upheld the decision to withhold the information under the particular statute, and a concise description of the scope of the information being withheld.

(f) *Extension of time.* (1) In unusual circumstances, when additional time is needed to respond to the initial request, the DoD Component shall acknowledge the request in writing the 20 day period, describe the circumstances requiring the delay, and indicate the anticipated date for a substantive response that may not exceed 10 additional working days, except as follows:

(2) With respect to a request for which a written notice has extended the time limits by 10 additional working days, and the Component determines that it cannot make a response determination within that additional 10 working day period, the requester shall be notified and provided an opportunity to limit the scope of the request so that it may be processed within the extended time limit, or an opportunity to arrange an alternative time frame for processing the request or a modified request. Refusal by the requester to reasonably modify the request or arrange for an alternative time frame shall be considered a factor in determining whether exceptional circumstances exist with respect to DoD Components' request backlogs. Exceptional circumstances do not include a delay that results from predictable component backlogs, unless the DoD Component demonstrates reasonable progress in reducing its backlog.

(3) Unusual circumstances that may justify delay are:

(i) The need to search for and collect the requested records from other facilities that are separate from the office determined responsible for a release or denial decision on the requested information.

(ii) The need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records which are requested in a single request.

(iii) The need for consultation, which shall be conducted with all practicable speed, with other agencies having a substantial interest in the determination of the request, or among two or more DoD Components having a substantial subject-matter interest in the request.

(4) DoD Components may aggregate certain requests by the same requester, or by a group of requesters acting in concert, if the DoD Component reasonably believes that such requests actually constitute a single request, which would otherwise satisfy the unusual circumstances set forth in paragraph (f)(3) of this section, and the requests involve clearly related matters. Multiple requests involving unrelated matters shall not be aggregated. If the requests are aggregated under these conditions, the requester or requesters shall be so notified.

(5) In cases where the statutory time limits cannot be met and no informal extension of time has been agreed to, the inability to process any part of the request within the specified time should be explained to the requester with a request that he agree to await a substantive response by an anticipated date. If should be made clear that any such agreement does not prejudice the right of the requester to appeal the initial decision after it is made. DoD Components are reminded that the requester still retains the right to treat this delay as a de facto denial with full administrative remedies.

(6) As an alternative to the taking of formal extensions of time as described in § 286.23(f), the negotiation by the cognizant FOIA coordinating office of informal extensions in time with requesters is encouraged where appropriate.

(g) *Misdirected requests.* Misdirected requests shall be forwarded promptly to the DoD Component or other Federal Agency with the responsibility for the records requested. The period allowed for responding to the request misdirected by the requester shall not begin until the request is received by the DoD Component that manages the records requested.

(h) *Records of non-U.S. government source.* (1) When a request is received for a record that falls under exemption 4 (see § 286.12(d)), that was obtained from a non-U.S. Government source, or for a record containing information clearly identified as having been provided by a non-U.S. Government source, the source of the record or information (also known as ''the submitter'' for matters pertaining to proprietary data under 5 U.S.C. 552, Exemption (b)(4)) (§ 286.12(d), this part and E.O. 12600 (3 CFR, 1987 Comp., p. 235)) shall be notified promptly of that request and afforded reasonable time (e.g., 30 calendar days) to present any objections concerning the release, unless it is clear that there can be no valid basis for objection. This practice is required for those FOIA requests for data not deemed clearly exempt from disclosure under exemption (b)(4) of 5 U.S.C. 552. If, for example, the record or information was provided with actual or presumptive knowledge of the non-U.S. Government source and established that it would be made available to the public upon request, there is no obligation to notify the source. Any objections shall be evaluated. The final decision to disclose information claimed to be exempt under exemption (b)(4) shall be made by an official equivalent in rank to the official who would make the decision to withhold that information under the FOIA. When a substantial issue has been raised, the DoD Component may seek additional information from the source of the information and afford the source and requester reasonable opportunities to present their arguments on the legal and substantive issues involved prior to making an agency determination. When the source advises it will seek a restraining order or take court action to prevent release of the record or information, the requester shall be notified, and action on the request

normally shall not be taken until after the outcome of that court action is known. When the requester brings court action to compel disclosure, the submitter shall be promptly notified of this action.

(2) If the submitted information is a proposal in response to a solicitation for a competitive proposal, and the proposal is in the possession and control of DoD, and meets the requirements of 10 U.S.C. 2305(g), the proposal shall not be disclosed, and no submitter notification and subsequent analysis is required. The proposal shall be withheld from public disclosure pursuant to 10 U.S.C. 2305(g) and exemption (b)(3) of 5 U.S.C. 552. This statute does not apply to bids, unsolicited proposals, or any proposal that is set forth or incorporated by reference in a contract between a DoD Component and the offeror that submitted the proposal. In such situations, normal submitter notice shall be conducted in accordance with paragraph (h)(1) of this section, except for sealed bids that are opened and read to the public. The term proposal means information contained in or originating from any proposal, including a technical, management, or cost proposal submitted by an offeror in response to solicitation for a competitive proposal, but does not include an offeror's name or total price or unit prices when set forth in a record other than the proposal itself. Submitter notice, and analysis as appropriate, are required for exemption (b)(4) matters that are not specifically incorporated in 10 U.S.C. 2305(g).

(3) If the record or information was submitted on a strictly voluntary basis, absent any exercised authority that prescribes criteria for submission, and after consultation with the submitter, it is absolutely clear that the record or information would customarily not be released to the public, the submitter need not be notified. Examples of exercised authorities prescribing criteria for submission are statutes, Executive Orders, regulations, invitations for bids, requests for proposals, and contracts. Records or information submitted under these authorities are not voluntary in nature. When it is not clear whether the information was submitted on a voluntary basis, absent any exercised authority, and whether it would customarily be released to the public by the submitter, notify the submitter and ask that it describe its treatment of the information, and render an objective evaluation. If the decision is made to release the information over the objection of the submitter, notify the submitter and afford the necessary time to allow the submitter to seek a restraining order, or take court action to prevent release of the record or information.

(4) The coordination provisions of this paragraph also apply to any non-U.S. Government record in the possession and control of the DoD from multi-national organizations, such as the North Atlantic Treaty Organization (NATO), United Nations Commands, the North American Aerospace Defense Command (NORAD), the Inter-American Defense Board, or foreign governments. Coordination with foreign governments under the provisions of this paragraph may be made through Department of State, or the specific foreign embassy.

(i) *File of initial denials.* Copies of all initial denials shall be maintained by each DoD Component in a form suitable for rapid retrieval, periodic statistical compilation, and management evaluation. Records denied for any of the reasons contained in paragraph (b) of this section shall be maintained for a period of six years to meet the statute of limitations requirement.

(j) *Special mail services.* Components are authorized to use registered mail, certified mail, certificates of mailing and return receipts. However, their use should be limited to instances where it appears advisable to establish proof of dispatch or receipt of FOIA correspondence. The requester shall be notified that they are responsible for the full costs of special services.

(k) *Receipt accounts.* The Treasurer of the United States has established two accounts for FOIA receipts, and all money orders or checks remitting FOIA fees should be made payable to the U.S. Treasurer. These accounts, which are described in paragraphs (k)(1) and (k)(2) of this section shall be used for depositing all FOIA receipts, except receipts for Working Capital and non appropriated funded activities. Components are reminded that the below account numbers must be preceded by the appropriate disbursing office two digit prefix. Working Capital and non appropriated funded activity FOIA receipts shall be deposited to the applicable fund.

(1) *Receipt account 3210 sale of publications and reproductions, Freedom of Information Act.* This account shall be used when depositing funds received from providing existing publications and forms that meet the Receipt Account Series description found in Federal Account Symbols and Titles.

(2) *Receipt account 3210 fees and other charges for services, Freedom of Information Act.* This account is used to deposit search fees, fees for duplicating and reviewing (in the case of commercial requesters) records to satisfy requests that could not be filled with existing publications or forms.

§ 286.24 Appeals.

(a) *General.* If the official designated DoD Component to make initial determinations on requests for records declines to provide a record because the official considers it exempt under one or more of the exemptions of the FOIA, that decision may be appealed by the requester, in writing, to a designated appellate authority. The appeal should be accompanied by a copy of the letter denying the initial request. Such appeals should contain the basis for disagreement with the initial refusal. Appeal procedures also apply to the disapproval of a fee category claim by a requester, disapproval of a request for waiver or reduction of fees, disputes regarding fee estimates, review on an expedited basis a determination not to grant expedited access to agency records, for no record determinations when the requester considers such responses adverse in nature, not providing a response determination to a FOIA request within the statutory time limits, or *any* determination found to be adverse in nature by the requester. When denials have been made under the provisions of the Privacy Act and the FOIA, and the denied information is contained in a Privacy Act system of records, appeals shall be processed under both the Privacy Act and the FOIA. If the denied information is not maintained in a Privacy Act system of records, the appeal shall be processed under the FOIA. Appeals of Office of the Secretary of Defense and Chairman of the Joint Chiefs of Staff determinations may be sent to the address in appendix B of this part. If a request is merely misaddressed, and the receiving DoD Component simply advises the requester of such and refers the request to the appropriate DoD Component, this shall not be considered a no record determination.

(b) *Time of receipt.* A FOIA appeal has been received by a DoD Component when it reaches the office of an appellate authority having jurisdiction. Misdirected appeals should be referred expeditiously to the proper appellate authority.

(c) *Time limits.* (1) The requester shall be advised to file an appeal so that it is postmarked no later than 60 calendar days after the date of the initial denial letter. If no appeal is received, or if the appeal is postmarked after the conclusion of this 60-day period, the appeal may be considered closed. However, exceptions to the above may be considered on a case by case basis.

In cases where the requester is provided several incremental determinations for a single request, the time for the appeal shall not begin until the date of the final response. Records that are denied shall be retained for a period of six years to meet the statute of limitations requirement.

(2) Final determinations on appeals normally shall be made within 20 working days after receipt. When a DoD Component has a significant number of appeals preventing a response determination within 20 working days, the appeals shall be processed in a multitrack processing system, based at a minimum, on the three processing tracks established for initial requests. See § 286.4(d) of this part. All of the provisions of § 286.4(d) apply also to appeals of initial determinations, to include establishing additional processing queues as needed.

(d) *Delay in responding to an appeal.* (1) If additional time is needed due to the unusual circumstances described in § 286.23(f), the final decision may be delayed for the number of working days (not to exceed 10), that were not used as additional time for responding to the initial request.

(2) If a determination cannot be made and the requester notified within 20 working days, the appellate authority shall acknowledge to the requester, in writing, the date of receipt of the appeal, the circumstances surrounding the delay, and the anticipated date for substantive response. Requesters shall be advised that, if the delay exceeds the statutory extension provision or is for reasons other than the unusual circumstances identified in § 286.23(f), they may consider their administrative remedies exhausted. They may, however, without prejudicing their right of judicial remedy, await a substantiative response. The DoD component shall continue to process the case expeditiously.

(e) *Response to the requester.* (1) When an appellate authority makes a final determination to release all or a portion of records withheld by an IDA, a written response and a copy of the records so released should be forwarded promptly to the requester after compliance with any preliminary procedural requirements, such as payment of fees.

(2) Final refusal of an appeal must be made in writing by the appellate authority or by a designated representative. The response, at a minimum, shall include the following:

(i) The basis for the refusal shall be explained to the requester in writing, both with regard to the applicable statutory exemption or exemptions invoked under provisions of the FOIA, and with respect to other appeal matters as set forth in paragraph (a) of this section.

(ii) When the final refusal is based in whole or in part on a security classification, the explanation shall include a determination that the record meets the cited criteria and rationale of the governing Executive Order, and that this determination is based on a declassification review, with the explanation of how that review confirmed the continuing validity of the security classification.

(iii) The final denial shall include the name and title or position of the official responsible for the denial.

(iv) In the case of appeals for total denial of records, the response shall advise the requester that the information being denied does not contain meaningful portions that are reasonably segregable.

(v) When the denial is based upon an exemption 3 statute (subpart C of this part), the response, in addition to citing the statute relied upon to deny the information, shall state whether a court has upheld the decision to withhold the information under the statute, and shall contain a concise description of the scope of the information withheld.

(vi) The response shall advise the requester of the right to judicial review.

(f) *Consultation.* (1) Final refusal involving issues not previously resolved or that the DoD Component knows to be inconsistent with rulings of other DoD Components ordinarily should not be made before consultation with the DoD Office of the General Counsel.

Tentative decisions to deny records that raise new or significant legal issues of potential significance to other Agencies of the Government shall be provided to the DoD Office of the General Counsel.

§ 286.25 Judicial actions.

(a) *General.* (1) This section states current legal and procedural rules for the convenience of the reader. The statemetns of rules do not create rights or remedies not otherwise available, nor do they bind the Department of Defense to particular judicial interpretations or procedures.

(2) A requester may seek an order from a U.S. District Court to compel release of a record after administrative remedies have been exhausted; i.e., when refused a record by the head of a Component or an appellate designee or when the DoD Component has failed to respond with the time limits prescribed by the FOIA and in this part.

(b) *Jurisdiction.* The requester may bring suit in the U.S. District Court in the district in which the requester resides or is the requesters place of business, in the district in which the record is located, or in the District of Columbia.

(c) *Burden of proof.* The burden of proof is on the DoD Component to justify its refusal to provide a record. The court shall evaluate the case de novo (anew) and may elect to examine any requester record in camera (in private) to determine whether the denial was justified.

(d) *Actions by the court.* (1) When a DoD Component has failed to make a determination within the statutory time limits but can demonstrate due diligence in exceptional circumstances, to include negotiating with the requester to modify the scope of their request, the court may retain jurisdiction and allow the Component additional time to complete its review of the records.

(2) If the court determines that the requester's complaint is substantially correct, it may require the United States to pay reasonable attorney fees and other litigation costs.

(3) When the court orders the release of denied records, it may also issue a written finding that the circumstances surrounding the witholding raise questions whether DoD Component personnel acted arbitrarily and capriciously. In these cases, the special counsel of the Merit System Protection Board shall conduct an investigation to determine whether or not disciplinary action is warranted. The DoD Component is obligated to take the action recommended by the special counsel.

(4) The court may punish the responsible official for contempt when a DoD Component fails to comply with the court order to produce records that it determines have been withheld improperly.

(e) *Non-United States government source information.* A requester may bring suit in a U.S. District Court to compel the release of records obtained from a non-government source or records based on information obtained from a non-government source. Such source shall be notified promptly of the court action. When the source advises that it is seeking court action to prevent release, the DoD Component shall defer answering or otherwise pleading to the complainant as long as permitted by the Court or until a decision is rendered in the court action of the source, whichever is sooner.

(f) *FOIA litigation.* Personnel responsible for processing FOIA requests at the DoD Component level shall be aware of litigation under the FOIA. Such information will provide

management insights into the use of the nine exemptions by Component personnel. Whenever a complaint under the FOIA is filed in a U.S. District Court, the DoD Component named in the complaint shall forward a copy of the complaint by any means to the Director, Freedom of Information and Security Review with an information copy to the DoD Office of the General counsel, ATTN: Office of Legal Counsel.

Subpart F—Fee Schedule

§ 286.28 General provisions.

(a) *Authorities.* The Freedom of Information Act, as amended; the Paperwork Reduction Act (44 U.S.C. Chapter 35), as amended; the Privacy Act of 1974, as amended; the Budget and Accounting Act of 1921 and the Budget and Accounting Procedures Act, as amended (see 31 U.S.C.); and 10 U.S.C. 2328.

(b) *Application.* (1) The fees described in this subpart apply to FOIA requests, and conform to the Office of Management and Budget Uniform Freedom of Information Act Fee Schedule and Guidelines. They reflect direct costs for search, review (in the case of commercial requesters); and duplication of documents, collection of which is permitted by the FOIA. They are neither intended to imply that fees must be charged in connection with providing information to the public in the routine course of business, nor are they meant as a substitute for any other schedule of fees, such as DoD 7000.14–R,[11] which does not supersede the collection of fees under the FOIA. Nothing in this subpart shall supersede fees chargeable under a statute specifically providing for setting the level of fees for particular types of records. A ''statute specifically providing for setting the level of fees for particular types of records'' (5 U.S.C. 552(a)(4)(a)(vi)) means any statute that enables a Government Agency such as the Government Printing Office (GPO) or the National Technical Information Service (NTIS), to set and collect fees. Components should ensure that when documents that would be responsive to a request are maintained for distribution by agencies operating statutory-based fee schedule programs such as the GPO or NTIS, they inform requesters of the steps necessary to obtain records from those sources.

(2) The term ''direct costs'' means those expenditures a Component actually makes in searching for, reviewing (in the case of commercial requesters), and duplicating documents to respond to a FOIA request. Direct costs include, for example, the salary of the employee performing the work (the basic rate of pay for the employee plus 16 percent of that rate to cover benefits), and the costs of operating duplicating machinery. These factors have been included in the fee rates prescribed at § 286.29 of this subpart. Not included in direct costs are overhead expenses such as costs of space, heating or lighting the facility in which the records are stored.

(3) The term ''search'' includes all time spent looking, both manually and electronically, for material that is responsive to a request. Search also includes a page-by-page or line-by-line identification (if necessary) of material in the record to determine if it, or portions thereof are responsive to the request. Components should ensure that searches are done in the most efficient and least expensive manner so as to minimize costs for both the Component and the requester. For example, Components should not engage in line-by-line searches when duplicating an entire document known to contain responsive information would prove to be the less expensive and quicker method of complying with the request. Time spent reviewing documents in order to determine whether to apply one or more of the statutory exemptions is not search time, but review time. See paragraph (b)(5) of this section, for the definition of review, and paragraph (c)(5) of this section and § 286.29(b)(2), for information pertaining to computer searches.

(4) The term ''duplication'' refers to the process of making a copy of a document in response to a FOIA request. Such copies can take the form of paper copy, microfiche, audiovisual, or machine readable documentation (e.g., magnetic tape or disc), among others. Every effort will be made to ensure that the copy provided is in a form that is reasonably usable, the requester shall be notified that the copy provided is the best available and that the Agency's master copy shall be made available for review upon appointment. For duplication of computer tapes and audiovisual, the actual cost, including the operator's time, shall be charged. In practice, if a Component estimates that assessable duplication charges are likely to exceed $25.00, it shall notify the requester of the estimate, unless the requester has indicated in advance his or her willingness to pay fees as high as those anticipated. Such a notice shall offer a requester the opportunity to confer with Component personnel with the object of reformulating the request to meet his or her needs at a lower cost.

(5) The term ''review'' refers to the process of examining documents located in response to a FOIA request to determine whether one or more of the statutory exemptions permit withholding. It also includes processing the documents for disclosure, such as excising them for release. Review does not include the time spent resolving general legal or policy issues regarding the application of exemptions. It should be noted that charges for commercial requesters may be assessed only for the initial review. Components may not charge for reviews required at the administrative appeal level of an exemption already applied. However, records or portions of records withheld in full under an exemption that is subsequently determined not to apply may be reviewed again to determine the applicability of other exemptions not previously considered. The costs for such a subsequent review would be properly assessable.

(c) *Fee restrictions.* (1) No fees may be charged by any DoD Component if the costs of routine collection and processing of the fee are likely to equal or exceed the amount of the fee. With the exception of requesters seeking documents for a commercial use, Components shall provide the first two hours of search time, and the first one hundred pages of duplication without charge. For example, for a request (other than one from a commercial requester) that involved two hours and ten minutes of search time, and resulted in one hundred and five pages of documents, a Component would determine the cost of only ten minutes of search time, and only five pages of reproduction. If this processing cost was equal to, or less than, the cost to the Component for billing the requester and processing the fee collected, no charges would result.

(2) Requesters receiving the first two hours of search and the first one hundred pages of duplication without charge are entitled to such only once per request. Consequently, if a Component, after completing its portion of a request, finds it necessary to refer the request to a subordinate office, another DoD Component, or another Federal Agency to action their portion of the request, the referring Component shall inform the recipient of the referral of the expended amount of search time and duplication cost to date.

(3) The elements to be considered in determining the ''cost of collecting a fee'' are the administrative costs to the Component of receiving and recording a remittance, and processing the fee for deposit in the Department of Treasury's special account. The cost to the

[11] See footnote 1 to § 286.1(a).

Department of Treasury to handle such remittance is negligible and shall not be considered in Components' determinations.

(4) For the purposes of these restrictions, the word ''pages'' refers to paper copies of a standard size, which will normally be 8½″ x 11″ or 11″ x 14″. Thus, requesters would not be entitled to 100 microfiche or 100 computer disks, for example. A microfiche containing the equivalent of 100 pages or 100 pages of computer printout however, might meet the terms of the restriction.

(5) In the case of computer searches, the first two free hours will be determined against the salary scale of the individual operating the computer for the purposes of the search. As an example, when the direct costs of the computer central processing unit, input-output devices, and memory capacity equal $24.00 (two hours of equivalent search at the clerical level), amounts of computer costs in excess of that amount are chargeable as computer search time. In the event the direct operating cost of the hardware configuration cannot be determined, computer search shall be based on the salary scale of the operator executing the computer search. See § 286.29, this subpart, for further details regarding fees for computer searches.

(d) *Fee waivers.* (1) Documents shall be furnished without charge, or at a charge reduced below fees assessed to the categories of requesters in paragraph (e) of this section when the Component determines that waiver or reduction of the fees is in the public interest because furnishing the information is likely to contribute significantly to public understanding of the operations or activities of the Department of Defense and is not primarily in the commercial interest of the requester.

(2) When assessable costs for a FOIA request total $15.00 or less, fees shall be waived automatically for all requesters, regardless of category.

(3) Decisions to waive or reduce fees that exceed the automatic waiver threshold shall be made on a case-by-case basis, consistent with the following factors:

(i) Disclosure of the information ''is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the Government.''

(A) *The subject of the request.* Components should analyze whether the subject matter of the request involves issues that will significantly contribute to the public understanding of the operations or activities of the Department of Defense. Requests for records in the possession of the Department of Defense which were originated by non-government organizations and are sought for their intrinsic content, rather than informative value, will likely not contribute to public understanding of the operations or activities of the Department of Defense. An example of such records might be press clippings, magazine articles, or records forwarding a particular opinion or concern from a member of the public regarding a DoD activity. Similarly, disclosures of records of considerable age may or may not bear directly on the current activities of the Department of Defense; however, the age of a particular record shall not be the sole criteria for denying relative significance under this factor. It is possible to envisage an informative issue concerning the current activities of the Department of Defense, based upon historical documentation. Requests of this nature must be closely reviewed consistent with the requester's stated purpose for desiring the records and the potential for public understanding of the operations and activities of the Department of Defense.

(B) *The informative value of the information to be disclosed.* This factor requires a close analysis of the substantive contents of a record, or portion of the record, to determinate whether disclosure is meaningful, and shall inform the public on the operations or activities of the Department of Defense. While the subject of a request may contain information that concerns operations or activities of the Department of Defense, it may not always hold great potential for contributing to a meaningful understanding of these operations or activities. An example of such would be a previously released record that has been heavily redacted, the balance of which may contain only random words, fragmented sentences, or paragraph headings. A determination as to whether a record in this situation will contribute to the public understanding of the operations or activities of the Department of Defense must be approached with caution, and carefully weighed against the arguments offered by the requester. Another example is information already known to be in the public domain. Disclosure of duplicative, or nearly identical information already existing in the public domain may add no meaningful new information concerning the operations and activities of the Department of Defense.

(C) *The contribution to an understanding of the subject by the general public likely to result from disclosure.* The key element in determining the applicability of this factor is whether disclosure will inform, or have the potential to inform the public, rather than simply the individual requester or small segment of interested persons. The identity of the requester is essential in this situation in order to determine whether such requester has the capability and intention to disseminate the information to the public. Mere assertions of plans to author a book, researching a particular subject, doing doctoral dissertation work, or indigence are insufficient without demonstrating the capacity to further disclose the information in a manner that will be informative to the general public. Requesters should be asked to describe their qualifications, the nature of their research, the purpose of the requested information, and their intended means of dissemination to the public.

(D) *The significance of the contribution to public understanding.* In applying this factor, Components must differentiate the relative significance or impact of the disclosure against the current level of public knowledge, or understanding which exists before the disclosure. In other words, will disclosure on a current subject of wide public interest be unique in contributing unknown facts, thereby enhancing public knowledge, or will it basically duplicate what is already known by the general public? A decision regarding significance requires objective judgment, rather than subjective determination, and must be applied carefully to determine whether disclosure will likely lead to a significant understanding of the issue. Components shall not make value judgments as to whether the information is important enough to be made public.

(ii) Disclosure of the information ''is not primarily in the commercial interest of the requester.''

(A) *The existence and magnitude of a commercial interest.* If the request is determined to be of a commercial interest, Components should address the magnitude of that interest to determine if the requester's commercial interest is primary, as opposed to any secondary personal or non-commercial interest. In addition to profitmaking organizations, individual persons or other organizations may have a commercial interest in obtaining certain records. Where it is difficult to determine whether the requester is of a commercial nature, Components may draw inference from the requester's identity and circumstances of the request. In such situations, the provisions of paragraph (e) of this section apply. Components are

reminded that in order to apply the commercial standards of the FOIA, the requester's commercial benefit must clearly override any personal or non-profit interest.

(B) *The primary interest in disclosure.* Once a requester's commercial interest has been determined, Components should then determine if the disclosure would be primarily in that interest. This requires a balancing test between the commercial interest of the request against any public benefit to be derived as a result of that disclosure. Where the public interest is served above and beyond that of the requester's commercial interest, a waiver or reduction of fees would be appropriate. Conversely, even if a significant public interest exists, and the relative commercial interest of the requester is determined to be greater than the public interest, then a waiver or reduction of fees would be inappropriate. As examples, news media organizations have a commercial interest as business organizations; however, their inherent role of disseminating news to the general public can ordinarily be presumed to be of a primary interest. Therefore, any commercial interest becomes secondary to the primary interest in serving the public. Similarly, scholars writing books or engaged in other forms of academic research, may recognize a commercial benefit, either directly, or indirectly (through the institution they represent); however, normally such pursuits are primarily undertaken for educational purposes, and the application of a fee charge would be inappropriate. Conversely, data brokers or others who merely compile government information for marketing can normally be presumed to have an interest primarily of a commercial nature.

(4) Components are reminded that the factors and examples used in this subsection are not all inclusive. Each fee decision must be considered on a case-by-case basis and upon the merits of the information provided in each request. When the element of doubt as to whether to charge or waive the fee cannot be clearly resolved, Components should rule in favor of the requester.

(5) In addition, the following circumstances describe situations where waiver or reduction of fees are most likely to be warranted:

(i) A record is voluntarily created to prevent an otherwise burdensome effort to provide voluminous amounts of available records, including additional information not requested.

(ii) A previous denial of records is reversed in total, or in part, and the assessable costs are not substantial (e.g. $15.00–$30.00).

(e) *Fee assessment.* (1) Fees may not be used to discourage requesters, and to this end, FOIA fees are limited to standard charges for direct document search, review (in the case of commercial requesters) and duplication.

(2) In order to be as responsive as possible to FOIA requests while minimizing unwarranted costs to the taxpayer, Components shall adhere to the following procedures:

(i) Analyze each request to determine the category of the requester. If the Component determination regarding the category of the requester is different than that claimed by the requester, the Component shall:

(A) Notify the requester to provide additional justification to warrant the category claimed, and that a search for responsive records will not be initiated until agreement has been attained relative to the category of the requester. Absent further category justification from the requester, and within a reasonable period of time (i.e., 30 calendar days), the Component shall render a final category determination, and notify the requester of such determination, to include normal administrative appeal rights of the determination.

(B) Advise the requester that, notwithstanding any appeal, a search for responsive records will not be initiated until the requester indicates a willingness to pay assessable costs appropriate for the category determined by the Component.

(ii) Requesters should submit a fee declaration appropriate for the following categories.

(A) *Commercial.* Requesters should indicate a willingness to pay all search, review and duplication costs.

(B) *Educational or noncommercial scientific institution or news media.* Requesters should indicate a willingness to pay duplication charges in excess of 100 pages if more than 100 pages of records are desired.

(C) *All others.* Requesters should indicate a willingness to pay assessable search and duplication costs if more than two hours of search effort or 100 pages of records are desired.

(iii) If the above conditions are not met, then the request need not be processed and the requester shall be so informed.

(iv) In the situations described by paragraphs (e)(2)(i) and (e)(2)(ii) of this section, Components must be prepared to provide an estimate of assessable fees if desired by the requester. While it is recognized that search situations will vary among Components, and that an estimate is often difficult to obtain prior to an actual search, requesters who desire estimates are entitled to such before committing to a willingness to pay. Should Components' actual costs exceed the amount of the estimate or the amount agreed to by the requester, the amount in excess of the estimate or the requester's agreed amount shall not be charged without the requester's agreement.

(v) No DoD Component may require advance payment of any fee; i.e., payment before work is commenced or continued on a request, unless the requester has previously failed to pay fees in a timely fashion, or the agency has determined that the fee will exceed $250.00. As used in this sense, a timely fashion is 30 calendar days from the date of billing (the fees have been assessed in writing) by the Component.

(vi) Where a Component estimates or determines that allowable charges that a requester may be required to pay are likely to exceed $250.00, the Component shall notify the requester of the likely cost and obtain satisfactory assurance of full payment where the requester has a history of prompt payments, or require an advance payment of an amount up to the full estimated charges in the case of requesters with no history of payment.

(vii) Where a requester has previously failed to pay a fee charged in a timely fashion (i.e., within 30 calendar days from the date of the billing), the Component may require the requester to pay the full amount owed, plus any applicable interest, or demonstrate that he or she has paid the fee, and to make an advance payment of the full amount of the estimated fee before the Component begins to process a new or pending request from the requester. Interest will be at the rate prescribed in 31 U.S.C. 3717, and confirmed with respective Finance and Accounting Offices.

(viii) After all work is completed on a request, and the documents are ready for release, Components may request payment before forwarding the documents, particularly for those requesters who have no payment history, or for those requesters who have failed previously to pay a fee in a timely fashion (i.e., within 30 calendar days from the date of the billing). In the case of the latter, the previsions of paragraph (e)(2)(vii) of this section, apply.

(ix) When Components act under paragraphs (e)(2)(i) through (e)(2)(vii) of this section, the administrative time limits of the FOIA will begin only after the Component has received a willingness to pay fees and satisfaction

as to category determination, or fee payments (if appropriate).

(x) Components may charge for time spent searching for records, even if that search fails to locate records responsive to the request. Components may also charge search and review (in the case of commercial requesters) time in records located are determined to be exempt from disclosure. In practice, if the Components estimates that search charges are likely to exceed $25.00, it shall notify the requester of the estimated amount of fees, unless the requester has indicated in advance his or her willingness to pay fees as high as those anticipated. Such a notice shall offer the requester the opportunity to confer with Component personnel with the object or reformulating the request to meet his or her needs at a lower cost.

(3) *Commercial requesters.* Fees shall be limited to reasonable standard charges for document search, review and duplication when records are requested for commerical use. Requesters must reasonably describe the records sought. (See § 286.4(h)).

(i) The term ''commercial use'' request refers to a request from, or on behalf of one who seeks information for a use or purpose that furthers the commercial, trade, or profit interest of the requester or the person on whose behalf the request is made. In determining whether a requester properly belongs in this category. Components must determine the use to which a requester will put the documents requested. Moreover, where a Component has reasonable cause to doubt the use to which a requester will put the records sought, or where that use is not clear from the request itself, Components should seek additional clarification before assigning the request to a specific category.

(ii) When Components receive a request for documents for commercial use, they should assess charges which recover the full direct costs of searching for, reviewing for release, and duplicating the records sought. Commerical requesters (unlike other requesters) are not entitled to two hours of free search time, nor 100 free pages of reproduction of documents. Moreover, commerical requesters are not normally entitled to a waiver or reduction of fees based upon an assertion that disclosure would be in the public interest. However, because use is the exclusive determining criteria, it is possible to envision a commerical enterprise making a request that is not for commercial use. It is also possible that a non-profit organization could make a request that is for commerical use. Such situations must be addressed on a case-by-case basis.

(4) *Educational institution requesters.* Fees shall be limited to only reasonable standard charges for document duplication (excluding charges for the first 100 pages) when the request is made by an educational institution whose purpose is scholarly research. Requesters must reasonably describe the records sought (see § 286.4(h).). The term ''educational institution'' refers to a pre-school, a public or private elementary or secondary school, an institution of graduate high education, an institution of undergraduate higher education, an institution of professional education, and an institution of vocational education, which operates a program or programs of scholarly research. Fees shall be waived or reduced in the public interest if the criteria of paragraph (d) of this section, have been met.

(5) *Non-commercial scientific institution requesters.* Fees shall be limited to only reasonable standard charges for document duplication (excluding charges for the first 100 pages) when the request is made by a non-commerical scientific institution whose purpose is scientific research. Requesters must reasonbly describe the records sought (see § 286.4(h)). The term ''non-commercial scientific institution'' refers to an institution that is not operated on a ''commercial'' basis as defined in paragraph (e)(3) of this section, and that is operated solely for the purpose of conducting scientific research, the results of which are not intended to promote any particular product or industry. Fees shall be waived or reduced in the public interest if the criteria of paragraph (d) of this section, have beem met.

(6) Components shall provide documents to requesters in paragraphs (e)(4) and (e)(5) of this section for the cost of duplication alone, excluding charges for the first 100 pages. To be eligible for inclusion in these categories, requesters must show that the request is being made under the auspices of a qualifying institution and that the records are not sought for commercial use, but in furtherance of scholarly (from an educational institution) or scientific (from a non-commercial scientific institution) research.

(7) *Representatives of the news media.* Fees shall be limited to only reasonable standard charges for document duplication (excluding charges for the first 100 pages) when the request is made by a representative of the news media. Requesters must reasonably describe the records sought (see § 286.4(h)). Fees shall be waived or reduced if the criteria of paragraph (d) of this section, have been met.

(i) The term ''representative of the news media'' refers to any person actively gathering news for an entity that is organized and operated to publish or broadcast news to the public. The term ''news'' means information that is about current events or that would be of current interest to the public. Examples of news media entities include television or radio stations broadcasting to the public at large, and publishers of periodicals (but only in those instances when they can qualify as disseminators of ''news'') who make their products available for purchase or subscription by the general public. These examples are not meant to be all-inclusive. Moreover, as traditional methods of news delivery evolve (e.g., electronic dissemination of newspapers through telecommunications services), such alternative media would be included in this category. In the case of ''freelance'' journalists they may be regarded as working for a news organization if they can demonstrate a solid basis for expecting publication through that organization, even though not actually employed by it. A publication contract would be the clearest proof, but Components may also look to the past publication record of a requester in making this determination.

(ii) To be eligible for inclusion in this category, a requester must meet the criteria in paragraph (e)(7)(i) of this section, and his or her request must not be made for commercial use. A request for records supporting the news dissemination function of the requester shall not be considered to be a request that is for a commercial use. For example, a document request by a newspaper for records relating to the investigation of a defendant in a current criminal trial of public interest could be presumed to be a request from an entity eligible for inclusion in this category, and entitled to records at the cost of reproduction alone (excluding charges for the first 100 pages).

(iii) ''Representative of the news media'' does not include private libraries, private repositories of Government records, information vendors, data brokers or similar marketers of information whether to industries and businesses, or other entities.

(8) *All other requesters.* Components shall charge requesters who do not fit into any of the categories described in paragraphs (e)(3), (e)(4), (e)(5), or (e)(7) of this section, fees which recover the full direct cost of searching for and duplicating records, except that the first two hours of search time and the first 100 pages of duplication shall be furnished without charge. Requesters

must reasonably describe the records sought (see § 286.4(h)). Requests from subjects about themselves will continue to be treated under the fee provisions of the Privacy Act of 1974, which permit fees only for duplication. Components are reminded that this category of requester may also be eligible for a waiver or reduction of fees if disclosure of the information is in the public interest as defined under paragraph (d)(1) of this section. (See also paragraph (e)(3)(ii) of this section.)

(f) *Aggregating requests.* Except for requests that are for a commercial use, a Component may not charge for the first two hours of search time or for the first 100 pages of reproduction. However, a requester may not file multiple requests at the same time, each seeking portions of a document of documents, solely in order to avoid payment of fees. When a Component reasonably believes that a requester or, on rare occasions, a group of requesters acting on concert, is attempting to break a request down into a series of requests for the purpose of avoiding the assessment of fees, the Agency may aggregate any such requests and charge accordingly. One element to be considered in determining whether a belief would be reasonable is the time period in which the requests have occurred. For example, it would be reasonable to presume that multiple requests of this type made within a 30 day period had been made to avoid fees. For requests made over a longer period however, such a presumption becomes harder to sustain and Components should have a solid basis for determining that aggregation is warranted in such cases. Components are cautioned that before aggregating requests from more than one requester, they must have a concrete basis on which to conclude that the requesters are acting in concert and are acting specifically to avoid payment of fees. In no case may Components aggregate multiple requests on unrelated subjects from one requester.

(g) *Effect of the Debt Collection Act of 1982 (5 U.S.C. 5515 note).* The Debt Collection Act of 1982 (5 U.S.C. 5515 note) provides for a minimum annual rate of interest to be charged on overdue debts owed the Federal Government. Components may levy this interest penalty for any fees that remain outstanding 30 calendar days from the date of billing (the first demand notice) to the requester of the amount owed. The interest rate shall be as prescribed in 31 U.S.C. 3717. Components should verify the current interest rate with respective Finance and Accounting Offices. After one demand letter has been sent, and 30 calendar days have lapsed with no payment, Components may submit the debt to respective Finance and Accounting Offices for collection pursuant to 5 U.S.C. 5515 note.

(h) *Computation of fees.* The fee schedule in this subpart shall be used to compute the search, review (in the case of commercial requesters) and duplication costs associated with processing a given FOIA request. Costs shall be computed on time actually spent. Neither time-based nor dollar-based minimum charges for search, review and duplication are authorized. The appropriate fee category of the requester shall be applied before computing fees.

(i) *Refunds.* In the event that a Component discovers that it has overcharged a requester or a requester has overpaid, the Component shall promptly refund the charge to the requester by reimbursement methods that are agreeable to the requester and the Component.

§ 286.29 Collection of fees and fee rates.

(a) *Collection of fees.* Collection of fees will be made at the time of providing the documents to the requester or recipient when the requester specifically states that the costs involved shall be acceptable or acceptable up to a specified limit that covers the anticipated costs. Collection of fees may not be made in advance unless the requester has failed to pay previously assessed fees within 30 calendar days from the date of the billing by the DoD Component, or the Component has determined that the fee will be in excess of $250 (see § 286.28(e)).

(b) *Search time*—(1) *Manual search.*

Type	Grade	Hourly rate
Clerical	E9/GS8 and below	$12
Professional.	O1–O6/GS9–GS15	25
Executive	O7/GS16/ES1 and above.	45

(2) *Computer search.* Fee assessments for computer search consists of two parts; individual time (hereafter referred to as human time), and machine time.

(i) *Human time.* Human time is all the time spent by humans performing the necessary tasks to prepare the job for a machine to execute the run command. If execution of a run requires monitoring by a human, that human time may be also assessed as computer search. The terms ''programmer/operator'' shall not be limited to the traditional programmers or operators. Rather, the terms shall be interpreted in their broadest sense to incorporate any human involved in performing the computer job (e.g. technician, administrative support, operator, programmer, database administrator, or action officer).

(ii) *Machine time.* Machine time involves only direct costs of the Central Processing Unit (CPU), input/output devices, and memory capacity used in the actual computer configuration. Only this CPU rate shall be charged. No other machine related costs shall be charged. In situations where the capability does not exist to calculate CPU time, no machine costs can be passed on to the requester. When CPU calculations are not available, only human time costs shall be assessed to requesters. Should DoD Components lease computers, the services charged by the lessor shall not be passed to the requester under the FOIA.

(c) *Duplication.*

Type	Cost per Page (cents)
Pre-Printed material.	02
Office copy	15
Microfiche	25
Computer copies (tapes, discs or printouts).	Actual cost of duplicating the tape, disc or printout (includes operator's time and cost of the medium)

(d) *Review time (in the case of commercial requesters).*

Type	Grade	Hourly rate
Clerical	E9/GS8 and below	$12
Professional.	O1–O6/GS9–GS15	25
Executive	O7/GS16/ES1 and above.	45

(e) *Audiovisual documentary materials.* Search costs are computed as for any other record. Duplication cost is the actual direct cost of reproducing the material, including the wage of the person doing the work. Audiovisual materials provided to a requester need not be in reproducible format or quality.

(f) *Other records.* Direct search and duplication cost for any record not described in this section shall be computed in the manner described for audiovisual documentary material.

(g) *Costs for special services.* Complying with requests for special services is at the discretion of the Components. Neither the FOIA, nor its fee structure cover these kinds of services. Therefore, Components may recover the costs of special services requested by the requester after agreement has been obtained in writing

from the requester to pay for one or more of the following services:

(1) Certifying that records are true copies.

(2) Sending records by special methods such as express mail, etc.

§ 286.30 Collection of fees and fee rates for technical data.

(a) *Fees for technical data.* Technical data, other than technical data that discloses critical technology with military or space application, if required to be released under the FOIA, shall be released after the person requesting such technical data pays all reasonable costs attributed to search, duplication and review of the records to be released. Technical data, as used in this section, means recorded information, regardless of the form or method of the recording of a scientific or technical nature (including computer software documentation). This term does not include computer software, or data incidental to contract administration, such as financial and/or management information. DoD Components shall retain the amounts received by such a release, and it shall be merged with and available for the same purpose and the same time period as the appropriation from which the costs were incurred in complying with request. All reasonable costs as used in this sense are the full costs to the Federal Government of rendering the service, or fair market value of the service, whichever is higher. Fair market value shall be determined in accordance with commercial rates in the local geographical area. In the absence of a known market value, charges shall be based on recovery of full costs to the Federal Government. The full costs shall include all direct and indirect costs to conduct the search and to duplicate the records responsive to the request. This cost is to be differentiated from the direct costs allowable under § 286.29 of this subpart for other types of information released under the FOIA.

(b) *Waiver.* Components shall waive the payment of costs required in paragraph (a) of this section, which are greater than the costs that would be required for release of this same information under § 286.29 of this subpart if:

(1) The request is made by a citizen of the United States or a United States corporation, and such citizen or corporation certifies that the technical data requested is required to enable it to submit an offer, or determine whether it is capable of submitting an offer to provide the product to which the technical data relates to the United States or a contractor with the United States. However, Components may require the citizen or corporation to pay a deposit in an amount equal to not more than the cost of complying with the request, which will be refunded upon submission of an offer by the citizen or corporation;

(2) The release of technical data is requested in order to comply with the terms of an international agreement; or

(3) The Component determines in accordance with § 286.28(d)(1), that such a waiver is in the interest of the United States.

(c) *Fee rates*—(1) *Search time*—(i) *Manual search: clerical.*

Type	Grade	Hourly rate
Clerical	E9/GS8 and below ...	$13.25
(Minimum Charge).	.....	8.30

(ii) *Manual search: professional and executive* (To be established at actual hourly rate prior to search. A minimum charge will be established at ½ hourly rates).

(2) Computer search is based on the total cost of the central processing unit, input-output devices, and memory capacity of the actual computer configuration. The wage (based upon the scale in paragraph (c)(1)(i) of this section) for the computer operator and/or programmer determining how to conduct, and subsequently executing the search will be recorded as part of the computer search. See § 286.29(b)(2) for further details regarding computer search.

(3) *Duplication.*

Type	Cost
Aerial photograph, maps, specifications, permits, charts, blueprints, and other technical engineering documents	$2.50
Engineering data (microfilm):	
(i) Aperture cards.	
(A) Silver duplicate negative, per card	.75
When key punched and verified, per card	.85
(B) Diazo duplicate negative, per card	.65
When key punched and verified, per card	.75
(ii) 35mm roll film, per frame	.50
(iii) 16mm roll film, per frame	.45
(iv) Paper prints (engineering drawings), each	1.50
(v) Paper reprints of microfilm indices, each	.10

(4) *Review time*—(i) *Clerical.*

Type	Grade	Hourly rate ($)
Clerical	E9/GS8 and below ...	13.25
(Minimum Charge).	.....	8.30

(ii) *Professional and executive* (To be established at actual hourly rate prior to review. A minimum charge will be established at ½ hourly rates).

(d) *Other technical data records.* Charges for any additional services not specifically provided in paragraph (c) of this section, consistent with Volume 11A of DoD 7000.14–R, shall be made by Components at the following rates:

(1) Minimum charge for office copy (up to six images)	$3.50
(2) Each additional image	.10
(3) Each typewritten page	3.50
(4) Certification and validation with seal, each	5.20
(5) Hand-drawn plots and sketches, each hour or fraction thereof	12.00

Subpart G—Reports

§ 286.33 Reports control.

(a) *General.* (1) The Annual Freedom of Information Act Report is mandated by the statute and reported on a fiscal year basis. Due to the magnitude of the requested statistics and the need to ensure accuracy of reporting, DoD Components shall track this data as requests are processed. This will also facilitate a quick and accurate compilation of statistics. DoD Components shall forward their report to the Directorate for Freedom of Information and Security Review no later than November 30 following the fiscal year's close. It may be submitted electronically and via hard copy accompanied by a computer diskette. In turn, DoD will produce a consolidated report for submission to the Attorney General, and ensure that a copy of the DoD consolidated report is placed on the Internet for public access.

(2) Existing DoD standards and registered data elements are to be utilized to the greatest extent possible in accordance with the provisions of DoD Manual 8320.1–M,[12] ''Data Administration Procedures.''

(3) The reporting requirement outlined in this subpart is assigned Report Control Symbol DD–DA&M(A)1365, Freedom of Information Act Report to Congress.

(b) *Annual Report.* The current edition of DD Form 2564 shall be used to submit component input. DD Form 2564 is available on the Internet at http://www.defenselink.mil/pubs/ under Regulations and Forms. Instructions for completion follow:

[12] See footnote 1 to § 286.1(a).

(1) *Item 1: Initial request determinations.* Please note that initial Privacy Act requests which are also processed as initial FOIA requests are reported here. They will also be reported as ''Privacy Act requests'' on the Annual Privacy Act Report. See § 286.4(m), Relationship between the FOIA and the Privacy Act (PA).

(i) *Total requests processed.* Enter the total number of initial FOIA requests responded to (completed) during the fiscal year. Since more than one action frequently is taken on a completed case, total actions (see (b)(1)(vi) of this section) the sum of Items (b)(1)(ii) through (b)(1)(v) of this section, may exceed total requests processed (See appendix E of this part for form layout.)

(ii) *Granted in full.* Enter the total number of initial FOIA requests responded to that were granted in full during the fiscal year. (This may include requests granted by your office, yet still requiring action by another office.)

(iii) *Denied in part.* Enter the total number of initial FOIA requests responded to and denied in part based on one or more of the FOIA exemptions. (Do not report ''other reason responses'' as a partial denial here, unless a FOIA exemption is used also.)

(iv) *Denied in full.* Enter the total number of initial FOIA requests responded to and denied in full based on one or more of the FOIA exemptions. (Do not report ''other reason responses'' as denials here, unless a FOIA exemption is used also.)

(v) *''Other reason'' responses.* Enter the total number of initial FOIA requests in which you were unable to provide all or part of the requested information based on an ''other reason'' response. Paragraph (b)(2)(ii) of this section explains the nine possible ''other reasons.''

(vi) *Total actions.* Enter the total number of FOIA actions taken during the fiscal year. This number will be the sum of (b)(1)(ii) through (b)(1)(v) of this section. Total actions must be equal to or greater than the number of total requests processed (paragraph (b)(1)(i) of this section).

(2) *Item 2: Initial request exemptions and other reasons*—(i) *Exemptions invoked on initial request determinations.* Enter the number of times an exemption was claimed for each request that was denied in full or in part. Since more than one exemption may be claimed when responding to a single request, this number will be equal to or greater than the sum of (b)(1)(iii) and (b)(1)(iv) of this section. The (b)(7) exemption is reported by subcategories identified in paragraphs (b)(2)(i)(A) through (b)(2)(i)(F) of this section:

(A) Interfere with enforcement;
(B) Fair trial right;
(C) Invasion of privacy;
(D) Protect confidential source;
(E) Disclose techniques; and
(F) Endanger life or safety.

(ii) *''Other reasons'' cited on initial determinations.* Identify the ''other reason'' response cited when responding to a FOIA request and enter the number of times each was claimed.

(A) *No records.* Enter the number of times a reasonable search of files failed to identify records responsive to subject request.

(B) *Referrals.* Enter the number of times a request was referred to another DoD Component or Federal Agency for action.

(C) *Request withdrawn.* Enter the number of times a request and/or appeal was withdrawn by a requester. (For appeals, report number in Item 4b on the report form. (See appendix E of this part.))

(D) *Fee-related reason.* Requester is unwilling to pay the fees associated with a request; the requester is past due in the payment of fees from a previous FOIA request; or the requester disagrees with a fee estimate.

(E) *Records not reasonably described.* Enter the number of times a FOIA request could not be acted upon since the record had not been described with sufficient particularity to enable the DoD Component to locate it by conducting a reasonable search.

(F) *Not a proper FOIA request for some other reason.* Enter the number of times the requester has failed unreasonably to comply with procedural requirements, other than fee-related (described in paragraph (b)(2)(ii)(D) of this section), imposed by this part or a DoD Component's supplementing regulation.

(G) *Not an agency record.* Enter the number of times a requester was provided a response indicating the requested information was not a record within the meaning of the FOIA and this part.

(H) *Duplicate request.* Record number of duplicate requests closed for that reason (e.g., request for the same information by the same requester). This includes identical requests received via different means (e.g., electronic mail, facsimile, mail, courier) at the same or different times.

(I) *Other (specify).* Any other reason a requester does not comply with published rules, other than those reasons outlined in paragraphs (b)(2)(ii)(A) through (b)(2)(ii)(H) of this section.

(J) *Total.* Enter the sum of paragraphs (b)(2)(ii)(A) through (b)(2)(ii)(I) of this section in the block provided on the form. This number will be equal to or greater than the number in paragraph (b)(1)(v) of this section since more than one reason may be claimed for each ''other reason'' response.

(iii) *(b)(3) statutes invoked on initial determinations.* Identify the number of times you have used a specific statute to support each (b)(3) exemption. List the statutes used to support each (b)(3) exemption; the number of instances in which the statute was cited; note whether or not the statute has been upheld in a court hearing; and provide a concise description of the material withheld in each individual case by the statute's use. Ensure you cite the specific sections of the acts invoked. The total number of instances reported will be equal to or greater than the total number of (b)(3) exemptions listed in Item 2a on the report form.

(3) *Item 3: Appeal determinations.* Please note that Privacy Act appeals which are also processed as FOIA appeals are reported here. They will also be reported as ''Privacy Act appeals'' on the Annual Privacy Act Report. See § 286.4(m), Relationship Between the FOIA and the Privacy Act (PA).

(i) *Total appeal responses.* Enter the total number of FOIA appeals responded to (completed) during the fiscal year.

(ii) *Granted in full.* Enter the total number of FOIA appeals responded to and granted in full during the year.

(iii) *Denied in part.* Enter the total number of FOIA appeals responded to and denied in part based on one or more of the FOIA exemptions. (Do not report ''other reason responses'' as a partial denial here, unless a FOIA exemption is used also.)

(iv) *Denied in Full.* Enter the total number of FOIA appeals responded to and denied in full based on one or more of the FOIA exemptions. (Do not report ''other reason responses'' as denials here, unless a FOIA exemption is used also.)

(v) *''Other reason'' responses.* Enter the total number of FOIA appeals in which you were unable to provide the requested information based on an ''other reason'' response (as outlined in ''other reasons'' in paragraph (b)(2)(ii) of this section).

(vi) *Total actions.* Enter the total number of FOIA appeal actions taken during the fiscal year. This number will be the sum of paragraphs (b)(3)(ii) through (b)(3)(v) of this section, and should be equal to or greater than the number of total appeal responses, paragraph (b)(3)(i) of this section.

(4) *Item 4: Appeal exemptions and other reasons*—(i) *Exemptions invoked on appeal determinations.* Enter the number of times an exemption was claimed for each appeal that was denied in full or in part. Since more than one exemption may be claimed when responding to a single request, this number will be equal to or greater than the sum of paragraphs (b)(3)(iii) and (b)(3)(iv) of this section. Note that the (b)(7) exemption is reported by subcategories identified in paragraphs (b)(4)(i)(A) through (b)(4)(i)(F) of this section:

(A) Interfere with enforcement;

(B) Fair trial right;

(C) Invasion of privacy;

(D) Protect confidential source;

(E) Disclose techniques; and

(F) Endanger life or safety.

(ii) *''Other reasons'' cited on appeal determinations.* Identify the ''other reason'' response cited when responding to a FOIA appeal and enter the number of times each was claimed. See paragraph (b)(2)(ii) of this section for description of ''other reasons.'' This number may be equal to or possibly greater than the number in paragraph (b)(3)(v) of this section since more than one reason may be claimed for each ''other reason'' response.

(iii) *(b)(3) statutes invoked on appeal determinations.* Identify the number of times a specific statute has been used to support each (b)(3) exemption identified in item 4a on the report form (Appendix E of this part). List the statutes used to support each (b)(3) exemption; the number of instances in which the statute was cited; note whether or not the statute has been upheld in a court hearing; and provide a concise description of the material withheld in each individual case by the statute's use. Ensure citation to the specific sections of the statute invoked. The total number of instances reported will be equal to or greater than the total number of (b)(3) exemptions listed in Item 4a on the report form.

(5) *Item 5: Number and median age of initial cases pending:* (i) Total initial cases pending:

(ii) *Beginning and ending report period:* Midnight, 2400 hours, September 30 of the Preceding Year—OR—0001 hours, October 1 is the beginning of the report period. Midnight, 2400 hours, is the close of the reporting period.

(iii) *Median age of initial requests pending:* Report the median age in days (including holidays and weekends) of initial requests pending.

(iv) *Examples of median calculation.* (A) If given five cases aged 10, 25, 35, 65, and 100 days from date of receipt as of the previous September 30th, the total requests pending is five (5). The median age (days) of open requests is the middle, not average value, in this set of numbers (10, 25, 35, 65, and 100), 35 (the middle value in the set).

(B) If given six pending cases, aged 10, 20, 30, 50, 120, and 200 days from date of receipt, as of the previous September 30th, the total requests pending is six (6). The median age (days) of open requests 40 days (the mean [average] of the two middle numbers in the set, in this case the average of middle values 30 and 50).

(v) *Accuracy of calculations.* Components must ensure the accuracy of calculations. As backup, the raw data used to perform calculations should be recorded and preserved. This will enable recalculation of median (and mean values) as necessary. Components may require subordinate elements to forward raw data, as deemed necessary and appropriate.

(vi) *Average.* If a Component believes that ''average'' (mean) processing time is a better measure of performance, then report ''averages'' (means) as well as median values (e.g., with data reflected and plainly labeled on plain bond as an attachment to the report). However, ''average'' (mean) values will not be included in the consolidated DoD report unless all Components report it.

(6) *Item 6: Number of initial requests received during the fiscal year.* Enter the total number of initial FOIA requests received during the reporting period (fiscal year being reported).

(7) *Item 7: Types of requests processed and median age.* Information is reported for three types of initial requests completed during the reporting period: Simple; Complex; and Expedited Processing. The following items of information are reported for these requests:

(i) *Total number of initial requests.* Enter the total number of initial requests processed [completed] during the reporting period (fiscal year) by type (Simple, Complex and Expedited Processing) in the appropriate row on the form.

(ii) *Median age (days).* Enter the median number of days [calendar days including holidays and weekends] required to process each type of case (Simple, Complex and Expedited Processing) during the period in the appropriate row on the form.

(iii) *Example.* Given seven initial requests, multitrack—simple completed during the fiscal year, aged 10, 25, 35, 65, 79, 90 and 400 days when completed. The total number of requests completed was seven (7). The median age (days) of completed requests is 65, the middle value in the set.

(8) *Item 8: Fees collected from the public.* Enter the total amount of fees collected from the public during the fiscal year. This includes search, review and reproduction costs only.

(9) *Item 9: FOIA program costs*—(i) *Number of full time staff.* Enter the number of personnel your agency had dedicated to working FOIA full time during the fiscal year. This will be expressed in work-years (manyears). For example: ''5.1, 3.2, 1.0, 6.5, et al.'' A sample calculation follows:

Employee	Number (months worked)	Work-years	Note
SMITH, Jane	6	0.5	Hired full time at middle of fiscal year.
PUBLIC, John Q	4	.34	Dedicated to full time FOIA processing last quarter of fiscal year.
BROWN, Tom	12	1.0	Worked FOIA full time all fiscal year.
Total	22	1.84	

(ii) *Number of part time staff:* Enter the number of personnel your agency had dedicated to working FOIA part time during the fiscal year. This will be expressed in work-years (manyears). For example: ''5.1, 3.2, 1.0, 6.5, et al.'' A sample calculation follows:

Employee	Number (hours worked)	Work-years	Note
PUBLIC, John Q	200	.1	Amount of time devoted to part time FOIA processing before becoming full time FOIA processor in previous example.
WHITE, Sally	400	.2	Processed FOIA's part time while working as paralegal in General Counsel's Office.
PETERS, Ron	1,000	.5	Part time employee dedicated to FOIA processing.
Total: [1] 1,600/2,000			

[1] Hours (hours worked in a year) equals 0.8 work-years.

(iii) *Estimated litigation cost:* Report your best estimate of litigation costs for the FY. Include all direct and indirect expenses associated with FOIA litigation in U.S. District Courts, U.S. Circuit Courts of Appeals, and the U.S. Supreme Court.

(iv) *Total program cost:* Report the total cost of FOIA program operation within your agency. Include your litigation costs in this total. While you do not have to report detailed cost information as in the past, you should be able to explain the technique by which you derived your agency's total cost figures if the need arises.

(A) Before the close of each fiscal year, the Directorate for Freedom of Information and Security Review (DFOISR) will dispatch the latest OSD Composite Rate Chart for military personnel to DoD Components. This information may be used in computing military personnel costs.

(B) DoD Components should compute their civilian personnel costs using rates from local Office of Personnel Management (OPM) Salary Tables and shall add 16% for benefits.

(C) Data captured on DD Form 2086, Record of Freedom of Information (FOI) Processing Cost and DD Form 2086–1, Record of Freedom of Information (FOI) Processing Cost for Technical Data, shall be summarized and used in computing total costs.

(D) An overhead rate of 25% shall be added to all calculated costs for supervision, space, and administrative support.

(10) *Item 10: Authentication.* The official that approves the agency's report submission to DoD will sign and date; enter typed name and duty title; and provide both the agency's name and phone number for questions about the report.

(c) *Electronic publication.* The consolidated DoD Annual FOIA Program Report will be made available to the public in either paper or electronic format.

Subpart H—Education and Training

§ 286.36 Responsibility and purpose.

(a) *Responsibility.* The Head of each DoD Component is responsible for the establishment of educational and training programs on the provisions and requirements of this part. The educational programs should be targeted toward all members of the DoD Component, developing a general understanding and appreciation of the DoD FOIA Program; whereas, the training programs should be focused toward those personnel who are involved in the day-to-day processing of FOIA requests, and should provide a thorough understanding of the procedures outlined in this part.

(b) *Purpose.* The purpose of the educational and training programs is to promote a positive attitude among DoD personnel and raise the level of understanding and appreciation of the DoD FOIA Program, thereby improving the interaction with members of the public and improving the public trust in the DoD.

(c) *Scope and principles.* Each Component shall design its FOIA educational and training programs to fit the particular requirements of personnel dependent upon their degree of involvement in the implementation of this part. The program should be designed to accomplish the following objectives:

(1) Familiarize personnel with the requirements of the FOIA and its implementation by this part.

(2) Instruct personnel, who act in FOIA matters, concerning the provisions of this part, advising them of the legal hazards involved and the strict prohibition against arbitrary and capricious withholding of information.

(3) Provide for the procedural and legal guidance and instruction, as may be required, in the discharge of the responsibilities of initial denial and appellate authorities.

(4) Advise personnel of the penalties for noncompliance with the FOIA.

(d) *Implementation.* To ensure uniformity of interpretation, all major educational and training programs concerning the implementation of this part should be coordinated with the Director, Freedom of Information and Security Review.

(e) *Uniformity of legal interpretation.* In accordance with DoD Directive 5400.7, the DoD Office of the General Counsel shall ensure uniformity in the legal position and interpretation of the DoD FOIA Program.

Appendix A to Part 286—Combatant Commands—Processing Procedures for FOIA Appeals

AP1.1. *General*

AP1.1.1. In accordance with DoD Directive 5400.7 [1] and this part, the Combatant Commands are placed under the jurisdiction of the Office of the Secretary of Defense, instead of the administering Military Department, only for the purpose of administering the Freedom of Information Act (FOIA) Program. This policy represents an exception to the policies in DoD Directive 5100.3.[2]

AP1.1.2. The policy change in AP1.1.1. of this appendix authorizes and requires the Combatant Commands to process FOIA requests in accordance with DoD Directive 5400.7 and DoD Instruction 5400.10 [3] and to forward directly to the Director, Freedom of Information and Security Review, all correspondence associated with the appeal of an initial denial for information under the provisions of the FOIA.

AP1.2. *Responsibilities of Commands*

Combatant Commanders in Chief shall:

AP1.2.1. Designate the officials authorized to deny initial FOIA requests for records.

AP1.2.2. Designate an office as the point-of-contact for FOIA matters.

AP1.2.3. Refer FOIA cases to the Director, Freedom of Information and Security Review, for review and evaluation when the issues raised are of unusual significance, precedent setting, or otherwise require special attention or guidance.

[1] Copy may be viewed via internet at http://web7.whs.osd.mil/corres.htm.

[2] See footnote 1 to paragraph AP1.1.1. of this appendix.

[3] See footnote 1 to paragraph AP1.1.1. of this appendix.

AP1.2.4. Consult with other OSD and DoD Components that may have a significant interest in the requested record prior to a final determination. Coordination with Agencies outside of the Department of Defense, if required, is authorized.

AP1.2.5. Coordinate proposed denials of records with the appropriate Combatant Command's Office of the Staff Judge Advocate.

AP1.2.6. Answer any request for a record within 20 working days of receipt. The requesters shall be notified that his request has been granted or denied. In unusual circumstances, such notification may state that additional time, not to exceed 10 working days, is required to make a determination.

AP1.2.7. Provide to the Director, Freedom of Information and Security Review when the request for a record is denied in whole or in part, a copy of the response to the requester or the requester's representative, and any internal memoranda that provide background information or rationale for the denial.

AP1.2.8. State in the response that the decision to deny the release of the requested information, in whole or in part, may be appealed to the Director, Administration and Management and Washington Headquarters Services, Directorate for Freedom of Information and Security Review, Room 2C757, 1155 Defense Pentagon, Washington, DC 20301–1155.

AP1.2.9. Upon request, submit to Director, Administration and Management and Washington Headquarters Services a copy of the records that were denied. The Director, Administration and Management and Washington Headquarters Services shall make such requests when adjudicating appeals.

AP1.3. *Fees for FOIA Requests*

The fees charged for requested records shall be in accordance with subpart F of this part.

AP1.4. *Communications*

Excellent communication capabilities currently exist between the Director, Freedom of Information and Security Review and the Freedom of Information Act Offices of the Combatant Commands. This communication capability shall be used for FOIA cases that are time sensitive.

AP1.5. *Information Requirements*

AP1.5.1. The Combatant Commands shall submit to the Director, Freedom of Information and Security Review, an annual report. The instructions for the report are outlined in subpart G of this part.

AP1.5.2. The annual reporting requirement contained in this part shall be submitted in duplicate to the Director, Freedom of Information and Security Review not later than each November 30. This reporting requirement has been assigned Report Control Symbol DD–DA&M(A) 1365 in accordance with DoD 8910.1–M.[4]

[4] See footnote 1 to paragraph AP1.1.1. of this appendix.

Appendix B to Part 286—Addressing FOIA Requests

AP2.1. *General*

AP2.1.1. The Department of Defense includes the Office of the Secretary of Defense, the Chairman of the Joint Chiefs of Staff, the Military Departments, the Combatant Commands, the Inspector General, the Defense Agencies, and the DoD Field Activities.

AP2.1.2. The Department of Defense does not have a central repository for DoD records. FOIA requests, therefore, should be addressed to the DoD Component that has custody of the record desired. In answering inquiries regarding FOIA requests, DoD personnel shall assist requesters in determining the correct DoD Component to address their requests. If there is uncertainty as to the ownership of the record desired, the requester shall be referred to the DoD Component that is most likely to have the record.

AP2.2. *Listing of DoD Component Addresses for FOIA Requests*

AP2.2.1. *Office of the Secretary of Defense and the Chairman of the Joint Chiefs of Staff.* Send all requests for records from the below listed offices to: Directorate for Freedom of Information and Security Review, Room 2C757, 1155 Defense Pentagon, Washington, DC 20301–1155.

Executive Secretariat
Under Secretary of Defense (Policy)
- Assistant Secretary of Defense (International Security Affairs)
- Assistant Secretary of Defense (Special Operations & Low Intensity Conflict)
- Assistant Secretary of Defense (Strategy & Threat Reduction)
- Deputy to the Under Secretary of Defense (Policy Support)
- Director of Net Assessment
- Defense Security Assistance Agency
- Defense Technology Security Administration

Under Secretary of Defense (Acquisition & Technology)
- Deputy Under Secretary of Defense (Logistics)
- Deputy Under Secretary of Defense (Advanced Technology)
- Deputy Under Secretary of Defense (Acquisition Reform)
- Deputy Under Secretary of Defense (Environmental Security)
- Deputy Under Secretary of Defense (International & Commercial Programs)
- Deputy Under Secretary of Defense (Industrial Affairs & Installations)
- Assistant to the Secretary of Defense (Nuclear, Chemical & Biological Defense Programs)
- Director, Defense Research & Engineering
- Director, Small & Disadvantaged Business Utilization
- Director, Defense Procurement
- Director, Test Systems Engineering & Evaluation
- Director, Strategic & Tactical Systems
- DoD Radiation Experiments Command Center
- On-Site Inspection Agency

Under Secretary of Defense (Comptroller)
- Director, Program Analysis and Evaluation

Under Secretary of Defense (Personnel & Readiness)
Assistant Secretary of Defense (Health Affairs)
Assistant Secretary of Defense (Legislative Affairs)
Assistant Secretary of Defense (Public Affairs)
Assistant Secretary of Defense (Command, Control, Communications & Intelligence)
Assistant Secretary of Defense (Reserve Affairs)
General Counsel, Department of Defense
Director, Operational Test and Evaluation
Assistant to the Secretary of Defense (Intelligence Oversight)
Director, Administration and Management
Special Assistant for Gulf War Illness
Defense Advanced Research Projects Agency
Ballistic Missile Defense Organization
Defense Systems Management College
National Defense University
Armed Forces Staff College
Department of Defense Dependents Schools
Uniformed Services University of the Health Sciences
Armed Forces Radiology Research Institute
Washington Headquarters Services

AP2.2.2. *Department of the Army.* Army records may be requested from those Army officials who are listed in 32 CFR 518. Send requests to the Department of the Army, Freedom of Information and Privacy Acts Office, TAPC–PDR–PF, 7798 Cissna Road, Suite 205, Springfield, VA 22150–3166, for records of the Headquarters, U.S. Army, or if there is uncertainty as to which Army activity may have the records.

AP2.2.3. *Department of the Navy.* Navy and Marine Corps records may be requested from any Navy or Marine Corps activity by addressing a letter to the Commanding Officer and clearly indicating that it is a FOIA request. Send requests to Chief of Naval Operations, N09B30, 2000 Navy Pentagon, Washington, DC 20350–2000, for records of the Headquarters, Department of the Navy, and to Commandant of the Marine Corps, (ARAD), Headquarters U.S. Marine Corps, 2 Navy Annex, Washington, DC 20380–1775 for records of the U.S. Marine Corps, or it there is uncertainty as to which Navy or Marine activities may have the records.

AP2.2.4. *Department of the Air Force.* Air Force records may be requested from the commander of any Air Force installation, major command, or field operating agency (ATTN: FOIA Office). For Air Force records of Headquarters, United States Air Force, or it there is uncertainty as to which Air Force activity may have the records, send requests to Department of the Air Force, 11CS/SCSR(FOIA), 1000 Air Force Pentagon, Washington, DC 20330–1000.

AP2.2.5. *Defense Contract Audit Agency (DCAA).* DCAA records may be requested from any of its regional offices or from its Headquarters. Requesters should send FOIA requests to the Defense Contract Audit Agency, ATTN: CMR, 8725 John J. Kingman Road, Suite 2135, Fort Belvoir, VA 22060–6219, for records of its headquarters or if there is uncertainty as to which DCAA region may have the records sought.

AP2.2.6. *Defense Information Systems Agency (DISA).* DISA records may be requested from any DISA field activity or from its Headquarters. Requesters should send FOIA requests to Defense Information Systems Agency, Regulatory/General Counsel, 701 South Courthouse Road, Arlington, VA 22204–2199.

AP2.2.7. *Defense Intelligence Agency (DIA).* FOIA requests for DIA records may be addressed to Defense Intelligence Agency, ATTN: SVI–1, Washington, DC 20340–5100.

AP2.2.8. *Defense Security Service (DSS).* All FOIA requests for DSS records should be sent to the Defense Security Service, Office of FOIA and Privacy V0020, 1340 Braddock Place, Alexandria, VA 22314–1651.

AP2.2.9. *Defense Logistics Agency (DLA).* DLA records may be requested from its headquarters or from any of its field activities. Requesters should send FOIA requests to Defense Logistics Agency, ATTN: CAAR, 8725 John J. Kingman Road, Suite 2533, Ft. Belvoir, VA 22060–6221.

AP2.2.10. *National Imagery and Mapping Agency (NIMA).* FOIA requests for NIMA records may be sent to the National Imagery and Mapping Agency, General Counsels Office, GCM, mail Stop D–10, 4600 Sangamore Road, Bethesda, MD 20816–5003.

AP2.2.11. *Defense Special Weapons Agency (DSWA).* FOIA requests for DSWA records may be sent to the Defense Special Weapons Agency, Public Affairs Office, Room 113, 6801 Telegraph Road, Alexandria, VA 22310–3398.

AP2.2.12. *National Security Agency (NSA).* FOIA requests for NSA records may be sent to the National Security Agency/Central Security Service, FOIA/PA Services, N5P5, 9800 Savage Road, Suite 6248, Fort George G. Meade, MD 20755–6248.

AP2.2.13. *Inspector General of the Department of Defense (IG, DoD).* FOIA requests for IG, DoD records may be sent to the Inspector General of the Department of Defense, Chief FOIA/PA Office, 400 Army Navy Drive, Room 405, Arlington, VA 22202–2884.

AP2.2.14. *Defense Finance and Accounting Service (DFAS).* DFAS records may be requested from any of its regional offices or from its Headquarters. Requesters should send FOIA requests to Defense Finance and Accounting Service, Directorate for External Services, Crystal Mall 3, Room 416, Arlington, VA 22240–5291, for records of its Headquarters, or if there is uncertainty as to which DFAS region may have the records sought.

AP2.2.15. *National Reconnaissance Office (NRO).* FOIA requests for NRO records may be sent to the National Reconnaissance Office, Information Access and Release Center, Attn: FOIA Officer, 14675 Lee Road, Chantilly, VA 20151–1715.

AP2.3. *Other Addresses.* Although the below organizations are OSD and Chairman of the Joint Chiefs of Staff Components for the purposes of the FOIA, requests may be sent directly to the addresses indicated.

AP2.3.1. *DoD TRICARE Management Activity.* Director, TRICARE Management Activity, 16401 East Centretech Parkway, Aurora, CO 80011–9043.

AP2.3.2. *Chairman, Armed Services Board of Contract Appeals (ASBCA).* Chairman, Armed Services Board of Contract Appeals, Skyline Six Rm 703, 5109 Leesburg Pike, Falls Church, VA 22041–3208.

AP2.3.3. *U.S. Central Command.* Commander-in-Chief, U.S. Central Command, CCJ1 AGR, MacDill Air Force Base, FL 33608–7001.

AP2.3.4. *U.S. European Command.* Commander-in-Chief, Headquarters, U.S. European Command/ECJ1–AA(FOIA) Unit 30400 Box 1000, APO AE 09128–4209.

AP2.3.5. *U.S. Southern Command.* Commander-in-Chief, U.S. Southern Command, SCJ1–A, 3511 NW 91st Avenue, Miami, FL 33172–1217.

AP2.3.6. *U.S. Pacific Command.* Commander-in-Chief, U.S. Pacific Command, USPACOM FOIA Coordinator (J042), Administrative Support Division, Joint Secretariat, Box 28, Camp H. M. Smith, HI 96861–5025.

AP2.3.7. *U.S. Special Operations Command.* Commander-in-Chief, U.S. Special Operations Command, Chief, Command Information Management Branch, ATTN: SOJ6–SI, 7701 Tampa Point Blvd., MacDill Air Force Base, FL 33621–5323.

AP2.3.8. *U.S. Atlantic Command.* Commander-in-Chief, U.S. Atlantic Command, Code J02P, Norfolk, VA 23511–5100.

AP2.3.9. *U.S. Space Command.* Commander-in-Chief, U.S. Space Command, Command Records Manager/FOIA/PA Officer, 150 Vandenberg Street, Suite 1105, Peterson Air Force Base, CO 80914–5400.

AP2.3.10. *U.S. Transportation Command.* Commander-in-Chief, U.S. Transportation Command, ATTN: TCJ1–1F, 508 Scott Drive, Scott Air Force Base, IL 62225–5357.

AP2.3.11. *U.S. Strategic Command.* Commander-in-Chief, U.S. Strategic Command, Attn: J0734, 901 SAC Blvd., Suite 1E5, Offutt Air Force Base, NE 68113–6073.

AP2.4. *National Guard Bureau*

FOIA requests for National Guard Bureau records may be sent to the Chief, National Guard Bureau, ATTN: NGB–ADM, Room 2C363, 2500 Army Pentagon, Washington, DC 20310–2500.

AP2.5. *Miscellaneous*

If there is uncertainty as to which DoD Component may have the DoD record sought, the requester may address a Freedom of Information request to the Directorate for Freedom of Information and Security Review, Room 2C757, 1155 Defense Pentagon, Washington, DC 20301–1155.

BILLING CODE 5000–04–M

Appendix C to Part 286—DD Form 2086, "Record of Freedom of Information (FOI) Processing Cost"

RECORD OF FREEDOM OF INFORMATION (FOI) PROCESSING COST *Please read instructions on back before completing form.*				REPORT CONTROL SYMBOL DA&M(A)1365
1. REQUEST NUMBER 98-F-8888	2. TYPE OF REQUEST *(X one)* X a. INITIAL	b. APPEAL	3. DATE COMPLETED *(YYYYMMDD)* 19980701	

	TOTAL HOURS (1)		HOURLY RATE (2)		COST (3)
4. CLERICAL HOURS *(E-9/GS-8 and below)*					
a. SEARCH	1.00	X	$12.00	=	12.00
b. REVIEW/EXCISING	2.00	X	$12.00	=	24.00
c. CORRESPONDENCE AND FORMS PREPARATION	1.00	X	$12.00	=	12.00
d. OTHER ACTIVITY	2.00	X	$12.00	=	24.00
5. PROFESSIONAL HOURS *(O-1 - O-6/GS-9 - GS-15)*	TOTAL HOURS (1)		HOURLY RATE (2)		COST (3)
a. SEARCH	2.00	X	$25.00	=	50.00
b. REVIEW/EXCISING	1.00	X	$25.00	=	25.00
c. COORDINATION/APPROVAL/DENIAL	1.00	X	$25.00	=	25.00
d. OTHER ACTIVITY	0.00	X	$25.00	=	0.00
6. EXECUTIVE HOURS *(O-7 - GS-16/ES 1 and above)*	TOTAL HOURS (1)		HOURLY RATE (2)		COST (3)
a. SEARCH	0.00	X	$45.00	=	0.00
b. REVIEW/EXCISING	0.00	X	$45.00	=	0.00
c. COORDINATION/APPROVAL/DENIAL	0.50	X	$45.00	=	22.50
7. COMPUTER SEARCH	TOTAL HOURS (1)		HOURLY RATE (2)		COST (3)
a. MACHINE HOURS	0.00	X	0.00	=	0.00
b. PROGRAMMER/OPERATOR TIME		X		=	
(1) Clerical	1.00	X	$12.00	=	12.00
(2) Professional	1.00	X	$25.00	=	25.00
8. OFFICE COPY REPRODUCTION	NUMBER (1)		RATE (2)		COST (3)
a. PAGES REPRODUCED	450	X	.15	=	67.50
9. MICROFICHE REPRODUCTION	NUMBER (1)		RATE (2)		COST (3)
a. MICROFICHE REPRODUCED	0	X	.25	=	0.00
10. PRINTED RECORDS	TOTAL PAGES (1)		RATE (2)		COST (3)
a. FORMS	0	X	.02	=	0.00
b. PUBLICATIONS	156	X	.02	=	3.12
c. REPORTS	45	X	.02	=	0.90
11. COMPUTER COPY	NUMBER (1)		ACTUAL COST (2)		COST (3)
a. TAPE	0	X	0.00	=	0.00
b. PRINTOUT	0	X	0.00	=	0.00
12. AUDIOVISUAL MATERIALS	NUMBER (1)		ACTUAL COST (2)		COST (3)
a. MATERIALS REPRODUCED	0	X	0.00	=	0.00

13. FOR FOI OFFICE USE ONLY

a. SEARCH FEES PAID	$99.00	f. TOTAL COLLECTABLE COSTS	$219.52
b. REVIEW FEES PAID	$49.00	g. TOTAL PROCESSING COSTS	$303.02
c. COPY FEES PAID	$71.52	h. TOTAL CHARGED	$219.52
d. TOTAL PAID	$219.52	i. FEES WAIVED/REDUCED *(X one)*	Yes: ; No: X
e. DATE PAID *(YYYYMMDD)*	19980801	*See Chapter 6, Fee Schedule, DoD 5400.7-R, to determine appropriate assessment of fees.*	

DD FORM 2086, AUG 1998 (EG) PREVIOUS EDITION MAY BE USED. Designed using Perform Pro, WHS/DIOR, Jul 98

INSTRUCTIONS FOR COMPLETING DD FORM 2086

This form is used to record costs associated with the processing of a Freedom of Information request.

1. REQUEST NUMBER - First two digits will express Calendar Year followed by dash (-) and Component's request number, i.e., 97-001.

2. TYPE OF REQUEST - Mark the appropriate block to indicate initial request or appeal of a denial.

3. DATE COMPLETED - Enter year, month and day, i.e., 19970621.

4. CLERICAL HOURS - For each applicable activity category, enter time expended to the nearest 15 minutes in the total hours column. The activity categories are:

Search - Time spent in locating from the files the requested information.

Review/Excising - Time spent in reviewing the document content and determining if the entire document must retain its classification or segments could be excised thereby permitting the remainder of the document to be declassified. In reviews for other than classification, FOI exemptions 2 through 9 should be considered.

Correspondence and Forms Preparation - Time spent in preparing the necessary correspondence and forms to answer the request.

Other Activity - Time spent in activity other than above, such as duplicating documents, hand carrying documents to other locations, restoring files, etc.

- Multiply the time in the total hours column of each category by the hourly rate and enter the cost figures for each category.

5. PROFESSIONAL HOURS - For each applicable activity category, enter time expended to the nearest 15 minutes in the total hours column. The activity categories are:

Search/Review/Excising, and Other Activity - See explanation above.

Coordination/Approval/Denial - Time spent coordinating the staff action with interested offices or agencies and obtaining the approval for the release or denial of the requested information.

- Multiply the time in the total hours column of each category by the hourly rate and enter the cost figures for each category.

6. EXECUTIVE HOURS - For each applicable activity category, enter the time expended to the nearest 15 minutes in the total hours column. The activity categories are:

Search/Review/Excising - See explanation above.

Coordination/Approval/Denial - See explanation above.

- Multiply the time in the total hours column of each category by the hourly rate and enter the cost figures for each category.

7. COMPUTER SEARCH - When the amount of government-owned (not leased) computer processing machine time required to complete a search is known, and accurate cost information for operation on an hourly basis is available, enter the time used and the hourly rate. Then, calculate the total cost which is fully chargeable to the requester.

- Programmer and operator costs are calculated using the same method as in Items 4 and 5. This cost is also fully chargeable to requesters as computer search time.

8. OFFICE COPY REPRODUCTION - Enter the number of pages reproduced.

- Multiply by the rate per copy and enter cost figures.

9. MICROFICHE REPRODUCTION - Enter the number of microfiche copies reproduced.

- Multiply by the rate per copy and enter cost figures.

10. PRINTED RECORDS - Enter total pages in each category. The categories are:

Forms *(Include any type of printed forms)*

Publications *(Include any type of bound document, such as directives, regulations, studies, etc.)*

Reports *(Include any type of memorandum, staff action paper, etc.)*

- Multiply the total number of pages in each category by the rate per page and enter cost figures.

11. COMPUTER COPY - Enter the total number of tapes and/or printouts.

- Multiply by the actual cost per tape or printout and enter cost figures.

12. AUDIOVISUAL MATERIALS - Duplication cost is the actual cost of reproducing the material, including the wages of the person doing the work.

13. FOR FOI OFFICE USE ONLY -

Search Fees Paid - Enter total search fees paid by the requester.

Review Fees Paid - Enter total review fees paid by the requester.

Copy Fees Paid - Enter the total of copy fees paid by the requester.

Total Paid - Add search fees paid and copy fees paid. Enter total in the total paid block.

Date Paid - Enter year, month, and day, i.e., 19971024, the fee payment was received.

Total Collectable Costs - Add the blocks in the cost column and enter total in the total collectable cost block. Apply the appropriate waiver for the category of requester prior to inserting the final figure. Further discussion of chargeable fees is contained in Chapter VI of DoD Regulation 5400.7-R.

Total Processing Costs - Add all blocks in the cost column and enter total in the total processing cost block. The total processing cost in most cases will exceed the total collectable cost.

Total Charged - Enter the total amount that the requester was charged, taking into account the fee waiver threshold and fee waiver policy.

Fees Waived/Reduced - Indicate if the cost of processing the request was waived or reduced by placing an "X" in the "Yes" block or the "No" block.

DD FORM 2086 (BACK), AUG 1998

Appendix D to Part 286—DD Form 2086–1, "Record of Freedom of Information (FOI) Processing Cost for Technical Data"

RECORD OF FREEDOM OF INFORMATION (FOI) PROCESSING COST FOR TECHNICAL DATA

Please read instructions on back before completing form.

REPORT CONTROL SYMBOL: DA&M(A)1365

1. REQUEST NUMBER	2. TYPE OF REQUEST *(X one)*		3. DATE COMPLETED *(YYYYMMDD)*
98-F-9999	X a. INITIAL	b. APPEAL	19980701

	TOTAL HOURS (1)		HOURLY RATE (2)		COST (3)
4. CLERICAL HOURS *(E-9/GS-8 and below)*					
a. SEARCH	2.00	X	$13.25	=	* 26.50
b. REVIEW/EXCISING	1.00	X	$13.25	=	* 13.25
c. CORRESPONDENCE AND FORMS PREPARATION	0.00	X	$13.25	=	0.00
d. OTHER ACTIVITY	0.00	X	$13.25	=	0.00
e. MINIMUM CHARGE	3.00	X	$ 8.30	=	24.90
5. PROFESSIONAL HOURS *(O-1 - O-6/GS-9 - GS/GM-15)*	TOTAL HOURS (1)		HOURLY RATE (2)		COST (3)
a. SEARCH	1.00	X	ACTUAL HOURLY RATE	=	* 25.00
b. REVIEW/EXCISING	1.50	X	ACTUAL HOURLY RATE	=	* 37.50
c. COORDINATION/APPROVAL/DENIAL	0.25	X	ACTUAL HOURLY RATE	=	6.25
d. OTHER ACTIVITY	0.00	X	ACTUAL HOURLY RATE	=	0.00
e. MINIMUM CHARGE	2.75	X	1/2 HOURLY RATE	=	34.38
6. EXECUTIVE HOURS *(O-7/GM-16/ES 1 and above)*	TOTAL HOURS (1)		HOURLY RATE (2)		COST (3)
a. SEARCH	0.00	X	ACTUAL HOURLY RATE	=	* 0.00
b. REVIEW/EXCISING	0.00	X	ACTUAL HOURLY RATE	=	* 0.00
c. COORDINATION/APPROVAL/DENIAL	0.25	X	ACTUAL HOURLY RATE	=	25.00
d. MINIMUM CHARGE	0.25	X	1/2 HOURLY RATE	=	12.50
7. COMPUTER SEARCH S A M P L E	TOTAL HOURS (1)		HOURLY RATE (2)		COST (3)
a. MACHINE HOURS	0.00	X	0.00	=	* 0.00
b. PROGRAMMER/OPERATOR TIME					
- Clerical	1.00	X	$13.25 OR MINIMUM	=	* 13.25
- Professional	1.00	X	ACTUAL OR MINIMUM	=	* 25.00
8. REPRODUCTION	NUMBER (1)		RATE (2)		COST (3)
a. AERIAL PHOTOGRAPHS, SPECIFICATIONS, PERMITS, CHARTS, BLUEPRINTS, AND OTHER TECHNICAL DOCUMENTS	1	X	$ 2.50	=	* 2.50
b. ENGINEERING DATA *(Microfilm)*					
- Aperture cards					
-- Silver duplicate negative, per card	0	X	.75	=	* 0.00
-- When keypunched and verified, per card	0	X	.85	=	* 0.00
-- Diazo duplicate negative, per card	1	X	.65	=	* 0.65
-- When keypunched and verified, per card	0	X	.75	=	* 0.00
- 35 mm roll film, per frame	0	X	.50	=	* 0.00
- 16 mm roll film, per frame	0	X	.45	=	* 0.00
- Paper prints *(engineering drawings)*, each	0	X	1.50	=	* 0.00
- Paper reprints of microfilm indices, each	0	X	.10	=	* 0.00
c. AUDIOVISUAL MATERIALS *(Insert actual cost in block (2))*	25	X	1.24	=	* 31.00
d. OTHER TECHNICAL DATA RECORDS Charges for any additional services not specifically provided above shall be made by components at the following rates:					
- Minimum charge for office copy *(up to six images)*	1		$ 3.50		* 3.50
- Each additional image	30	X	.10	=	* 3.00
- Each typewritten page	0	X	3.50	=	* 0.00
- Certification and validation with seal, each	0	X	5.20	=	* 0.00
- Hand-drawn plots and sketches, each hour or fraction thereof	0.00	X	12.00	=	* 0.00

** Chargeable to all requesters.*

9. FOR FOI OFFICE USE ONLY			
a. SEARCH FEES PAID	89.75	f. TOTAL COLLECTABLE	181.15
b. REVIEW FEES PAID	50.75	g. TOTAL PROCESSING	212.40
c. COPY FEES PAID	40.65	h. TOTAL CHARGED	181.15
d. TOTAL PAID	181.15	i. FEES WAIVED/REDUCED *(X one)*	YES: — NO: X
e. DATE PAID *(YYYYMMDD)*	19980801		

DD FORM 2086-1, JUL 1997 (EG) PREVIOUS EDITION MAY BE USED UNTIL SUPPLY IS EXHAUSTED. Designed using Perform Pro, WHS/DIOR, Jul 97

INSTRUCTIONS FOR COMPLETING DD FORM 2086-1

This form is used to record costs associated with the processing of a Freedom of Information request 'or technical data.

1. REQUEST NUMBER - First two digits will express Calendar Year followed by dash (-) and Component's request number, i.e., 87-001.

2. TYPE OF REQUEST - Mark the appropriate block to indicate initial request or appeal of a denial.

3. DATE COMPLETED - Enter year, month and day, i.e., 19970621.

4. CLERICAL HOURS - For each applicable activity category, enter time expended to the nearest 15 minutes in the total hours column. The activity categories are:

Search - Time spent in locating from the files the requested information.

Review/Excising - Time spent reviewing the document content and determining if the entire document must retain its classification or segments could be excised thereby permitting the remainder of the document to be declassified. In reviews for other than classification, FOI exemptions 2 through 9 should be considered.

Correspondence and Forms Preparation - Time spent in preparing the necessary correspondence and forms to answer the request.

Other Activity - Time spent in activity other than above, such as duplicating documents, hand carrying documents to other locations, restoring files, etc.

- Multiply the time in the total hours column of each category by the hourly rate and enter the cost figures for each category. Both search and review costs are chargeable to the requester.

5. PROFESSIONAL HOURS - For each applicable activity category, enter time expended to the nearest 15 minutes in the total hours column. The activity categories are:

Search/Review/Excising, and Other Activity - See explanation above.

Coordination/Approval/Denial - Time spent coordinating the staff action with interested offices or agencies and obtaining the approval for the release or denial of the requested information.

- Multiply the time in the total hours column of each category by the hourly rate and enter the cost figures for each category. Both search and review costs are chargeable to the requester.

6. EXECUTIVE HOURS - For each applicable activity category, enter the time expended to the nearest 15 minutes in the total hours column. The activity categories are:

Search/Review/Excising - See explanation above.

Coordination/Approval/Denial - See explanation above.

- Multiply the time in the total hours column in each category by the hourly rate and enter the cost figures for each category. Review costs are chargeable to the requester.

7. COMPUTER SEARCH - When the amount of government-owned (not leased) computer processing machine time is known, and accurate cost information for operation on an hourly basis is available, enter the time used and the hourly rate. Then, calculate the total cost which is fully chargeable to the requester.

- Programmer and operator costs are calculated using the same method as in Items 4 and 5. This cost is also fully chargeable to requesters as computer search time.

8. REPRODUCTION - Enter the number of pages or items reproduced.

- Multiply by the rate per copy and enter cost figures. The entire cost is chargeable to the requester. Reproduction cost for audiovisual material is the actual cost of reproducing the material, including the wage of the person doing the work.

9. FOR FOI OFFICE USE ONLY -

Search Fees Paid - Enter total search fees paid by the requester.

Review Fees Paid - Enter total review fees paid by the requester.

Copy Fees Paid - Enter the total of copy fees paid by the requester.

Total Paid - Add search fees paid and copy fees paid. Enter total in the total paid block.

Date Paid - Enter year, month, and day, i.e., 19971024, the fee payment was received.

Total Collectable Costs - Add the blocks in the cost column marked with an asterisk and enter total in the total collectable cost block. Only search, reproduction and printed records are chargeable to the requester. Further discussion of collectable costs is contained in Chapter VI, Section 3, DoD Regulation 5400.7-R.

Total Processing Costs - Add all blocks in the cost column and enter total in the total processing cost block. The total processing cost in most cases will exceed the total collectable cost.

Total Charged - Enter the total amount that the requester was charged, taking into account the fee waiver threshold and fee waiver policy.

Fees Waived/Reduced - Indicate if the cost of processing the request was waived or reduced by placing an "X" in the "YES" block or an "X" in the "NO" block.

DD FORM 2086-1 (BACK), JUL 1997

ANNUAL REPORT
FREEDOM OF INFORMATION ACT

REPORT CONTROL SYMBOL
DD-DA&M(A)1365

1. INITIAL REQUEST DETERMINATIONS

a. TOTAL REQUESTS	b. GRANTED IN FULL	c. DENIED IN PART	d. DENIED IN FULL	e. "OTHER REASONS"	f. TOTAL ACTIONS
30	24	3	1	6	34

2a. EXEMPTIONS INVOKED ON INITIAL REQUEST DETERMINATIONS

(b) (1)	(b) (2)	(b) (3)	(b) (4)	(b) (5)	(b) (6)
3	0	2	1	0	0

(b) (7)(A)	(b) (7)(B)	(b) (7)(C)	(b) (7)(D)	(b) (7)(E)	(b) (7)(F)	(b) (8)	(b) (9)
0	0	0	1	1	1	0	0

2b. "OTHER REASONS" CITED ON INITIAL DETERMINATIONS

1	2	3	4	5	6	7	8	9	TOTAL
1	4	1	1	0	0	0	0	0	7

2c. STATUTES CITED ON INITIAL REQUEST (b)(3) EXEMPTIONS

(1)(b)(3) STATUTE CLAIMED	NUMBER OF INSTANCES	COURT UPHELD? *(Yes or No)*	CONCISE DESCRIPTION OF MATERIAL WITHHELD
10 USC §130	1	Y	Unclassified technical data regarding design of reentry vehicles (RV)
10 USC §424	1	N	Organizational data for protected organizations

S A M P L E

3. APPEAL DETERMINATIONS

a. TOTAL REQUESTS	b. GRANTED IN FULL	c. DENIED IN PART	d. DENIED IN FULL	e. "OTHER REASONS"	f. TOTAL ACTIONS
4	0	3	1	0	4

DD FORM 2564, AUG 1998 (EG) PREVIOUS EDITION IS OBSOLETE. Designed using Perform Pro, WHS/DIOR, Jul 98

BILLING CODE 5000-04-C

4a. EXEMPTIONS INVOKED ON APPEAL DETERMINATIONS

(b) (1)	(b) (2)	(b) (3)	(b) (4)	(b) (5)	(b) (6)
4	0	1	0	0	0

(b) (7)(A)	(b) (7)(B)	(b) (7)(C)	(b) (7)(D)	(b) (7)(E)	(b) (7)(F)	(b) (8)	(b) (9)
0	0	0	0	0	0	0	0

4b. "OTHER REASONS" CITED ON APPEAL DETERMINATIONS

1	2	3	4	5	6	7	8	9	TOTAL
0	0	0	0	0	0	0	0	0	0

4c. STATUTES CITED ON APPEAL (b)(3) EXEMPTIONS

(1)(b)(3) STATUTE CLAIMED	NUMBER OF INSTANCES	COURT UPHELD? *(Yes or No)*	CONCISE DESCRIPTION OF MATERIAL WITHHELD
10 USC §424	1	N	Organizational data for a protected organization.

5. NUMBER AND MEDIAN AGE OF INITIAL CASES PENDING	(1) AS OF BEGINNING REPORT PERIOD	(2) AS OF END REPORT PERIOD
a. TOTAL INITIAL REQUESTS PENDING *(open)*	15	12
b. MEDIAN AGE *(in days)* OF OPEN INITIAL REQUESTS	62	60

6. TOTAL NUMBER OF INITIAL REQUESTS RECEIVED DURING THE FISCAL YEAR	27

7. TYPES OF INITIAL REQUESTS PROCESSED AND MEDIAN AGE	TOTAL NUMBER OF CASES	MEDIAN AGE *(Days)*
a. SIMPLE	28	57
b. COMPLEX	1	348
c. EXPEDITED PROCESSING	1	13

8. TOTAL AMOUNT COLLECTED FROM THE PUBLIC	$ 2?

9. PROGRAM COST	
a. NUMBER OF FULL TIME STAFF	1
b. NUMBER OF PART TIME STAFF	1.6
c. ESTIMATED LITIGATION COST	$ 2,495
d. TOTAL PROGRAM COST	$ 121,345

10. AUTHENTICATION

a. SIGNATURE *(Approving Official)*

b. TYPED NAME *(Last, First, Middle Initial)*	c. DUTY TITLE
A. G. CAMPBELL, Colonel, U. S. Army	Asst Chief of Staff, J-1
d. AGENCY NAME	**e. TELEPHONE NUMBER** *(Include Area Code)*
United States Antarctic Command (USARCCOM) APO AS 00000-0001	77-100-555-1212, DSN 314-999

DD FORM 2564 (BACK), AUG 1998

Appendix F to Part 286—DoD Freedom of Information Act Program Components

Office of the Secretary of Defense/Chairman of the Joint Chiefs of Staff/Combatant Commands, Defense Agencies, and the DoD Field Activities
Department of the Army
Department of the Navy
Department of the Air Force
Defense Information Systems Agency
Defense Contract Audit Agency
Defense Intelligence Agency
Defense Security Service
Defense Logistics Agency
National Imagery and Mapping Agency
Defense Special Weapons Agency
National Security Agency
Office of the Inspector General, Department of Defense
Defense Finance and Accounting Service
National Reconnaissance Office

Dated: November 17, 1998.

Patricia L. Toppings,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 98–31103 Filed 11–24–98; 8:45 am]

BILLING CODE 5000–04–M

Federal Register

Wednesday
November 25, 1998

Part V

Department of Housing and Urban Development

Funding Availability (NOFA) for CDBG Small Cities Development Grants for Fiscal Year 1999; Notice

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–4422–N–01]

Notice of Funding Availability for: the HUD-Administered Small Cities Community Development Block Grant (CDBG) Program, Development Grants-Fiscal Year 1999; and the Section 108 Loan Guarantee Program for Small Communities in New York State

AGENCY: Office of the Assistant Secretary for Community Planning and Development, HUD.

ACTION: Notice of funding availability (NOFA) for CDBG Small Cities Development Grants for Fiscal Year (FY) 1999.

SUMMARY: This Notice of Funding Availability (NOFA) announces the availability of CDBG Small Cities economic development grants and guaranteed loans to fund eligible economic development activities related to the New York canal system. This NOFA is part of the Canal Corridor Initiative, a multiyear effort designed to revitalize the economic base of communities in upstate New York through economic development projects and job creation along the canal system and connecting waterways. HUD announced the first Canal Corridor Initiative grants in FY 1997 and awarded 51 Canal Corridor CDBG grants to communities for canal-related projects. This NOFA is the second round in that overall initiative.

Eligible economic development activities are expected to be funded through a combination of resources, including Community Development Block Grant (CDBG) funds made available through this NOFA under the HUD-administered Small Cities CDBG program and the Section 108 Loan Guarantee program. HUD expects to provide funds for the selected economic development projects through a combination of CDBG and Section 108 in an aggregate amount of approximately $3 million.

HUD expects that the typical project proposal would be a Section 108-eligible economic development project that builds on the unique locational opportunities afforded by the New York canal system and connecting waterways to foster commercial revitalization, business growth and expansion, and job creation that will result in the economic and physical revitalization of the project area. Such projects would utilize funds made available by the Section 108 Loan Guarantee program to provide the ''up-front'' financing, along with other public or private resources to the extent financially feasible. The loan guaranteed by section 108 would be expected to be repaid with a combination of the CDBG funds requested as part of this application, future CDBG appropriations, and the ''cash flows'', if any, generated by the assisted project. This NOFA makes available $1 million in FY 1999 funding through the HUD-administered Small Cities CDBG program for the first year of multiyear plans requested through applications. Multiyear plans approved will not propose an amount of grant funds totaling more than $4.63 million for all years.

HUD encourages applications from joint applicants in accordance with 24 CFR 570.422. The nature of riverfront revitalization is such that waterfront projects undertaken in tandem at different points along the waterfront creates a ''regional synergy'' that enhances the success of all projects in the region.

Combining Section 108 Loans with Multiyear Plans for CDBG Funding to Create a Financial Package. Under the Section 108 program and pursuant to 24 CFR 570.705(a)(2)(iii), a New York State nonentitled community/public entity eligible to receive HUD-administered CDBG Small Cities funds may borrow an aggregate amount of funds guaranteed under the Section 108 Loan Guarantee program that is five times the greater of:

(A) The most recent CDBG Small Cities grant approved for the applicant,

(B) The average of the most recent three CDBG Small Cities grants approved for the applicant (excluding any CDBG grant in the same fiscal year as the Section 108 Loan Guarantee commitment), or

(C) The average amount of CDBG Small Cities grants made to units of general local government in New York State in the previous fiscal year.

Note that the amount of Section 108 guaranteed funds that is available to a community for new projects may be determined by subtracting the recipient's total unpaid balance of debt obligations currently guaranteed under the Section 108 Loan Guarantee program from the amount authorized for the community as determined in (A) through (C) above.

In FY 1998, the average New York State CDBG Small Cities grant amount awarded was $421,699. This means that under the Section 108 program, a typical New York State nonentitled community or county may borrow, under (C) above, approximately $2.1 million (assuming that the community does not have any outstanding unpaid Section 108 Loan Guarantee balance). Given current Section 108 Loan Guarantee rates and a 20-year financing term, the average annual straight line principal and interest payment of a $2.1 million guaranteed Section 108 loan would be approximately $191,000 per year.

In addition to any other security arrangement that may be permitted or required pursuant to 24 CFR 570.705(b), and in order to reduce the risk to HUD and individual borrowers beginning in fiscal year 2000, HUD will establish a debt service reserve with CDBG Small Cities funds that will be used to make the first year's Section 108 debt obligation payments when they come due (ending in August of any year under the current system) for Canal Corridor projects approved under this NOFA. Early in the next fiscal year, HUD will replenish the debt service reserve for purposes of the next year's payments with another Small Cities grant under the noncompetitive authority of 24 CFR 570.432. HUD intends to, subject to the conditions stated in Sec. 570.432 including the availability of appropriations, continue to replenish the debt service reserve account each year for each grant made under this NOFA as long as any related Section 108 loan remains outstanding.

This NOFA sets out program guidelines that will govern the application, application review, and award process for the CDBG New York State Small Cities grants made available as part of the financial package for Canal Corridor Initiative projects.

DATES: Applications are due on or prior to February 3, 1999. Applications, if mailed, must be postmarked by the United States Postal Service no later than midnight on February 3, 1999. Overnight delivery items received within ten (10) days after February 3, 1999, will be deemed to have been received by that date, upon submission of documentary evidence that they were placed in transit with the overnight delivery service by no later than February 3, 1999. If an application is hand-delivered to the New York or the Buffalo Office, the application must be delivered to the appropriate office by no later than 4:00 p.m. on the deadline date.

The above-stated application deadline is firm as to date and hour. In the interest of fairness to all competing applicants, HUD will treat as ineligible for consideration any application that is not received by 4:00 p.m. on, or postmarked by February 3, 1999. Applicants should take this policy into account and make early submission of their materials to avoid any risk of loss of eligibility brought about by

unanticipated delays or other delivery-related problems.

ADDRESSES: Completed applications will be accepted at the following addresses:

1. For the nonentitled CDBG jurisdictions in and county of Ulster and nonparticipating jurisdictions in the urban county of Dutchess: Department of Housing and Urban Development, Office of Community Planning and Development, Attention: Small Cities Coordinator, 26 Federal Plaza, New York, NY 10278–0068. Telephone (212) 264–0771; and

2. For the nonentitled CDBG jurisdictions in and counties of Albany, Cayuga, Clinton, Columbia, Erie, Essex, Fulton, Greene, Herkimer, Jefferson, Madison, Monroe, Montgomery, Niagara, Oneida, Onondaga, Ontario, Orleans, Oswego, Rensselaer, St. Lawrence, Saratoga, Schenectady, Schuyler, Seneca, Tompkins, Warren, Washington, Wayne and Yates: Department of Housing and Urban Development, Community Planning and Development Division, Attention: Small Cities Coordinator, 465 Main Street, Lafayette Court, Buffalo, NY 14203–1780. Telephone (716) 551–5742.

FOR FURTHER INFORMATION CONTACT: Robert Duncan, Deputy Director, Office of Block Grant Assistance, Department of Housing and Urban Development, Room 7286, 451 Seventh Street, SW, Washington, DC 20410, Telephone (202) 708–3587; or Mr. Michael Merrill, Director, Community Planning and Development Division, Department of Housing and Urban Development, 415 Main Street, Buffalo, NY 14203–1780, Telephone (716) 551–5755. (This is not a toll-free number)

Persons with hearing or speech impairments may access these numbers via TTY by calling the toll-free Federal Information Relay Service at (800) 877–8339.

SUPPLEMENTARY INFORMATION:

I. Purpose and Substantive Description

A. Authorities and Background

1. Authority

Title I, Housing and Community Development Act of 1974 (the HCD Act) (42 U.S.C. 5301–5320); 24 CFR part 570, subpart F.

2. Background

Title I of the Housing and Community Development Act of 1974 authorizes the Community Development Block Grant (CDBG) program. Section 106 of Title I permits the States to elect to assume the administrative responsibility for the CDBG program for nonentitled areas within their jurisdiction. Section 106 provides that HUD will administer the CDBG program for nonentitled areas within any State that does not elect to assume the administrative responsibility for the program. Subpart F of 24 CFR part 570 sets out the requirements for HUD's administration of the CDBG program in nonentitled areas (Small Cities program). The State of New York has not elected to implement the CDBG Small Cities program.

With respect to this NOFA, subpart F, at 24 CFR 570.421(a)(5), ''Economic development grants,'' provides that in the event that a nonentitlement New York State Small Cities applicant needs a CDBG Small Cities grant, in addition to a Section 108 Loan Guarantee, to make its economic development project viable, HUD may fund such applications, as they are determined to be fundable in a specific amount up to the sum set aside for economic development projects in this Notice of Funding Availability. This NOFA proposes to maximize the utilization of Section 108 guaranteed loans in conjunction with multiyear plans for use of CDBG funds to undertake eligible development projects. As a result of this approach, the funds announced in this NOFA provide eligible small communities and counties in New York State with a unique opportunity to propose programs that focus on canal-related economic development projects to expand economic and job opportunities and act as a catalyst to spur community and neighborhood economic revitalization. HUD encourages eligible communities to propose programs that are creative and innovative in addressing their economic development needs. Although the focus of 24 CFR 570.421(a)(5) is broadly described as economic development, as a technical matter any activity eligible for Section 108 Loan Guarantee assistance under 24 CFR 570.703 is eligible under this NOFA (except as stated in section I.C.3.a. of this NOFA, below) to carry out the applicant's economic development project. As emphasized in the selection factors (see section II.C. of this NOFA), however, the overall purpose of the eligible activity, or group of eligible activities, proposed for funding in response to this NOFA is job creation and the economic development of the area served by the proposed project.

Because of the integral relationship of CDBG grant funds and the Section 108 Loan Guarantees, the scale of economic development projects solicited, and the expectation of a long-term stream of CDBG funds (subject to future appropriations) to make such projects economically feasible, this NOFA solicits applications for multiyear plans. If an applicant's multiyear plan is selected on a competitive basis, the first year will be funded, and HUD may fund future years for purposes of paying the Section 108 Loan Guarantee debt obligation due that year on a noncompetitive basis subject to acceptable performance, submission of an acceptable application and certifications, and the provision of adequate appropriations for the CDBG New York nonentitlement Small Cities program. Note that a community whose Canal Corridor grant and multiyear plan is approved will be required and must agree to submit an application for CDBG Small Cities funds to HUD each year of the multiyear plan in order to pay any amount of the Section 108 debt service obligation that would not otherwise be paid from the cash flow of the assisted project. This is necessary in order to ensure the timely payment of the Section 108 debt obligation and avoid a default of the 108 guaranteed loan.

3. Other Program Requirements

a. Abbreviated Consolidated Plan. Each jurisdiction that applies for funds under this NOFA must have submitted a consolidated plan, as provided at 24 CFR part 91. A jurisdiction that does not expect to be a participating jurisdiction in the HOME program under 24 CFR part 92, may submit (or may have submitted) an abbreviated consolidated plan that is appropriate to the types and amounts of assistance sought from HUD. (See 24 CFR 91.235.) If an applicant has an abbreviated consolidated plan previously approved by HUD, the applicant may update it, if necessary, if the CDBG development activities proposed in the application contain any new non-housing community development activity. Note that applicants that are also submitting applications for the New York CDBG Small Cities competition (see the NOFA for that program published elsewhere in this issue of the **Federal Register**) may meet the consolidated plan submission for both competitions with one consolidated plan submission as long as the consolidated plan submission covers the activities proposed in both applications.

Applicants are not authorized to undertake a housing activity with funds under this NOFA. An applicant seeking funds under this NOFA to address non-housing community development needs should prepare an abbreviated consolidated plan that describes the jurisdiction's priority non-housing community development needs eligible for assistance under the CDBG program by eligibility category, reflecting the

needs of families for each type of activity, as appropriate, in terms of dollar amounts estimated to meet the priority need for the type of activity (see 24 CFR 91.235(c)(2)). The abbreviated consolidated plan is subject to the same citizen participation requirements as is the jurisdiction's Small Cities CDBG application. Both must meet the citizen participation requirements before they may be submitted to HUD. (See 24 CFR 570.431) A Section 108 Loan Guarantee application would also have to meet these requirements if the jurisdiction submits one to HUD for consideration.

If possible, applicants should endeavor to submit the abbreviated consolidated plan in advance of the Small Cities Canal Corridor application due date. The latest time at which the abbreviated consolidated plan will be accepted by HUD for the HUD-administered Small Cities program in New York will be the application due date for the Small Cities Canal Corridor application. Failure to submit the abbreviated consolidated plan by the due date is not a curable technical deficiency. Questions regarding the abbreviated consolidated plan should be directed to the appropriate HUD field office.

Any application that is fundable, but does not have an approved consolidated plan, will receive a conditional approval subject to HUD's approval of the abbreviated consolidated plan. If HUD is unable to approve the abbreviated consolidated plan within a reasonable period of time, but not less than 60 days from the date that the conditional approval is announced, HUD reserves the right to rescind the award. In such event the funding will be awarded to the highest rated fundable applicant that did not receive funding under this competition.

b. Section 3. Assistance provided under this NOFA is subject to the requirements of section 3 of the Housing and Urban Development Act of 1968, and the implementing regulations in 24 CFR part 135. One of the purposes of this NOFA, which is consistent with section 3, is to give, to the greatest extent feasible and consistent with Federal, State, and local laws and regulations, job training, employment and other contracting opportunities generated from certain HUD financial assistance to low- and very low-income persons. Public entities awarded funds under this NOFA that intend to use the funds for housing rehabilitation, housing construction, or other public construction must comply with the applicable requirements set forth in the regulations.

c. CDBG Program Requirements. The provisions of 24 CFR part 570, subpart F, as applicable, shall apply to CDBG grants made under this NOFA.

4. Accountability in the Provision of HUD Assistance: Documentation and Public Access Requirements; Applicant/Recipient Disclosures

HUD has promulgated a final rule to implement section 102 of the Department of Housing and Urban Development Reform Act of 1989 (HUD Reform Act) (Pub. L. 101–235; approved December 15, 1989). The final rule is codified at 24 CFR part 4. Section 102 contains a number of provisions that are designed to ensure greater accountability and integrity in the provision of certain types of assistance administered by HUD. On January 16, 1992 (57 FR 1942), HUD published a final rule implementing section 102. Although the rule has been amended and now appears in part 4, the January 16, 1992 notice provided the public (including applicants for, and recipients of, HUD assistance) with further information on the implementation of section 102. The documentation, public access, and applicant and recipient disclosure requirements of section 102 apply to assistance awarded under this NOFA as follows:

a. HUD Responsibilities. (1) Documentation and Public Access. HUD will ensure that documentation and other information regarding each application submitted pursuant to this NOFA are sufficient to indicate the basis upon which assistance was provided or denied. This material, including any letters of support, will be made available for public inspection for a five-year period beginning not less than 30 days after the award of the assistance. Material will be made available in accordance with the Freedom of Information Act (5 U.S.C. 552) and HUD's implementing regulations at 24 CFR part 15. In addition, HUD will include the recipients of assistance pursuant to this NOFA in its **Federal Register** notice of all recipients of HUD assistance awarded on a competitive basis.

(2) *Disclosures.* HUD will make available to the public for five years all applicant disclosure reports (HUD Form 2880) submitted in connection with this NOFA. Update reports (also Form 2880) will be made available along with the applicant disclosure reports, but in no case for a period of less than three years. All reports—both applicant disclosures and updates—will be made available in accordance with the Freedom of Information Act (5 U.S.C. 552) and HUD's implementing regulations at 24 CFR part 15.

b. Units of General Local Government Responsibilities. Units of general local government awarded assistance under this NOFA are subject to the provisions of either paragraph b.(1), or paragraph b.(2) and b.(3), below. For units of local government awarded assistance under this NOFA which in turn make the assistance available on a NONCOMPETITIVE BASIS for a specific project or activity to a subrecipient, or a ''Community Based Development Organization'' (CBDO) as defined in 24 CFR 570.204, paragraph b. (1) applies. For units of local government awarded assistance under this NOFA, which in turn make the assistance available on a COMPETITIVE BASIS for a specific project or activity to a subrecipient, or a CBDO, paragraphs b. (2) and (3) apply.

(1) *Disclosures.* The units of general local government receiving assistance under this NOFA must make all applicant disclosure reports available to the public for three years. Required update reports must be made available along with the applicant disclosure reports, but in no case for a period less than three years. Each unit of general local government may use HUD Form 2880 to collect the disclosures, or may develop its own form.

(2) *Documentation and Public Access.* The recipient unit of general local government must ensure that documentation and other information regarding each application submitted to the recipient by a subrecipient or CBDO applicant are adequate to indicate the basis upon which assistance was provided or denied. The unit of general local government must make this material, including any letters of support, available for public inspection for a five-year period beginning not less than 30 days after the award of the assistance. Unit of general local government recipients must also notify the public of the subrecipients or CBDO's that receive the assistance. Each recipient will develop documentation, public access, and notification procedures for its programs.

(3) *Disclosures.* Units of general local government receiving assistance under this NOFA must make all applicant disclosure reports available to the public for five years. Required update reports must be made available along with the applicant disclosure reports, but in no case for a period less than three years. Each unit of general local government may use HUD Form 2880 to collect the disclosures, or may develop its own form.

B. Allocation of Grant Amounts and Section 108 Loan Guarantee Commitments

1. Total Available Funding

The nonentitlement CDBG funds for New York State for FY 1999 total approximately $54,558,000. Of that amount, this NOFA sets aside $1 million for eligible economic development grants for projects that create jobs, principally for low and moderate income persons, and increase economic opportunities related to the New York State Canal System or connecting waterways (see section I.C.1. of this NOFA, below, regarding eligible applicants).

2. Maximum Grant Amounts

The maximum CDBG grant amount that will be awarded from FY 1999 funds for an eligible economic development project pursuant to this NOFA is $300,000, though the average grants may be less. For a multiyear plan, HUD expects that no more than $1 million will be made available in funds under this NOFA and approximately $191,000 per year in future years' CDBG funds (subject to appropriations) to pay the Section 108-guaranteed debt obligation per grantee over the life of the plan. Thus in the aggregate for all plans, HUD expects that no more than $38 million will be required (subject to appropriations) for Section 108 loan payments over a projected 20 year life of all multiyear plans approved, limiting the set-asides of CDBG funds for multiyear plans to an average of $1.91 million per year over a 20-year period.

Note that the maximum grant amounts discussed in this paragraph are solely for grants made under this NOFA. The maximum grant amounts authorized under the regular New York CDBG nonentitlement competition are $400,000 for cities, towns and villages and $600,000 for counties. A community may apply for a grant under both competitions and may be awarded grants up to the maximum amounts authorized under both competitions.

3. Availability of Section 108 Loan Guarantees

HUD could make up to $21 million in Section 108 Loan Guarantee commitments, or higher, if all applicants proposed projects that utilized the maximum amount of Section 108 loan guarantee authority available to them.

4. Multiyear Requests and Repayment of Section 108 Loans With CDBG Funds

a. General. Pursuant to 24 CFR 570.432, HUD expects to approve multiyear plans of up to twenty (20) years, for use of CDBG funds for the sole purpose of paying any amounts due on debt obligations issued by such unit of general local government (or its designated public agency) and guaranteed by the Secretary pursuant to section 108 of the Housing and Community Development Act of 1974, as amended.

b. Submission of multiyear request and plan. Each application for a CDBG economic development grant under this NOFA should include a multiyear plan for CDBG funds, the use of which will be limited to paying projected amounts due on Section 108-guaranteed debt obligations over the projected term of the loan.

The multiyear plans will be rated competitively against each other based on the selection criteria in section II.C. of this NOFA. Each applicant's multiyear plan must discuss:

- the total amount of the Section 108 Loan Guarantee commitment that will be requested,
- the term of the Section 108 guaranteed loan and
- a repayment schedule for the Section 108 guaranteed loan that clearly identifies the amount and source of the projected funds, including the CDBG funds proposed to be used to repay the Section 108 guaranteed loan over the course of the multiyear plan.

The multiyear period may not exceed 20 years.

HUD intends to fund succeeding years of the plan on a noncompetitive basis, subject to acceptable performance, submission of an acceptable application and certifications, and the provision of adequate appropriations for the HUD-administered Small Cities program. HUD reserves the right to lower the amount of funds for succeeding years if respective recipients are not in compliance with performance requirements and applicable regulations. The application must list for each year of the multiyear period the projected amount of CDBG funds requested for each year. The amount of CDBG funds requested for each year need not be the same amount; however, the amount requested for each year should relate to the anticipated amounts appropriate to meet the CDBG portion of the debt obligation, principal and interest, on the Section 108 guaranteed loan, consistent with section I.B.2. of this NOFA, above. For subsequent years of the multiyear period and pursuant to 24 CFR 570.432, HUD will adjust the actual CDBG grant amount awarded to such amounts required for the sole purpose of paying any principal and interest amounts due on the loan guaranteed by Section 108 as provided under the Section 108 note contract, or in the event of a default any amounts due under the guarantee.

C. Eligibility

1. Eligible Applicants

Eligible applicants are units of general local government in New York State (excluding metropolitan cities, urban counties, units of government that are participating in urban counties or metropolitan cities even if only part of the participating unit of government is located in the urban county or metropolitan city, and Indian tribes eligible for assistance under section 106 of the HCD Act) that are proposing development activities related to the New York State Canal System or connecting waterways, including, but not limited to the Hudson River, Cayuga Lake, Seneca Lake, Lake Champlain, Lake George, Lake Erie, and Lake Ontario. Eligible applicants are further limited to the nonentitled CDBG jurisdictions in and counties of Albany, Cayuga, Clinton, Columbia, Erie, Essex, Fulton, Greene, Herkimer, Jefferson, Madison, Montgomery, Niagara, Oneida, Onondaga, Ontario, Orleans, Oswego, Rensselaer, Saint Lawrence, Saratoga, Schenectady, Schuyler, Seneca, Tompkins, Ulster, Warren, Washington, Wayne, and Yates, and the nonparticipating jurisdictions in the urban counties of Dutchess and Monroe.

2. Joint Applicants

There may be several instances in which several communities have common economic development opportunities that are more feasible if an eligible development project were carried out jointly rather than on an individual basis. In such cases, HUD encourages these communities to develop regional solutions to regional problems and propose a joint application from all affected communities. This NOFA authorizes eligible units of general local government under section I.C.1. of this NOFA, above, to submit a joint application to carry out an eligible economic development project that addresses common problems faced by all of the jurisdictions. A joint application must be pursuant to a written cooperation agreement submitted with the application. The cooperation agreement must authorize one of the participating units of government to act as the lead applicant that will submit the application to HUD, and must delineate the responsibilities of each participating unit of government with respect to the Small Cities

program. (See 24 CFR 570.422 for requirements regarding joint applications.) Except as otherwise noted, a joint application must meet all of the requirements of this NOFA as an application from a single unit of general local government. Applications under this NOFA may be submitted individually or jointly, subject to 24 CFR 570.422. However, Section 108 Loan Guarantee applications must be submitted individually and in accordance with 24 CFR 570.704 by each unit of general local government that will receive a guarantee and issue guaranteed obligations.

3. Activities Eligible for CDBG Small Cities Grants Under This NOFA

Eligible activities are economic development activities related to the New York State Canal System or connecting waterways, including, but not limited to the Hudson River, Cayuga Lake, Seneca Lake, Lake Champlain, Lake George, Lake Erie and Lake Ontario. Economic development activities must also meet the criteria below:

a. Eligible economic development projects and activities to be financed with FY 1999 CDBG funds include the following:

(1) The activities listed under the Section 108 Loan Guarantee program at 24 CFR 570.703, except subparagraphs (j) Construction of housing by non-profit organizations, and (m) regarding activities by ''colonias;'' and

(2) Capitalization of a Section 108 debt service reserve/loan loss reserve as part of the financing of activities that are otherwise eligible under this NOFA. A debt service reserve created from Small Cities grant funds should not, however, exceed one year's Section 108 projected debt obligation needs.

b. Eligible activities to be funded during FY 2000 and later years with CDBG Small Cities funds under multiyear plans proposed pursuant to this NOFA are limited to the repayment of any amounts due on debt obligations issued by a units of general local government and guaranteed by the Secretary pursuant to section 108 of the HCD Act. This includes planned repayments from CDBG funds, as well as amounts due in the event of default, as applicable.

4. National Objectives and Primary Objective

Each activity to be funded with CDBG funds or funds guaranteed by the Section 108 Loan Guarantee program under this Canal Corridor Initiative competition only must meet the national objective of principally benefitting low and moderate income persons through the creation of jobs, 51% of which will be made available to or held by low and moderate income persons. See 24 CFR 570.208(a)(4). Pursuant to 24 CFR 570.420(e)(2), not less than 70 percent of the total of grant funds from a grant made under this NOFA and Section 108 Loan Guarantee funds received within a fiscal year must be expended for activities that benefit low- and moderate-income persons under the criteria of Sec. 570.208(a) or Sec. 570.208(d) (5) or (6).

5. Anti-Pirating Prohibition

Section 588 of the Quality Housing and Work Responsibility Act of 1998, P.L. 105–276, amended section 105(h) of the Housing and Community Development Act of 1974 as follows:

''(h) PROHIBITION ON USE OF ASSISTANCE FOR EMPLOYMENT RELOCATION ACTIVITIES. Notwithstanding any other provision of law, no amount from a grant under section 106 made in fiscal year 1999 or any succeeding fiscal year may be used to assist directly in the relocation of any industrial or commercial plant, facility, or operation, then the application shall include from 1 area to another area, if the relocation is likely to result in a significant loss of employment in the labor market area from which the relocation occurs.''

Accordingly, HUD will not award any grant for any project that would violate this prohibition.

6. Limitations on the Ratio of CDBG Grant Funds to Section 108 Loan Guarantee Funds

HUD reserves the right, within the maximum grant limit of $300,000 provided in section I.B.2. of this NOFA, above, to determine a minimum or a maximum amount of any CDBG grant award under this NOFA with the difference from the amount requested, if any, to be made up (to the maximum extent feasible to fund the eligible economic development project) with loan funds guaranteed by Section 108. HUD also reserves the right to determine the amount and number of years of the multiyear plan, or Section 108 Loan Guarantee award per applicant, application, or project and to modify requests accordingly.

In the case of an applicant that has received a prior CDBG grant award for an activity proposed in this application, HUD reserves the right to consider the amount of the previous CDBG award and the grant amount requested in response to this NOFA, and to adjust the amount of a CDBG award under this NOFA, including, if appropriate, not making an award.

In the event the applicant is awarded a CDBG grant that has been reduced below the original request, the applicant will be required to modify its project plans and application to conform to the terms of HUD approval before execution of a grant agreement and/or a Section 108 Loan Guarantee commitment. HUD reserves the right to reduce or de-obligate the CDBG grant award if an approvable Section 108 Loan Guarantee application is not submitted by the grantee in the required amounts on a timely basis (see section II.B.1.b. After approval of the CDBG grant, any program amendments must meet the provisions of 24 CFR 570.427.

7. Environmental Review Requirement

The HUD environmental review procedures contained in 24 CFR part 58 apply to this program, according to 24 CFR 570.604. Under part 58, grantees assume all of the responsibilities for environmental review, decision making, and action pursuant to the National Environmental Policy Act of 1969 and the other provisions of law specified by the Secretary in 24 CFR part 58 that would apply to the Secretary were he to undertake such projects as Federal projects.

II. The Application Process

Eligible applicants seeking CDBG assistance must apply in accordance with this NOFA. The CDBG application shall be accompanied by a request for Section 108 Loan Guarantee commitments, as further described in section II.B. of this NOFA, below. Application requirements for the Section 108 program are found in Sec. 570.704.

A. Timing of submission

Applications for CDBG assistance must be submitted for receipt in the manner described under ''Dates'' and ''Addresses,'' above.

B. Submission Requirements

1. The CDBG application (an original plus two copies) shall be accompanied by a request for loan guarantee assistance under Section 108. If more than one jurisdiction applies jointly, each entity that will receive a guarantee and issue guaranteed obligations must submit a separate request. Each request for Section 108 Loan Guarantee can be either one or more of the following:

a. A formal application for Section 108 Loan Guarantee(s), including the documents listed at 24 CFR 570.704(b);

b. A brief description of a Section 108 Loan Guarantee application(s) to be submitted within 60 days (with HUD reserving the right to extend such period for good cause on a case-by-case basis) of a notice of CDBG selection (CDBG

awards will be conditioned on approval of actual Section 108 loan commitments). This description must be sufficient to support the basic eligibility of the proposed project or activities for Section 108 assistance;

c. A request for a Section 108 Loan Guarantee amendment (analogous to subparagraph a. or b. above) that proposes to increase the amount of a previously approved application.

d. Applicants should note that an application for a Section 108 Loan Guarantee commitment requires that the applicant certify that it has made efforts to obtain financing without the use of the Section 108 Loan Guarantee and that it cannot complete such financing consistent with the timely execution of the program plans without the Section 108 Loan Guarantee.

2. In addition, an application for CDBG grant funds shall include the following:

a. A completed Standard Form 424, Application for Federal Assistance.

b. A signed copy of certifications required under the CDBG program, including, but not limited to the Drug-Free Workplace Certification, and the Certification Regarding Lobbying pursuant to section 319 of the Department of Interior Appropriations Act for Fiscal Year 1990 (31 U.S.C. 1352), generally prohibiting use of appropriated funds, and, if applicable, Disclosure of Lobbying Activities (SF–LLL). The applicant may use the lobbying certification published with this NOFA.

c. Form HUD–2880, Applicant/Recipient Disclosure/Update Report, as required under 24 CFR 4.9 through 4.13. The applicant may use the form published with this NOFA.

d. Abbreviated consolidated plan, if applicable;

e. A narrative statement, in accordance with section I.A.3.a. of this NOFA, consisting of the following:

(1) A description of the eligible activities that will be carried out with the CDBG grant funds and Section 108 Loan Guarantee funds and how these activities will meet the national objective of principally benefitting low and moderate income persons by creating jobs, 51% of which will be made available to or held by low and moderate income persons. The narrative statement should explain how the use of CDBG grant funds together with Section 108 Loan Guarantee funds will meet the selection criteria in section II.C. of this NOFA, below;

(2) A description of the multiyear plan for CDBG funds, the use of which will be limited to paying projected amounts due on Section 108 guaranteed loan debt obligations (principal and interest) over the projected term of the loan that is guaranteed by the Section 108 Loan Guarantee. Each applicant's multiyear plan must discuss the total amount of the Section 108 Loan Guarantee commitments that will be requested, the term of the Section 108 guaranteed loans, a repayment schedule for the Section 108 guaranteed loans that clearly identifies the amount and source of the projected funds, including the CDBG funds proposed to be used to repay the Section 108 guaranteed loans over the course of the multiyear plan. The multiyear period may not exceed 20 years. The description must list, for each year of the multiyear period, the projected amount of CDBG funds that will be needed each year to meet the Section 108 debt obligation. The amount of CDBG funds requested for each year need not be the same amount; however, the amount requested for each year should relate to the anticipated amounts appropriate to meet the CDBG portion of the payment on the Section 108 guaranteed loans, consistent with the maximum grant amounts specified in section I.B.2. of this NOFA; and

(3) The description of the activities to be carried out with the CDBG grant and Section 108 Loan Guarantee funds should also describe how they will create visible change and are part of a larger comprehensive revitalization effort, and how they meet the selection criteria, including performance measures and benchmarks for these activities; identify and describe the project service area; and, as an aid to reviewing the multiyear plan, include a draft business plan with financial projections for not less than a 5-year period.

In addition to the above, HUD encourages applicants to submit maps and related information generated by the community's consolidated plan computer software with their applications, and depictions of proposed projects.

d. The narrative statement and the response to all of the selection criteria in section II.D. of this NOFA, below, should preferably not exceed thirty (30) 8.5″ by 11″ typewritten pages.

C. Selection Criteria

All applications will be considered for selection based on the following criteria. As described in section II.B.2.d. of this NOFA, above, each applicant's response to the narrative statement and all of the selection criteria should preferably not exceed thirty (30) 8.5″ by 11″ typewritten pages. Each application will receive only one score.

A maximum of 184 points is possible under this NOFA, with the maximum points for each factor being:

Need-absolute number of persons in poverty	22
Need-percent of persons in poverty	22
Program Impact	125
Outstanding performance-FHEO	15
Total	184

Each of the four factors is outlined below. All points for each factor are rounded to the nearest whole number.

1. Need-Absolute Number of Persons in Poverty (Up to 22 Points)

HUD uses 1990 census data to determine the absolute number of persons in poverty residing within the applicant unit of general local government. Applicants which are county governments are rated separately from all other applicants. Applicants in each group are compared in terms of the number of persons whose incomes are below the poverty level. Individual scores are obtained by dividing each applicant's absolute number of persons in poverty by the greatest number of persons in poverty of any applicant, and multiplying by 22.

2. Need-Percent of Persons in Poverty (Up to 22 Points)

HUD uses 1990 census data to determine the percent of persons in poverty residing within the applicant unit of general local government. Applicants in each group are compared in terms of the percentage of their population below the poverty level. Individual scores are obtained by dividing each applicant's percentage of persons in poverty by the highest percentage of persons in poverty of any applicant, and multiplying by 22.

3. Program Impact (Up to 125 Points)

Within this selection factor, points will be awarded as follows:

a. *Quality of the Plan* (up to 65 points).

In reviewing the applicant's response to this criterion, HUD will consider the following:

(1) *Economic and commercial revitalization.* The extent to which the proposed canal-related economic development project will contribute to the physical and economic revitalization of a waterfront district, and the impact of the project in strengthening the economic health of the entire community.

(2) *Regional impact.* The extent to which the proposed canal-related economic development project relates to other waterfront development projects in the region to create a regional synergy which contributes to regional economic

growth, including job creation, increased business activity and tourism.

(3) *Job creation.* The extent to which the proposed canal-related economic development project assisted by the requested CDBG grant, Section 108 Loan Guarantees, and the multiyear CDBG program will create jobs, principally for low- and moderate-income persons.

(4) *Innovation and creativity.* The extent to which the applicant incorporated innovation and/or creativity in the design and proposed implementation of the activities to be carried out with Section 108/CDBG funds.

(5) *Feasibility of the economic development proposal.* HUD will consider the feasibility and quality of the applicant's canal-related economic development proposal for the use of CDBG funds and Section 108 guaranteed loans to address the applicant's economic and community development needs, and the extent to which the canal-related economic development proposal is logically, feasibly, and substantially likely to achieve its stated purpose. In evaluating feasibility, HUD will also consider the extent to which the proposal includes public/private partnerships, i.e. the involvement of groups such as nonprofit organizations, developers, financial institutions, and others integral to the implementation of the project.

(6) Impact of the project in utilizing the canal or related waterways to economically and physically revitalize the area.

b. *Extent of Need for CDBG Assistance to Financially Support the Section 108 Loans and the Project* (up to 20 points).

HUD will use the following information to evaluate this criterion. In utilizing this information, HUD will consider the extent to which the applicant's response demonstrates the financial need for the CDBG grant to support financially the loans guaranteed by the Section 108 Loan Guarantee commitments. Note that if the applicant proposes a generic loan fund to assist a certain category of project or business, the applicant should demonstrate the impact of the use of the CDBG funds to assist the project and the relationship of those funds to the use of Section 108 loans. Relevant information may include:

(1) Project costs and financial requirements;

(2) The amount of any debt service or operating reserve accounts to be established in connection with the economic development project;

(3) The reasonableness of the costs of any credit enhancement paid with CDBG grant funds;

(4) The amount of program income (if any) to be received each year during the repayment period for the guaranteed loans;

(5) Interest rates on those loans to third parties (other than subrecipients) (either as an absolute rate or as a plus/minus spread to the Section 108 rate);

(6) Underwriting guidelines used (or expected to be used) in determining project feasibility;

(7) The amount of anticipated ''cash flow'' the project is projected to generate that will be available to make debt service payments on the Section 108 guaranteed loans; and

(8) Other relevant information.

c. *The Extent to Which the Proposal, Compared to Other Canal-Related Economic Development Proposals Submitted Pursuant to this NOFA, Leverages Other Non-Federal Public and Private Resources, in Addition to Loan Funds Guaranteed Under the Section 108 Loan Guarantee Program* (up to 20 points).

Leveraged funds include State and local public funding and private financing.

d. *The Capacity or Potential Capacity of the CDBG applicant and the Section 108 Public Entities to Carry Out the Plan Successfully* (up to 20 points).

This may include factors such as the applicant's performance in the administration of its CDBG, HOME, or other programs; its previous experience, if any, in administering a Section 108 Loan Guarantee or CDBG grant; its performance and capacity in carrying out economic development projects; its ability to conduct prudent underwriting; its capacity to manage and service loans made with the guaranteed loan funds or CDBG grant funds; and its capacity to carry out its projects and programs in a timely manner. The applicant should also describe any recent experience it has had in carrying out programs similar to the one proposed in the application.

The capacity of subrecipients, nonprofit organizations, and other entities that have a role in implementing the proposed program will be included in this review. HUD may rely on information from performance reports, financial status information, monitoring reports, audit reports and other information available to HUD in making its determination under this criterion.

4. Fair Housing and Equal Opportunity Evaluation (Up to 15 Points)

Documentation for the 15 points for these items is the responsibility of the applicant. Claims of outstanding performance must be based upon actual accomplishments. Clear, precise documentation will be required. Maps must have a census tract (CT) or block numbering area (BNA), and they must be in accordance with the 1990 Census data. Additionally, maps must identify the locations of areas with minorities by census tract or BNA. If there are no minority areas, applicants must state so on the map. Only population data from the 1990 Census will be acceptable for purposes of this section.

Please note that a ''minority'' is a person belonging to, or culturally identified as, a member of any one of the following racial/ethnic categories: Black, Hispanic, Asian or Pacific Islander, and American Indian or Alaskan Native. For the purposes of this section, the term ''minority'' does not include women as a separate category.

Counties claiming points under this criterion must use county-wide statistics (excluding entitlement communities). In the case of joint applications, points will be awarded based on the performance of the lead entity only.

The following will be used to judge outstanding performance in these areas. Please note that points for outstanding performance may be claimed under each criterion:

a. *Housing Achievements* (up to 12 points total).

(1) *Provision of Assisted Housing* (up to 6 points).

Providing assisted housing for low- and moderate-income families, located in a manner which provides housing choice in areas outside of minority or low- and moderate-income concentrations.

Points will be awarded if both of the following criteria are met:

(a) More than one-third of the housing assistance provided by the applicant in the last five (5) years (excluding Section 8 existing and housing assistance provided in place) has been in census tracts (CT) or block numbering areas (BNA) having a percentage of minority population which is less than the minority population in the community as a whole; and

(b) With regard to the Section 8 Existing Housing program, a community must show the location (CT or BNA) of its currently occupied family units by race/ethnicity. Points will be awarded if more than one-half of the minority assisted families occupy units in areas which have a lower percentage of minority population than that of the community as a whole.

A community with no minorities must show the extent to which its assisted housing is located outside areas of concentrations of low- and moderate-income persons. In order to receive points under this criteria, applicants should follow the process outlined in (a)

and (b) above, substituting low- and moderate-income persons and families for minority persons or families. Applicants addressing the first criterion must use a map indicating the location of all assisted housing and a narrative indicating the number of units and the type of assisted housing. The map also must show the general location of low- and moderate-income households and minority households, giving the numbers and percentages for both.

To qualify as housing assistance provided, the units being claimed must be part of a project located outside minority or lower income concentrated areas which has, at a minimum, received a firm commitment from the funding agency.

(c) Points also may be awarded for efforts which enable low- and moderate-income persons to remain in their neighborhood when such neighborhoods are experiencing revitalization and substantial displacement as a result of private reinvestment. Applicants requesting points under this criterion would not need to meet the requirements of (a) and (b) in order to receive points. Points will be awarded if more than one-half of the families displaced were able to remain in their original neighborhood through the assistance of the applicant. Applicants must show that:

—The neighborhood experienced revitalization;
—The amount of displacement was substantial;
—Displacement was caused by private reinvestment;
—Low- and moderate-income persons were permitted to remain in the neighborhood as a result of action taken by the applicant.

If the community is inhabited predominantly by persons who are members of minority and/or low-income groups, points will be awarded if there is a balanced distribution of assisted housing throughout the community.

(2) *Implementation of a Fair Housing Action Plan* (up to 6 points).

The applicant must describe how it has implemented a Fair Housing Action Plan of its own or participated in a regional or countywide Fair Housing Action Plan. For the purposes of this NOFA, a Fair Housing Action Plan is a document that delineates specific actions to address fair housing problems in the area covered by the applicant. The plan should list Fair Housing actions, set priorities and time period for completion and include measures against which performance shall be evaluated, identify resources from local, State, and private agencies and organizations that have agreed to finance or support fair housing actions, and define the responsibilities of each group or organization. If the applicant is implementing a Fair Housing Plan, the application must include the plan being implemented, the actions taken to implement the plan, and the actions taken to address the fair housing problems. The applicant should provide written documentation of commitments from all involved parties.

b. *Equal Opportunity Employment* (up to 3 points).

Under this factor, the applicant must document that its percentage of minority permanent full-time employees is greater than the percentage of minorities within the county or the community, whichever is higher. Applicants with no full-time employees may claim points based on part-time employment provided that they document that the only permanent employment is on a part-time basis.

c. *Entrepreneurial Efforts and Local Equal Employment.* HUD encourages the use of minority contracting, although it will not be used as an evaluation factor in this NOFA.

D. Selection Process

All applications will be ranked in order of points assigned, with the applications receiving more points ranking above those receiving fewer points. Applications will be funded in rank order.

As discussed in section I.C.5. of this NOFA, above, HUD reserves the right to determine a minimum and a maximum amount of any CDBG award or Section 108 commitment per applicant, application, or project, the amount or number of years for which multiyear CDBG funding is proposed, and to modify requests accordingly. In addition, if HUD determines that an application rated, ranked, and fundable could be funded at a lesser CDBG grant amount than requested, consistent with feasibility of the funded project or activities and the purposes of the Act, HUD reserves the right to reduce the amount of the CDBG award and/or increase or decrease the Section 108 Loan Guarantee commitments, if necessary, in accordance with such determination.

HUD may decide not to award the full amount of CDBG grant funds available under this NOFA, and may make any remaining amounts available under a future NOFA.

To review and rate applications, HUD will establish a panel consisting predominantly of HUD employees assigned to the New York Field Offices. HUD may also include other HUD staff and persons not currently employed by HUD to obtain certain expertise and outside points of view, including views from other Federal agencies.

E. Timing of Grant Awards

To the extent full Section 108 applications are submitted concurrently with the CDBG grant application, HUD's approval of the related Section 108 Loan Guarantee commitments will in most cases be granted contemporaneously with CDBG grant approval. However, the CDBG grant may be awarded prior to HUD approval of the Section 108 commitments if HUD determines that such award will further the purposes of the Act. CDBG funds shall not be disbursed to the public entity before the issuance of the related Section 108 guaranteed obligations.

F. Program Administration

In order to be consistent with the local nature of the program, funds awarded under this NOFA will be administered by the New York State CPD Office.

G. Funding Award Process

In accordance with section 102 of the HUD Reform Act and HUD's regulation at 24 CFR part 4, HUD will notify the public, by notice published in the **Federal Register**, of all award decisions made by HUD under this competition. In accordance with the requirements of section 102 of the Reform Act and HUD's regulations at 24 CFR part 4, HUD also will ensure that documentation and other information regarding each application submitted under this Notice of Funding Availability is sufficient to indicate the basis upon which assistance was provided or denied. Additionally, in accordance with the Reform Act and the regulations, HUD will make this material available for public inspection for a period of five years, beginning not less than 30 calendar days after the date on which assistance is provided.

III. Technical Assistance

Prior to the application deadline, the New York Offices will provide technical assistance on request to individual applicants, including explaining and responding to questions regarding program regulations and the NOFA. In addition, HUD will conduct informational meetings around the State to discuss the Small Cities program, and will conduct application workshops in conjunction with these meetings. HUD employees are prohibited in these sessions, however, from advising applicants how to make substantive improvements to their applicants and

from disclosing other covered selection information described at 24 CFR 4.26. Please contact the Buffalo or New York Offices for further information regarding these meetings. In order to ensure that the application deadline is met, it is strongly suggested that applicants begin preparing their applications immediately and not wait for the informational meetings.

IV. Corrections to Deficient Applications

Under no circumstances will HUD accept from the applicant unsolicited information regarding the application after the application deadline has passed.

HUD may advise applicants of technical deficiencies in applications and permit them to be corrected. A technical deficiency would be an error or oversight which, if corrected, would not alter, in either a positive or negative fashion, the review and rating of the application. Examples of curable technical deficiencies would be a failure to submit the proper certifications or failure to submit an application containing an original signature by an authorized official. Situations not considered curable would be, for example, a failure to submit program impact descriptions.

HUD will notify applicants in writing of any curable technical deficiencies in applications. Applicants will have 14 calendar days from the date of HUD's correspondence to reply and correct the deficiency. If the deficiency is not corrected within this time period, HUD will reject the application as incomplete.

Applicants should note that if an abbreviated consolidated plan is not submitted, the failure to submit it in a timely manner is not considered a curable deficiency.

V. Findings and Certifications

Paperwork Reduction Act Statement

The information collection requirements related to this CDBG program have been approved by the Office of Management and Budget (OMB) in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520), and have been assigned OMB approval number 2506–0020. An agency may not conduct or sponsor, and a person is not required to respond to a collection of information unless the collection displays a valid control number.

Environmental Impact

In accordance with 24 CFR 50.19(c)(5) of HUD's regulations (as issued in a final rule on September 27, 1996 (61 FR 50914), this NOFA provides funding under, and does not alter environmental requirements of, a regulation previously published in the **Federal Register**. Therefore, this NOFA is categorically excluded from the requirements of the National Environmental Policy Act. The environmental review provisions of this regulation are in 24 CFR 570.604.

Federalism

The General Counsel, as the Designated Official under section 6(a) of Executive Order 12612, Federalism, has determined that this NOFA will not have substantial, direct effects on States, on their political subdivisions, or on their relationship with the Federal Government, or on the distribution of power and responsibilities between them and other levels of government. While the NOFA will provide financial assistance through the Small Cities program to New York State, none of its provisions will have an effect on the relationship between the Federal Government and New York State, or the State's political subdivisions.

Family

The General Counsel, as the Designated Official for Executive Order 12606, The Family, has determined that the policies announced in this NOFA would not have the potential for significant impact on family formation, maintenance, and general well-being within the meaning of the Order. No significant change in existing HUD policies and programs will result from issuance of this NOFA, as those policies and programs relate to family concerns.

Section 102 of the HUD Reform Act

Section 102 of the Department of Housing and Urban Development Reform Act of 1989 (HUD Reform Act) and the final rule codified at 24 CFR part 4, subpart A, published on April 1, 1996 (61 FR 1448), contain a number of provisions that are designed to ensure greater accountability and integrity in the provision of certain types of assistance administered by HUD. On January 14, 1992, HUD published, at 57 FR 1942, a notice that also provides information on the implementation of section 102. The documentation, public access, and disclosure requirements of section 102 are applicable to assistance awarded under this NOFA as follows:

Documentation and public access requirements. HUD will ensure that documentation and other information regarding each application submitted pursuant to this NOFA are sufficient to indicate the basis upon which assistance was provided or denied. This material, including any letters of support, will be made available for public inspection for a five-year period beginning not less than 30 days after the award of the assistance. Material will be made available in accordance with the Freedom of Information Act (5 U.S.C. 552) and HUD's implementing regulations at 24 CFR part 15. In addition, HUD will include the recipients of assistance pursuant to this NOFA in its **Federal Register** notice of all recipients of HUD assistance awarded on a competitive basis.

Disclosures. HUD will make available to the public for five years all applicant disclosure reports (HUD Form 2880) submitted in connection with this NOFA. Update reports (also Form 2880) will be made available along with the applicant disclosure reports, but in no case for a period less than three years. All reports—both applicant disclosures and updates—will be made available in accordance with the Freedom of Information Act (5 U.S.C. 552) and HUD's implementing regulations at 24 CFR part 15.

Section 103 of the HUD Reform Act

Section 103 of the Department of Housing and Urban Development Reform Act of 1989, and HUD's implementing regulation codified at subpart B of 24 CFR part 4, applies to the funding competition announced today. These requirements continue to apply until the announcement of the selection of successful applicants. HUD employees, including those conducting technical assistance sessions or workshops and those involved in the review of applications and in the making of funding decisions, are limited by section 103 from providing advance information to any person (other than an authorized employee of HUD) concerning funding decisions, or from otherwise giving any applicant an unfair competitive advantage. Persons who apply for assistance in this competition should confine their inquiries to the subject areas permitted under section 103 and subpart B of 24 CFR part 4.

Applicants who have ethics related questions should contact the HUD Ethics Law Division at (202) 708–3815. (This is not a toll-free number.)

Prohibition Against Lobbying Activities

The use of funds awarded under this NOFA is subject to the disclosure requirements and prohibitions of section 319 of the Department of Interior and Related Agencies Appropriations Act for Fiscal Year 1990 (31 U.S.C. 1352) and the implementing regulations at 24 CFR part 87. These authorities prohibit recipients of Federal contracts,

grants, or loans from using appropriated funds for lobbying the Executive or Legislative Branches of the Federal Government in connection with a specific contract, grant, or loan. The prohibition also covers the awarding of contracts, grants, cooperative agreements, or loans unless the recipient has made an acceptable certification regarding lobbying. Under 24 CFR part 87, applicants, recipients, and subrecipients of assistance exceeding $100,000 must certify that no Federal funds have been or will be spent on lobbying activities in connection with the assistance.

Dated: November 20, 1998.

Joseph A. D'Agosta,

Acting General Deputy, Assistant Secretary for Community Planning and Development.

Certification Required By Title I of the Housing and Community Development Act of 1974, as Amended, With Respect to the Community Development Block Grant Program

In accordance with the Housing and Community Development Act of 1974, as amended, the Applicant certifies that:

(a) It possesses legal authority to make a grant submission and to execute a community development and housing program;

(b) Its governing body has duly adopted or passed as an official act a resolution, motion or similar action authorizing the person identified as the official representative of the applicant to submit the subject application and all understandings and assurances contained therein, and directing and authorizing the person identified as the official representative of the applicant to act in connection with the submission of the application and to provide such additional information as may be required;

(c) Prior to submission of its application to HUD, the applicant has met the citizen participation requirements of 24 CFR 570.431;

(d) It is following a detailed citizen participation plan which:

(1) Provides for and encourages citizen participation, with particular emphasis on participation by persons of low and moderate income who are residents of slum and blighted areas in which funds are proposed to be used, and provides for participation of residents in low and moderate income neighborhoods as defined by the local jurisdiction;

(2) Provides citizens with reasonable and timely access to local meetings, information, and records relating to the applicant's proposed use of funds, as required by the regulations of the Secretary, and relating to the actual use of funds under the Act;

(3) Provides for technical assistance to groups representative of persons of low and moderate income that request such assistance in developing proposals with the level and type of assistance to be determined by the applicant;

(4) Provides for public hearings to obtain citizen views and to respond to proposals and questions at all stages of the community development program, including at least the development of needs, the review of proposed activities, and review of program performance, which hearings shall be held after adequate notice, at times and locations convenient to potential or actual beneficiaries, and with accommodation for the handicapped;

(5) Provides for a timely written answer to written complaints and grievances, within 15 working days where practicable; and

(6) Identifies how the needs of non-English speaking residents will be met in the case of public hearings where a significant number of non-English speaking residents can be reasonably expected to participate;

(e) The grant will be conducted and administered in compliance with:

(1) Title VI of the Civil Rights Act of 1964 (Public Law 88–352, 42 U.S.C. 2000d *et seq.*); and

(2) The Fair Housing Act (42 U.S.C. 3601–20);

(f) It will affirmatively further fair housing;

(g) It has developed its application so as to give maximum feasible priority to activities which benefit low and moderate income families or aid in the prevention or elimination of slums or blight; the application may also include activities which the applicant certifies are designed to meet other community development needs having a particular urgency because existing conditions pose a serious and immediate threat to the health or welfare of the community, and where other financial resources are not available to meet such needs; except that the grant shall principally benefit persons of low and moderate income in a manner that ensures that not less than 70 percent of such funds are used for activities that benefit such persons;

(h) It has developed a community development plan for the grant period which identifies community development and housing needs and specifies both short and long term community development objectives that have been developed in accordance with the primary objective and requirements of the Act;

(i) Any proposed housing activities are consistent with its abbreviated consolidated plan submitted or being submitted to HUD for approval pursuant to 24 CFR 570.420(d) and 24 CFR 91.235.

(j) It will not attempt to recover any capital costs of public improvements assisted in whole or in part with funds provided under section 106 of the Act or with amounts resulting from a guarantee under section 108 of the Act by assessing any amount against properties owned and occupied by persons of low and moderate income, including any fee charged or assessment made as a condition of obtaining access to such public improvements, unless:

(1) Funds received under section 106 of the Act are used to pay the proportion of such fee or assessment that relates to the capital costs of such public improvements that are financed from revenue sources other than under Title I of the Act; or

(2) For purposes of assessing any amount against properties owned and occupied by persons of moderate income, the applicant certifies to the Secretary that it lacks sufficient funds received under section 106 of the Act to comply with the requirements of subparagraph (1) above;

(k) Its notification, inspection, testing and abatement procedures concerning lead-based paint will comply with 24 CFR 570.608;

(l) It will comply with the acquisition and relocation requirements of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, as amended, as required under 24 CFR 570.606(b) and Federal implementing regulations; and the requirements in 24 CFR 570.606(c) governing the residential anti-displacement and relocation assistance plan under section 104(d) of the Act (including a certification that the applicant is following such a plan); and the relocation requirements of 24 CFR 570.606(d) governing optional relocation assistance under section 105(a)(11) of the Act;

(m) It has adopted and is enforcing:

(1) A policy prohibiting the use of excessive force by law enforcement agencies within its jurisdiction against any individuals engaged in nonviolent civil rights demonstrations; and

2. A policy of enforcing applicable State and local laws against physically barring entrance to or exit from a facility or location which is the subject of such nonviolent civil rights demonstrations within its jurisdiction;

(n) To the best of its knowledge and belief:

(1) No Federal appropriated funds have been paid or will be paid, by or on behalf of it, to any person for

influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with the awarding of any Federal contract, the making of any Federal grant, the making of any Federal loan, the entering into of any cooperative agreement, and the extension, continuation, renewal, amendment, or modification of any Federal contract, grant, loan, or cooperative agreement;

(2) If any funds other than Federal appropriated funds have been paid or will be paid to any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with this Federal contract, grant, loan, or cooperative agreement, it will complete and submit Standard Form-LLL, ''Disclosure Form to Report Lobbying,'' in accordance with its instructions; and

(3) It will require that the language of paragraph (n) of this certification be included in the award documents for all subawards at all tiers (including subcontracts, subgrants, and contracts under grants, loans, and cooperative agreements) and that all subrecipients shall certify and disclose accordingly;

(o) It will or will continue to provide a drug-free workplace by:

(1) Publishing a statement notifying employees that the unlawful manufacture, distribution, dispensing, possession, or use of a controlled substance is prohibited in the applicant's workplace and specifying the actions that will be taken against employees for violation of such prohibition;

(2) Establishing an ongoing drug-free awareness program to inform employees about—

(a) The dangers of drug abuse in the workplace;

(b) The applicant's policy of maintaining a drug-free workplace;

(c) Any available drug counseling, rehabilitation, and employee assistance programs; and

(d) The penalties that may be imposed upon employees for drug abuse violations occurring in the workplace;

(3) Making it a requirement that each employee to be engaged in the performance of the grant be given a copy of the statement required by paragraph (1);

(4) Notifying the employee in the statement required by paragraph (1) that, as a condition of employment under the grant, the employee will—

(a) Abide by the terms of the statement; and

(b) Notify the employer in writing of his or her conviction for a violation of a criminal drug statute occurring in the workplace no later than five calendar days after such conviction;

(5) Notifying the agency in writing, within ten calendar days after receiving notice under subparagraph (4)(b) from an employee or otherwise receiving actual notice of such conviction. Employers of convicted employees must provide notice, including position title, to every grant officer or other designee on whose grant activity the convicted employee was working, unless the Federal agency has designated a central point for the receipt of such notices. Notice shall include the identification number(s) of each affected grant;

(6) Taking one of the following actions, within 30 calendar days of receiving notice under subparagraph (4)(b), with respect to any employee who is so convicted—

(a) Taking appropriate personnel action against such an employee, up to and including termination, consistent with the requirements of the Rehabilitation Act of 1973, as amended; or

(b) Requiring such employee to participate satisfactorily in a drug abuse assistance or rehabilitation program approved for such purposes by a Federal, State, or local health, law enforcement, or other appropriate agency;

(7) Making a good faith effort to continue to maintain a drug-free workplace through implementation of paragraphs (1), (2), (3), (4), (5) and (6).

(8) The applicant may insert in the space provided below the site(s) for the performance of work done in connection with the specific grant:

Place of Performance (Street address, city, county, state, zip code)

_____

_____

_____

_____

Check XX if there are workplaces on file that are not identified here; and

(p) It will comply with the other provisions of the Act and with other applicable laws.

_____

Signature

_____

Title

_____

Date

Appendix to CDBG Certifications

Instructions Concerning Lobbying and Drug-Free Workplace Requirements

A. Lobbying Certification

This certification is a material representation of fact upon which reliance was placed when this transaction was made or entered into. Submission of this certification is a prerequisite for making or entering into this transaction imposed by section 1352, title 31, U.S. Code. Any person who fails to file the required certification shall be subject to a civil penalty of not less than $10,000 and not more than $100,000 for each such failure.

B. Drug-Free Workplace Certification

1. By signing and/or submitting this application or grant agreement, the applicant is providing the certification set out in paragraph (o).

2. The certification set out in paragraph (o) is a material representation of fact upon which reliance is placed when the agency awards the grant. If it is later determined that the applicant knowingly rendered a false certification, or otherwise violates the requirements of the Drug-Free Workplace Act, HUD, in addition to any other remedies available to the Federal Government, may take action authorized under the Drug-Free Workplace Act.

3. For applicants other than individuals, Alternate I applies. (This is the information to which applicants certify).

4. For applicants who are individuals, Alternate II applies. (Not applicable to CDBG applicants.)

5. Workplaces under grants, for applicants other than individuals, need not be identified on the certification. If known, they may be identified in the grant application. If the applicant does not identify the workplaces at the time of application, or upon award, if there is no application, the applicant must keep the identity of the workplace(s) on file in its office and make the information available for Federal inspection. Failure to identify all known workplaces constitutes a violation of the applicant's drug-free workplace requirements.

6. Workplace identifications must include the actual address of buildings (or parts of buildings) or other sites where work under the grant takes place. Categorical descriptions may be used (e.g., all vehicles of a mass transit authority or State highway department while in operation, State employees in each local unemployment office, performers in concert halls or radio stations).

7. If the workplace identified to the agency changes during the performance of the grant, the applicant shall inform the agency of the change(s), if it previously identified the workplaces in question (see paragraph five).

8. Definitions of terms in the Nonprocurement Suspension and Debarment common rule and Drug-Free Workplace common rule apply to this certification. Applicants' attention is called, in particular, to the following definitions from these rules:

''Controlled substance'' means a controlled substance in Schedules I through V of the Controlled Substances Act (21 U.S.C. 812) and as further defined by regulation (21 CFR 1308.11 through 1308.15);

''Conviction'' means a finding of guilt (including a plea of nolo contendere) or imposition of sentence, or both, by any judicial body charged with the responsibility to determine violations of the Federal or State criminal drug statutes;

''Criminal drug statute'' means a Federal or non-Federal criminal statute involving the manufacture, distribution, dispensing, use, or possession of any controlled substance;

''Employee'' means the employee of a applicant directly engaged in the performance of work under a grant, including: (i) All ''direct charge'' employees; (ii) all ''indirect charge'' employees unless their impact or involvement is insignificant to the performance of the grant; and (iii) temporary personnel and consultants who are directly engaged in the performance of work under the grant and who are not on the applicant's payroll. This definition does not include workers not on the payroll of the applicant (e.g., volunteers, even if used to meet a matching requirement; consultants or independent contractors not on the applicant's payroll; or employees of subrecipients or subcontractors in covered workplaces).

BILLING CODE 4210–29–P

Application for Federal Assistance

OMB Approval No. 0348-0043

	2. Date Submitted	Applicant Identifier
1. Type of Submission:	3. Date Received by State	State Application Identifier
Application ☐ Construction ☐ Non-Construction **Preapplication** ☐ Construction ☐ Non-Construction	4. Date Received by Federal Agency	Federal Identifier

5. Applicant Information

Legal Name	Organizational Unit
Address (give city, county, State, and zip code): matters	Name, telephone number, and facsimile number of the person to be contacted on involving this application (give area codes)

6. Employer Identification Number (EIN):

☐☐ — ☐☐☐☐☐☐☐

7. Type of Applicant: (enter appropriate letter in box) ☐

A. State
B. County
C. Municipal
D. Township
E. Interstate
F. Intermunicipal
G. Special District
H. Independent School Dist.
I. State Controlled Institution of Higher Learning
J. Private University
K. Indian Tribe
L. Individual
M. Profit Organization
N Non-profit
O Public Housing Agency
P. Other (Specify):

8. Type of Application:

☐ New ☐ Continuation ☐ Revision

If Revision, enter appropriate letter(s) in box(es): ☐ ☐

A. Increase Award B. Decrease Award C. Increase Duration
D. Decrease Duration Other (specify):

9. Name of Federal Agency:

10. Catalog of Federal Domestic Assistance Number:

☐☐ — ☐☐☐

Title:

11. Descriptive Title of Applicant's Project:

12. Areas Affected by Project (cities, counties, States, etc.):

13. Proposed Project: Start Date	Ending Date	**14. Congressional Districts of:** a. Applicant	b. Project

15. Estimated Funding:		
a. Federal	$	.00
b. Applicant	$	.00
c. State	$	.00
d. Local	$	.00
e. Other	$	.00
f. Program Income	$	.00
g. **Total**	$	.00

16. Is Application Subject to Review by State Executive Order 12372 Process?

a. **Yes** This preapplication/application was made available to the State Executive Order 12372 Process for review on:

Date: _____

b. **No** ☐ Program is not covered by E.O. 12372

or ☐ Program has not been selected by State for review.

17. Is the Applicant Delinquent on Any Federal Debt?

☐ Yes If "Yes," explain below or attach an explanation ☐ No

18. To the best of my knowledge and belief, all data in this application/preapplication are true and correct, the document has been duly authorized by the governing body of the applicant and the applicant will comply with the attached assurances if the assistance is awarded.

a. Typed Name of Authorized Representative	b. Title	c. Telephone Number

d. Signature of Authorized Representative	e. Date Signed

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form **SF-424** (4/92)
Prescribed by OMB Circular A-102

Instructions for the SF-424

This is a standard form used by applicants as a required facesheet for preapplications and applications submitted for Federal assistance. It will be used by Federal agencies to obtain applicant certification that States which have established a review and comment procedure in response to executive Order 12372 and have selected the program to be included in their process, have been given an opportunity to review the applicant's submission.

Item Entry

1. Self-explanatory.
2. Date application submitted to Federal agency (or State if applicable) and applicant's control number (if applicable).
3. State use only (if applicable).
4. If this application is to continue or revise an existing award, enter present Federal identifier number. If for a new project, leave blank.
5. Legal name of applicant, name of primary organizational unit which will undertake the assistance activity, complete address of the applicant, and name and telephone number of the person to contact on matters related to this application.
6. Enter Employer Identification Number (EIN) as assigned by the Internal Revenue Service.
7. Enter the appropriate letter in the space provided.
8. Check appropriate box and enter appropriate letter(s) in the space(s) provided:
   - "New" means a new assistance award.
   - "Continuation" means an extension for an additional funding budget period for a project with a projected completion date.
   - "Revision" means any change in the Federal Government's financial obligation or contingent liability from an existing obligation.
9. Name of Federal agency from which assistance is being requested with this application.
10. Use the Catalog of Federal Domestic Assistance number and title of the program under which assistance is requested.
11. Enter a brief descriptive title of the project. If more than one program is involved, you should append an explanation on a separate sheet. If appropriate (e.g., construction or real property projects), attach a map showing project location. For preapplications, use a separate sheet to provide a summary description of this project.
12. List only the largest political entities affected (e.g., State, counties, cities).
13. Self-explanatory.
14. List the applicant's Congressional District and any District(s) affected by the program or project.
15. Amount requested or to be contributed during the first funding/budget period by each contributor. Value of in-kind contributions should be included on appropriate lines as applicable. If the action will result in a dollar change to an existing award, indicate only the amount of the change. For decreases, enclose the amounts in parentheses. If both basic and supplemental amounts are included, show breakdown on an attached sheet. For multiple program funding, use totals and show breakdown using same categories as item 15.
16. Applicants should contact the State Single Point of Contact (SPOC) for Federal Executive Order 12372 to determine whether the application is subject to the State intergovernmental review process
17. This question applies to the applicant organization, not the person who signs as the authorized representative. Categories of debt include delinquent audit disallowances, loans and taxes.
18. To be signed by the authorized representative of the applicant. A copy of the governing body's authorization for you to sign this application as official representative must be on file in the applicant's office. (Certain Federal agencies may require that this authorization be submitted as part of the application.)

Certification for a Drug-Free Workplace

U.S. Department of Housing and Urban Development

Applicant Name

Program/Activity Receiving Federal Grant Funding:

Acting on behalf of the above named Applicant as its Authorized Official, I make the following certifications and agreements to the Department of Housing and Urban Development (HUD) regarding the sites listed below:

I certify that the above named Applicant will or will continue to provide a drug-free workplace by:

a. Publishing a statement notifying employees that the unlawful manufacture, distribution, dispensing, possession, or use of a controlled substance is prohibited in the Applicant's workplace and specifying the actions that will be taken against employees for violation of such prohibition.

b. Establishing an on-going drug-free awareness program to inform employees ---

(1) The dangers of drug abuse in the workplace;

(2) The Applicant's policy of maintaining a drug-free workplace;

(3) Any available drug counseling, rehabilitation, and employee assistance programs; and

(4) The penalties that may be imposed upon employees for drug abuse violations occurring in the workplace.

c. Making it a requirement that each employee to be engaged in the performance of the grant be given a copy of the statement required by paragraph a.;

d. Notifying the employee in the statement required by paragraph a. that, as a condition of employment under the grant, the employee will ---

(1) Abide by the terms of the statement; and

(2) Notify the employer in writing of his or her conviction for a violation of a criminal drug statute occurring in the workplace no later than five calendar days after such conviction;

e. Notifying the agency in writing, within ten calendar days after receiving notice under subparagraph d.(2) from an employee or otherwise receiving actual notice of such conviction. Employers of convicted employees must provide notice, including position title, to every grant officer or other designee on whose grant activity the convicted employee was working, unless the Federalagency has designated a central point for the receipt of such notices. Notice shall include the identification number(s) of each affected grant;

f. Taking one of the following actions, within 30 calendar days of receiving notice under subparagraph d.(2), with respect to any employee who is so convicted ---

(1) Taking appropriate personnel action against such an employee, up to and including termination, consistent with the requirements of the Rehabilitation Act of 1973, as amended; or

(2) Requiring such employee to participate satisfactorily in a drug abuse assistance or rehabilitation program approved for such purposes by a Federal, State, or local health, law enforcement, or other appropriate agency;

g. Making a good faith effort to continue to maintain a drug-free workplace through implementation of paragraphs a. thru f.

2. Sites for Work Performance. The Applicant shall list (on separate pages) the site(s) for the performance of work done in connection with the HUD funding of the program/activity shown above: Place of Performance shall include the street address, city, county, State, and zip code. Identify each sheet with the Applicant name and address and the program/activity receiving grant funding.)

Check here ☐ if there are workplaces on file that are not identified on the attached sheets.

I hereby certify that all the information stated herein, as well as any information provided in the accompaniment herewith, is true and accurate.

Warning: HUD will prosecute false claims and statements. Conviction may result in criminal and/or civil penalties. (18 U.S.C. 1001, 1010, 1012; 31 U.S.C. 3729, 3802)

Name of Authorized Official: | Title:

Signature: | Date:

X

form **HUD-50070** (3/98)
ref. Handbooks 7417.1, 7475.13, 7485.1 & .3

Certification of Payments to Influence Federal Transactions

U.S. Department of Housing and Urban Development
Office of Public and Indian Housing

Applicant Name

Program/Activity Receiving Federal Grant Funding

The undersigned certifies, to the best of his or her knowledge and belief, that:

(1) No Federal appropriated funds have been paid or will be paid, by or on behalf of the undersigned, to any person for influencing or attempting to influence an officer or employee of an agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with the awarding of any Federal contract, the making of any Federal grant, the making of any Federal loan, the entering into of any cooperative agreement, and the extension, continuation, renewal, amendment, or modification of any Federal contract, grant, loan, or cooperative agreement.

(2) If any funds other than Federal appropriated funds have been paid or will be paid to any person for influencing or attempting to influence an officer or employee of an agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with this Federal contract, grant, loan, or cooperative agreement, the undersigned shall complete and submit Standard Form-LLL, Disclosure Form to Report Lobbying, in accordance with its instructions.

(3) The undersigned shall require that the language of this certification be included in the award documents for all subawards at all tiers (including subcontracts, subgrants, and contracts under grants, loans, and cooperative agreements) and that all subrecipients shall certify and disclose accordingly.

This certification is a material representation of fact upon which reliance was placed when this transaction was made or entered into. Submission of this certification is a prerequisite for making or entering into this transaction imposed by Section 1352, Title 31, U.S. Code. Any person who fails to file the required certification shall be subject to a civil penalty of not less than $10,000 and not more than $100,000 for each such failure.

I hereby certify that all the information stated herein, as well as any information provided in the accompaniment herewith, is true and accurate.

Warning: HUD will prosecute false claims and statements. Conviction may result in criminal and/or civil penalties. (18 U.S.C. 1001, 1010, 1012; 31 U.S.C. 3729, 3802)

Name of Authorized Official:	Title:
Signature:	Date:
X	

Previous edition is obsolete

form HUD 50071 (3/98)
ref. Handboooks 7417.1, 7475.13, 7485.1, & 7485.3

Disclosure of Lobbying Activities

Approved by OMB 0348-0046

Complete this form to disclose lobbying activities pursuant to 31 U.S.C. 1352
(See reverse side for Instructions.)

Public Reporting Burden for this collection of information is estimated to average 30 minutes per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Please do not return your completed form to the Office of Management and Budget; send it to the address provided by the sponsoring agency .

1. **Type of Federal Action:**	2. **Status of Federal Action:**	3. **Report Type:**
☐ a. contract ☐ b. grant c. cooperative agreement d. loan e. loan guarantee f. loan insurance	☐ a. bid/offer/application ☐ b. initial award c. post-award	☐ a. initial filing ☐ b. material change **For Material Change Only:** year _____ quarter _____ date of last report _____

4. **Name and Address of Reporting Entity:** ☐ Prime ☐ Subawardee Tier _____, if known: **Congressional District,** if known:	5. **If Reporting Entity in No. 4 is Subawardee, enter Name and Address of Prime:** **Congressional District,** if known:
6. **Federal Department/Agency:**	7. **Federal Program Name/Description:** **CFDA Number,** if applicable: _____
8. **Federal Action Number,** if known:	9. **Award Amount,** if known: $
10a. **Name and Address of Lobbying Registrant** (if individual, last name, first name, MI):	b. **Individuals Performing Services** (including address if different from No. 10a.) (last name, first name, MI):

11. Information requested through this form is authorized by Sec.319, Pub. L. 101-121, 103 Stat. 750, as amended by sec. 10; Pub. L. 104-65, Stat. 700 (31 U.S.C. 1352). This disclosure of lobbying activities is a material representation of fact upon which reliance was placed by the above when this transaction was made or entered into. This disclosure is required pursuant to 31 U.S.C. 1352. This information will be reported to the Congress semiannually and will be available for public inspection. Any person who fails to file the required disclosure shall be subject to a civil penalty of not less than $10,000 and not more than $100,000 for each such failure.

Signature: _____

Print Name: _____

Title: _____

Telephone No.: _____

Date: _____

Federal Use Only:

Authorized for Local Reproduction
Standard Form-LLL (1/96)

Instructions for Completion of SF-LLL, Disclosure of Lobbying Activities

This disclosure form shall be completed by the reporting entity, whether subawardee or prime Federal recipient, at the initiation or receipt of a covered Federal action, or a material change to a previous filing, pursuant to title 31 U.S.C. section 1352. The filing of a form is required for each payment or agreement to make payment to any lobbying entity for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or any employee of a Member of Congress in connection with a covered Federal action. Complete all items that apply for both the initial filing and material change report. Refer to the implementing guidance published by the Office of Management and Budget for additional information.

1. Identify the type of covered Federal action for which lobbying activity is and/or has been secured to influence the outcome of a covered Federal action.

2. Identify the status of the covered Federal action.

3. Identify the appropriate classification of this report. If this is a followup report caused by a material change to the information previously reported, enter the year and quarter in which the change occurred. Enter the date of the last previously submitted report by this reporting entity for this covered Federal action.

4. Enter the full name, address, city, state and zip code of the reporting entity. Include Congressional District, if known. Check the appropriate classification of the reporting entity that designates if it is, or expects to be, a prime or subaward recipient. Identify the tier of the subawardee, e.g., the first subawardee of the prime is the 1st tier. Subawards include but are not limited to subcontracts, subgrants and contract awards under grants.

5.If the organization filing the report in item 4 checks "Subawardee", then enter the full name, address, city, state and zip code of the prime Federal recipient, Include Congressional District, if known.

6. Enter the name of the Federal agency making the award or loan commitment. Include at least one organizational level below agency name, if known. For example, Department of Transportation, United States Coast Guard.

7. Enter the Federal program name or description for the covered Federal action (item 1). If known, enter the full Catalog of Federal Domestic Assistance (CFDA) number for grants, cooperative agreements, loans, and loan commitments.

8. Enter the most appropriate Federal identifying number available for the Federal action identified in item 1 (e.g., Request for Proposal (RFP) number; Invitation for Bid (IFB) number; grant announcement number; the contract, grant, or loan award number; the application proposal control number assigned by the Federal agency). Include prefixes, e.g., "RFP-DE-90-001."

9.For a covered Federal action where there has been an award or loan commitment by the Federal agency, enter the Federal amount of the award/loan commitment for the prime entity identified in item 4 or 5.

10. (a) Enter the full name, address, city, state and zip code of the registrant under the Lobbying Disclosure Act of 1995 engaged by the reporting entity identified in item 4 to influence the covered Federal action.

(b) Enter the full names of the individual(s) performing services, and include full address if different from 10 (a). Enter Last Name, First Name, and Middle Initial (MI).

11. The certifying official shall sign and date the form, print his/her name, title, and telephone number.

Applicant/Recipient Disclosure/Update Report

U.S. Department of Housing and Urban Development
Office of Ethics

OMB Approval No. 2510-0011 (exp. 3/31/98)

Instructions. (See Public Reporting Statement and Privacy Act Statement and detailed instructions on page 4.)

Part I Applicant/Recipient Information **Indicate whether this is an Initial Report** ☐ **or an Update Report** ☐

1. Applicant/Recipient Name, Address, and Phone (include area code)	Social Security Number or Employer ID Number

2. Project Assisted/ to be Assisted (Project/Activity name and/or number and its location by Street address, City, and State)

3. Assistance Requested/Received	4. HUD Program	5. Amount Requested/Received
		$

Part II. Threshold Determinations -- Applicants Only

1. Are you requesting HUD assistance for a specific project or activity, as provided by 24 CFR Part 12, Subpart C, **and** have you received, or can you reasonably expect to receive, an aggregate amount of all forms of covered assistance from HUD, States, and units of general local government, in excess of $200,000 during the Federal fiscal year (October 1 through September 30) in which the application is submitted? ☐ **Yes** ☐ **No**

   If Yes, you must complete the remainder of this report.

   If No, you must sign the certification below and answer the next question.

   I hereby certify that this information is true. (Signature) _____ Date _____

2. Is this application for a specific housing project that involves other government assistance? ☐ **Yes** ☐ **No**

   If Yes, you must complete the remainder of this report.

   If No, you must sign this certification.

   I hereby certify that this information is true. (Signature) _____ Date _____

If your answers to both questions are No, you do not need to complete Parts III, IV, or V, but you must sign the certification at the end of the report.

Part III. Other Government Assistance Provided/Requested

Department/State/Local Agency Name and Address	Program	Type of Assistance	Amount Requested/Provided

Is there other government assistance that is reportable in this Part and in Part V, but that is reported only in Part V? ☐ Yes ☐ No

If there is no other government assistance, you must certify that this information is true.

I hereby certify that this information is true. (Signature) _____ Date _____

form **HUD-2880** (3/92)
ref. Sec 102, HRA 1989; PL. 101 - 235

Part IV. Interested Parties

Alphabetical list of all persons with a reportable financial interest in the project or activity (for individuals, give the last name first)	Social Security Number or Employee ID Number	Type of Participation in Project/Activity	Financial Interest in Project/Activity ($ and %)

If there are no persons with a reportable financial interest, you must certify that this information is true.

I hereby certify that this information is true. (Signature) _____ Date _____

form HUD-2880 (3/92)
ref. Sec 102, HRA 1989; PL. 101 - 235

Part V. Report on Expected Sources and Uses of Funds

Source

If there are no sources of funds, you must certify that this information is true.

I hereby certify that this information is true. (Signature) _____ Date _____

Use

If there are no uses of funds, you must certify that this information is true.

I hereby certify that this information is true. (Signature) _____ Date _____

Certification

Warning: If you knowingly make a false statement on this form, you may be subject to civil or criminal penalties under Section 1001 of Title 18 of the United States Code. In addition, any person who knowingly and materially violates any required disclosure of information, including intentional non-disclosure, is subject to civil money penalty not to exceed $10,000 for each violation.

I certify that this information is true and complete.

Signature	Date

form **HUD-2880** (3/92)
ref. Sec 102, HRA 1989; PL. 101 - 235

Public reporting burden for this collection of information is estimated to average 2.5 hours per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. This agency may not conduct or sponsor, and a person is not required to respond to, a collection information unless that collecton displays a valid OMB control number.

Privacy Act Statement. Except for Social Security Numbers (SSNs) and Employer Identification Numbers (EINs), the Department of Housing and Urban Development (HUD) is authorized to collect all the information required by this form under section 102 of the Department of Housing and Urban Development Reform Act of 1989, 42 U.S.C. 3531. Disclosure of SSNs and EINs is optional. The SSN or EIN is used as a unique identifier. The information you provide will enable HUD to carry out its responsibilities under Sections 102(b), (c), and (d) of the Department of Housing and Urban Development Reform Act of 1989, Pub. L. 101-235, approved December 15, 1989. These provisions will help ensure greater accountability and integrity in the provision of certain types of assistance administered by HUD. They will also help ensure that HUD assistance for a specific housing project under Section 102(d) is not more than is necessary to make the project feasible after taking account of other government assistance. HUD will make available to the public all applicant disclosure reports for five years in the case of applications for competitive assistance, and for generally three years in the case of other applications. Update reports will be made available along with the disclosure reports, but in no case for a period generally less than three years. All reports, both initial reports and update reports, will be made available in accordance with the Freedom of Information Act (5 U.S.C. §552) and HUD's implementing regulations at 24 CFR Part 15. HUD will use the information in evaluating individual assistance applications and in performing internal administrative analyses to assist in the management of specific HUD programs. The information will also be used in making the determination under Section 102(d) whether HUD assistance for a specific housing project is more than is necessary to make the project feasible after taking account of other government assistance. You must provide all the required information. Failure to provide any required information may delay the processing of your application, and may result in sanctions and penalties, including imposition of the administrative and civil money penalties specified under 24 CFR §12.34.

Note: This form only covers assistance made available by the Department. States and units of general local government that carry out responsibilities under Sections 102(b) and (c) of the Reform Act must develop their own procedures for complying with the Act.

Instructions (See Note 1 on last page.)

I. Overview. Subpart C of 24 CFR Part 12 provides for (1) initial reports from applicants for HUD assistance and (2) update reports from recipients of HUD assistance. An overview of these requirements follows.

A. Applicant disclosure (initial) reports: General. All applicants for assistance from HUD for a specific project or activity must make a number of disclosures, if the applicant meets a dollar threshold for the receipt of covered assistance during the fiscal year in which the application is submitted. The applicant must also make the disclosures if it requests assistance from HUD for a specific housing project that involves assistance from other governmental sources.

Applicants subject to Subpart C must make the following disclosures:

Assistance from other government sources in connection with the project,

The financial interests of persons in the project,

The sources of funds to be made available for the project, and

The uses to which the funds are to be put.

B. Update reports: General. All recipients of covered assistance must submit update reports to the Department to reflect substantial changes to the initial applicant disclosure reports.

C. Applicant disclosure reports: Specific guidance. The applicant must complete all parts of this disclosure form if **either** of the following **two** circumstances in paragraph 1. or 2., below, applies:

1.a. Nature of Assistance. The applicant submits an application for assistance for a specific project or activity (See Note 2) in which:

HUD makes assistance available to a recipient for a specific project or activity; or

HUD makes assistance available to an entity (other than a State or a unit of general local government), such as a public housing agency (PHA), for a specific project or activity, where the application is required by statute or regulation to be submitted to HUD for any purpose; **and**

b. Dollar Threshold. The applicant has received, or can reasonably expect to receive, an aggregate amount of all forms of assistance (See Note 3) from HUD, States, and units of general local government, in excess of $200,000 during the Federal fiscal year (October 1 through September 30) in which the application is submitted. (See Note 4)

2. The applicant submits an application for assistance for a specific housing project that involves other government assistance. (See Note 5) Note: There is no dollar threshold for this criterion: **any** other government assistance triggers the requirement. (See Note 6)

If the Application meets **neither** of these two criteria, the applicant need only complete Parts I and II of this report, as well as the certification at the end of the report. If the Application meets **either** of these criteria, the applicant must complete the entire report.

The applicant disclosure report must be submitted with the application for the assistance involved.

D. Update reports: Specific guidance. During the period in which an application for covered assistance is pending, or in which the assistance is being provided (as indicated in the relevant grant or other agreement), the applicant must make the following additional disclosures:

1. Any information that should have been disclosed in connection with the application, but that was omitted.

2. Any information that would have been subject to disclosure in connection with the application, but that arose at a later time, including information concerning an interested party that now meets the applicable disclosure threshold referred to in Part IV, below.

3. For changes in previously disclosed other government assistance:

For programs administered by the Assistant Secretary for Community Planning and Development, any change in other government assistance that exceeds the amount of such assistance that was previously disclosed by $250,000 or by 10 percent of the assistance (whichever is lower).

For all other programs, any change in other government assistance that exceeds the amount of such assistance that was previously disclosed.

4. For changes in previously disclosed financial interests, any change in the amount of the financial interest of a person that exceeds the amount of the previously disclosed interests by $50,000 or by 10 percent of such interests (whichever is lower).

5. For changes in previously disclosed sources or uses of funds:

a. For programs administered by the Assistant Secretary for Community Planning and Development:

Any change in a source of funds that exceeds the amount of all previously disclosed sources of funds by $250,000 or by 10 percent of those sources (whichever is lower); and

Any change in a use of funds under paragraph (b)(1)(iii) that exceeds the amount of all previously disclosed uses of funds by $250,000 or by 10 percent of those uses (whichever is lower).

b. For all programs, other than those administered by the Assistant Secretary for Community Planning and Development:

For projects receiving a tax credit under Federal, State, or local law, any change in a source of funds that was previously disclosed.

For all other projects, any change in a source of funds that exceeds the lower of:

The amount previously disclosed for that source of funds by $250,000, or by 10 percent of the amount previously disclosed for that source, whichever is lower; or

The amount previously disclosed for all sources of funds by $250,000, or by 10 percent of the amount previously disclosed for all sources of funds, whichever is lower.

c. For all programs, other than those administered by the Assistant Secretary for Community Planning and Development:

For projects receiving a tax credit under Federal, State, or local law, any change in a use of funds that was previously disclosed.

For all other projects, any change in a use of funds that exceeds the lower of:

The amount previously disclosed for that use of funds by $250,000, or by 10 percent of the amount previously disclosed for that use, whichever is lower; or

The amount previously disclosed for all uses of funds by $250,000, or by 10 percent of the amount previously disclosed for all uses of funds, whichever is lower.

Note: Update reports must be submitted within 30 days of the change requiring the update. The requirement to provide update reports only applies if the application for the underlying assistance was submitted on or after the effective date of Subpart C.

II. Line-by-Line Instructions.

A. Part I. Applicant/Recipient Information.

All applicants for HUD assistance specified in Section I.C.1.a., above, as well as all recipients required to submit an update report under Section I.D., above, must complete the information required by Part I. The applicant/recipient must indicate whether the disclosure is an initial or an update report. Line-by-line guidance for Part I follows:

1. Enter the full name, address, city, State, zip code, and telephone number (including area code) of the applicant/recipient. Where the applicant/recipient is an individual, the last name, first name, and middle initial must be entered. Entry of the applicant/recipient's SSN or EIN, as appropriate, is optional.

2. Applicants enter the name and full address of the project or activity for which the HUD assistance is sought. Recipients enter the name and full address of the HUD-assisted project or activity to which the update report relates. The most appropriate government identifying number must be used (e.g., RFP No.; IFB No.; grant announcement No.; or contract, grant, or loan No.) Include prefixes.

3. Applicants describe the HUD assistance referred to in Section I.C.1.a. that is being requested. Recipients describe the HUD assistance to which the update report relates.

4. Applicants enter the HUD program name under which the assistance is being requested. Recipients enter the HUD program name under which the assistance, that relates to the update report, was provided.

5. Applicants enter the amount of HUD assistance that is being requested. Recipients enter the amount of HUD assistance that has been provided and to which the update report relates. The amounts are those stated in the application or award documentation. NOTE: In the case of assistance that is provided pursuant to contract over a period of time (such as project-based assistance under section 8 of the United States Housing Act of 1937), the amount of assistance to be reported includes all amounts that are to be provided over the term of the contract, irrespective of when they are to be received.

Note: In the case of Mortgage Insurance under 24 CFR Subtitle B, Chapter II, the mortgagor is responsible for making the applicant disclosures, and the mortgagee is responsible for furnishing the mortgagor's disclosures to the Department. Update reports must be submitted directly to HUD by the mortgagor.

Note: In the case of the Project-Based Certificate program under 24 CFR Part 882, Subpart G, the owner is responsible for making the applicant disclosures, and the PHA is responsible for furnishing the owner's disclosures to HUD. Update reports must be submitted through the PHA by the owner.

B. Part II. Threshold Determinations — Applicants Only

Part II contains information to help the applicant determine whether the remainder of the form must be completed. **Recipients filing Update Reports should not complete this Part.**

1. The first question asks whether the applicant meets the Nature of Assistance and Dollar Threshold requirements set forth in Section I.C.1. above.

If the answer is Yes, the applicant must complete the remainder of the form. If the answer is No, the form asks the applicant to certify that its response is correct, and to complete the next question.

2. The second question asks whether the application is for a specific housing project that involves other government assistance, as described in Section I.C.2. above.

If the answer is Yes, the applicant must complete the remainder of the form. If the answer is No, the form asks the applicant to certify that its response is correct.

If the answer to both questions1 and 2 is No, the applicant need not complete Parts III, IV, or V of the report, but must sign the certification at the end of the form.

C. Part III. Other Government Assistance.

This Part is to be completed by both applicants filing applicant disclosure reports and recipients filing update reports. Applicants must report any other government assistance involved in the project or activity for which assistance is sought. Recipients must report any other government assistance involved in the project or activity, to the extent required under Section I.D.1., 2., or 3., above.

Other government assistance is defined in note 5 on the last page. For purposes of this definition, other government assistance is expected to be made available if, based on an assessment of all the circumstances involved, there are reasonable grounds to anticipate that the assistance will be forthcoming.

Both applicant and recipient disclosures must include all other government assistance involved with the HUD assistance, as well as any other government assistance that was made available before the request, but that has continuing vitality at the time of the request. Examples of this latter category include tax credits that provide for a number of years of tax benefits, and grant assistance that continues to benefit the project at the time of the assistance request.

The following information must be provided:

1. Enter the name and address, city, State, and zip code of the government agency making the assistance available. Include at least one organizational level below the agency name. For example, U.S. Department of Transportation, U.S. Coast Guard; Department of Safety, Highway Patrol.

2. Enter the program name and any relevant identifying numbers, or other means of identification, for the other government assistance.

3. State the type of other government assistance (e.g., loan, grant, loan insurance).

4. Enter the dollar amount of the other government assistance that is, or is expected to be, made available with respect to the project or activities for which the HUD assistance is sought (applicants) or has been provided (recipients).

If the applicant has no other government assistance to disclose, it must certify that this assertion is correct.

To avoid duplication, if there is other government assistance under this Part and Part V, the applicant/recipient should check the appropriate box in this Part and list the information in Part V, clearly designating which sources are other government assistance.

D. Part IV. Interested Parties.

This Part is to be completed by both applicants filing applicant disclosure reports and recipients filing update reports.

Applicants must provide information on:

(1) All developers, contractors, or consultants involved in the application for the assistance or in the planning, development, or implementation of the project or activity and

(2) any other person who has a financial interest in the project or activity for which the assistance is sought that exceeds $50,000 or 10 percent of the assistance (whichever is lower).

Recipients must make the additional disclosures refferred to in Section I.D.1.,2., or 4, above.

Note: A financial interest means any financial involvement in the project or activity, including (but not limited to) situations in which an individual or entity has an equity interest in the project or activity, shares in any profit on resale or any distribution of surplus cash or other assets of the project or activity, or receives compensation for any goods or services provided in connection with the project or activity. Residency of an individual in housing for which assistance is being sought is not, by itself, considered a covered financial interest.

The information required below must be provided.

1. Enter the full names and addresses of all persons referred to in paragraph (1) or (2) of this Part. If the person is an entity, the listing must include the full name of each officer, director, and principal stockholder of the entity. All names must be listed alphabetically, and the names of individuals must be shown with their last names first.

2. Entry of the Social Security Number (SSN) or Employee Identification Number (EIN), as appropriate, for each person listed is optional.

3. Enter the type of participation in the project or activity for each person listed: i.e., the person's specific role in the project (e.g., contractor, consultant, planner, investor).

4. Enter the financial interest in the project or activity for each person listed. The interest must be expressed both as a dollar amount and as a percentage of the amount of the HUD assistance involved.

If the applicant has no persons with financial interests to disclose, it must certify that this assertion is correct.

5. Part V. Report on Sources and Uses of Funds. This Part is to be completed by both applicants filing applicant disclosure reports and recipients filing update reports.

The applicant disclosure report must specify all expected sources of funds — both from HUD and from any other source — that have been, or are to be, made available for the project or activity. Non-HUD sources of funds typically include (but are not limited to) other government assistance referred to in Part III, equity, and amounts from foundations and private contributions. The report must also specify all expected uses to which funds are to be put. All sources and uses of funds must be listed, if, based on an assessment of all the circumstances involved, there are reasonable grounds to anticipate that the source or use will be forthcoming.

Note that if any of the source/use information required by this report has been provided elsewhere in this application package, the applicant need not repeat the information, but need only refer to the form and location to incorporate it into this report. (It is likely that some of the information required by this report has been provided on SF 424A, and on various budget forms accompanying the application.) If this report requires information beyond that provided elsewhere in the application package, the applicant must include in this report all the additional information required.

Recipients must submit an update report for any change in previously disclosed sources and uses of funds as provided in Section I.D.5., above.

General Instructions — sources of funds

Each reportable source of funds must indicate:

a. The name and address, city, State, and zip code of the individual or entity making the assistance available. At least one organizational level below the agency name should be included. For example, U.S. Department of Transportation, U.S. Coast Guard; Department of Safety, Highway Patrol.

b. The program name and any relevant identifying numbers, or other means of identification, for the assistance.

c. The type of assistance (e.g., loan, grant, loan insurance).

Specific instructions — sources of funds.

(1) For programs administered by the Assistant Secretaries for Fair Housing and Equal Opportunity and Policy Development and Research, each source of funds must indicate the total amount of approved, and received; and must be listed in descending order according to the amount indicated.

(2) For programs administered by the Assistant Secretaries for Housing-Federal Housing Commissioner, Community Planning and Development, and Public and Indian Housing, each source of funds must indicate the total amount of funds involved, and must be listed in descending order according to the amount indicated.

(3) If Tax Credits are involved, the report must indicate all syndication proceeds and equity involved.

General instructions—uses of funds.

Each reportable use of funds must clearly identify the purpose to which they are to be put. Reasonable aggregations may be used, such as "total structure" to include a number of structural costs, such as roof, evevators, exterior masonry, etc.

Specific instructions -- uses of funds.

(1) For programs administered by the Assistant Secretaries for Fair Housing and Equal Opportunity and Policy Development and Research, each use of funds must indicate the total amount of funds involved; must be broken down by amount committed, budgeted, and planned; and must be listed in descending order according to the amount indicated.

(ii) For programs administered by the Assistant Secretaries for Housing-Federal Housing Commissioner, Community Planning and Development, and Public and Indian Housing, each use of funds must indicate the total amount of funds involved and must be listed in descending order according to the amount involved.

(iii) If any program administered by the Assistant Secretary for Housing-Federal Housing Commissioner is involved, the report must indicate all uses paid from HUD sources and other sources, including syndication proceeds. Uses paid should include the following amounts.

AMPO
Architect's fee — design
Architect's fee — supervision
Bond premium
Builder's general overhead
Builder's profit
Construction interest
Consultant fee
Contingency Reserve
Cost certification audit fee
FHA examination fee
FHA inspection fee
FHA MIP
Financing fee
FNMA / GNMA fee
General requirements
Insurance
Legal — construction
Legal — organization
Other fees
Purchase price
Supplemental management fund
Taxes
Title and recording
Operating deficit reserve
Resident initiative fund
Syndication expenses
Working capital reserve
Total land improvement
Total structures

Uses paid from syndication must include the following amounts:

Additional acquisition price and expenses
Bridge loan interest
Development fee
Operating deficit reserve
Resident initiative fund
Syndication expenses
Working capital reserve

Footnotes:

1. All citations are to 24 CFR Part 12, which was published in the Federal Register on March 14, 1991 at 56 Fed. Reg. 11032.
2. A list of the covered assistance programs can be found at 24 CFR §12.30, or in the rules or administrative instructions governing the program involved. Note: The list of covered programs will be updated perodically.
3. Assistance means any contract, grant, loan, cooperative agreement, or other form of assistance, including the insurance or guarantee of a loan or mortgage, that is provided with respect to a specific project or activity under a program administered by the Department. The term does not include contracts, such as procurements contracts, that are subject to the Federal Acquisition Regulation (FAR) (48 CFR Chapter 1).
4. See 24 CFR §§12.32 (a)(2) and (3) for detailed guidance on how the threshold is calculated.
5. "Other government assistance" is defined to include any loan, grant, guarantee, insurance, payment, rebate, subsidy, credit, tax benefit, or any other form of direct or indirect assistance from the Federal government (other than that requested from HUD in the application), a State, or a unit of general local government, or any agency or instrumentality thereof, that is, or is expected to be made, available with respect to the project or activities for which the assistance is sought.
6. For further guidance on this criterion, and for a list of covered programs, see 24 CFR §12.50.
7. For purposes of Part 12, a person means an individual (including a consultant, lobbyist, or lawyer); corporation; company; association; authority; firm; partnership; society; State, unit of general local government, or other government entity, or agency thereof (including a public housing agency); Indian tribe; and any other organization or group of people.

Applicant Nondiscrimination Certifications

As the duly authorized representative of the applicant, I certify that the applicant:

1. Will comply with all Federal statutes relating to nondiscrimination. These include but are not limited to:

   a) Title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d) and regulations pursuant thereto (24 CFR Part 1), which prohibit discrimination on the basis of race, color or national origin;
   b) Section 504 of the Rehabilitation Act of 1973, as amended (29 U.S.C. §794), and implementing regulations at 24 CFR Part 8, which prohibit discrimination on the basis of handicap;
   c) the Age Discrimination Act of 1975, as amended (42 U.S.C. §§6101-6107), and implementing regulations at 24 CFR Part 146, which prohibit discrimination on the basis of age; and,
   d) the requirements of any other nondiscrimination statute(s) which may apply to the application.

2. Will comply with the Fair Housing Act of (42 U.S.C. 3601-19), as amended, and with implementing regulations at 24 CFR Part 100 et seq., which prohibit discrimination in housing on the basis of race, color, religion, sex, handicap, familial status or national origin, and administer its programs and activities relating to housing in a manner to affirmatively further fair housing.

3. Will comply with Section 109 of the Housing and Community Development Act of 1974, as amended, (42 U.S.C. 5301-5322), which states that no person shall on the ground of race, color, national origin, religion, or sex be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity funded in whole or in part with funds made available under this title.

Signature of Authorized Certifying Official: X	Applicant:
Title:	Date:

Certification Regarding Debarment and Suspension

U.S. Department of Housing and Urban Development

Certification A: Certification Regarding Debarment, Suspension, and Other Responsibility Matters - Primary Covered Transactions

1. The prospective primary participant certifies to the best of its knowledge and belief that its principals:

a. Are not presently debarred, suspended, proposed for debarment, declared ineligible, or voluntarily excluded from covered transactions by any Federal debarment or agency;

b. Have not within a three-year period preceding this proposal, been convicted of or had a civil judgment rendered against them for commission of fraud or a criminal offense in connection with obtaining, attempting to obtain, or performing a public (Federal, State, or local) transaction or contract under a public transaction; violation of Federal or State antitrust statutes or commission of embezzlement, theft, forgery, bribery, falsification, or destruction of records, making false statements, or receiving stolen property;

c. Are not presently indicted for or otherwise criminally or civilly charged by a governmental entity (Federal, State, or local) with commission of any of the offenses enumerated in paragraph (1)(b) of this certification; and

d. Have not within a three-year period preceding this application/proposal had one or more public transactions (Federal, State, or local) terminated for cause or default.

2. Where the prospective primary participant is unable to certify to any of the statements in this certification, such prospective participant shall attach an explanation to this proposal.

Instructions for Certification (A)

1. By signing and submitting this proposal, the prospective primary participant is providing the certification set out below.

2. The inability of a person to provide the certification required below will not necessarily result in denial of participation in this covered transaction. The prospective participant shall submit an explanation of why it cannot provide the certification set out below. The certification or explanation will be considered in connection with the department or agency's determination whether to enter into this transaction. However, failure of the prospective primary participant to furnish a certification or an explanation shall disqualify such person from participation in this transaction.

3. The certification in this clause is a material representation of fact upon which reliance was place when the department or agency determined to enter into this transaction. If it is later determined that the prospective primary participant knowingly rendered an erroneous certification, in addition to other remedies available to the Federal Government, the department or agency may terminate this transaction for cause of default.

4. The prospective primary participant shall provide immediate written notice to the department or agency to whom this proposal is submitted if at any time the prospective primary participant learns that its certification was erroneous when submitted or has become erroneous by reason of changed circumstances.

5. The terms **covered transaction, debarred, suspended, ineligible, lower tier covered transaction, participant, person, primary covered transaction, principal, proposal, and voluntarily excluded**, as used in this clause, have the meanings set out in the Definitions and Coverage sections of the rules implementing Executive Order 12549. You may contact the department or agency to which this proposal is being submitted for assistance in obtaining a copy of these regulations.

6. The prospective primary participant agrees by submitting this proposal that, should the proposed covered transaction be entered into, it shall not knowingly enter into any lower tier covered transaction with a person who is debarred, suspended, declared ineligible, or voluntarily excluded from participation in this covered transaction, unless authorized by the department or agency entering into this transaction.

7. The prospective primary participant further agrees by submitting this proposal that it will include the clause titled "Certification Regarding Debarment, Suspension, Ineligibility and Voluntary Exclusion - Lower Tier Covered Transaction," provided by the department or agency entering into this covered transaction, without modification, in all lower tier covered transactions and in all solicitations for lower tier covered transactions.

8. A participant in a covered transaction may rely upon a certification of a prospective participant in a lower tier covered transaction that it is not debarred, suspended, ineligible, or voluntarily excluded from the covered transaction, unless it knows that the certification is erroneous. A participant may decide the method and frequency by which it determines this eligibility of its principals. Each participant may, but is not required to, check the Nonprocurement List.

9. Nothing contained in the foregoing shall be construed to require establishment of a system of records in order to render in good faith the certification required by this clause. The knowledge and information of a participant is not required to exceed that which is normally possessed by a prudent person in the ordinary course of business dealings.

10. Except for transactions authorized under paragraph (6) of these instructions, if a participant in a covered transaction knowingly enters into a lower tier covered transaction with a person who is suspended, debarred, ineligible, or voluntarily excluded from participation in this transaction, in addition to other remedies available to the Federal Government, the department or agency may terminate this transaction for cause of default.

Certification B: Certification Regarding Debarment, Suspension, Ineligibility and Voluntary Exclusion - Lower Tier Covered Transactions

1. The prospective lower tier participant certifies, by submission of this proposal, that neither it nor its principals is presently debarred, suspended, proposed for debarment, declared ineligible, or voluntarily excluded from participation in this transaction by any Federal department or agency.

2. Where the prospective lower tier participant is unable to certify to any of the statements in this certification, such prospective participant shall attach an explanation to this proposal.

Instructions for Certification (B)

1. By signing and submitting this proposal, the prospective lower tier participant is providing the certification set out below.

2. The certification in this clause is a material representation of fact upon which reliance was placed when this transaction was entered into. If it is later determined that the prospective lower tier participant knowingly rendered an erroneous certification, in addition to other remedies available to the Federal Government, the department or agency with which this transaction originated may pursue available remedies, including suspension and/or debarment.

3. The prospective lower tier participant shall provide immediate written notice to the person to which this proposal is submitted if at any time the prospective lower tier participant learns that its certification was erroneous when submitted or has become erroneous by reason of changed circumstances.

4. The terms **covered transaction, debarred, suspended, ineligible, lower tier covered transaction, participant, person, primary covered transaction, principal, proposal, and voluntarily excluded**, as used in this clause, have the meanings set out in the Definitions and Coverage sections of rules implementing Executive Order 12549. You may contact the person to which this proposal is submitted for assistance in obtaining a copy of these regulations.

5. The prospective lower tier participant agrees by submitting this proposal that, should the proposed covered transaction be entered into, it shall not knowingly enter into any lower tier covered transaction with a person who is debarred, suspended, declared ineligible, or voluntarily excluded from participation in this covered transaction, unless authorized by the department or agency with which this transaction originated.

6. The prospective lower tier participant further agrees by submitting this proposal that it will include this clause titled "Certification Regarding Debarment, Suspension, Ineligibility and Voluntary Exclusion - Lower Tier Covered Transaction," without modification, in all lower tier covered transactions and in all solicitations for lower tier covered transactions.

7. A participant in a covered transaction may rely upon a certification of a prospective participant in a lower tier covered transaction that it is not debarred, suspended, ineligible, or voluntarily excluded from the covered transaction, unless it knows that the certification is erroneous. A participant may decide the method and frequency by which it determines the eligibility of its principals. Each participant may, but is not required to, check the Nonprocurement List.

8. Nothing contained in the foregoing shall be construed to require establishment of a system of records in order to render in good faith the certification required by this clause. The knowledge and information of a participant is not required to exceed that which is normally possessed by a prudent person in the ordinary course of business dealings.

9. Except for transactions authorized under paragraph (5) of these instructions, if a participant in a lower covered transaction knowingly enters into a lower tier covered transaction with a person who is suspended, debarred, ineligible, or voluntarily excluded from participation in this transaction, in addition to other remedies available to the Federal Government, the department or agency with which this transaction originated may pursue available remedies including suspension and/or debarment.

Applicant	Date
Signature of Authorized Certifying Official	Title

[FR Doc. 98–31515 Filed 11–20–98; 1:30 pm]
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Federal Register

Wednesday
November 25, 1998

Part VI

Department of Housing and Urban Development

Funding Availability for the HUD-Administered Small Cities Community Development Block Grant Program and the Section 108 Loan Guarantee Program for Small Communities in New York State; Notice

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–4424–N–01]

Notice of Funding Availability for: the HUD-Administered Small Cities Community Development Block Grant (CDBG) Program—Fiscal Year 1999; and the Section 108 Loan Guarantee Program for Small Communities in New York State

AGENCY: Office of the Assistant Secretary for Community Planning and Development, HUD.

ACTION: Notice of Funding Availability for Fiscal Year 1999.

SUMMARY: This Notice of Funding Availability (NOFA) announces: (1) the availability of approximately $54,558,000 in Fiscal Year (FY) 1999 funding for the HUD-administered Small Cities Program in New York State under the Community Development Block Grant (CDBG) Program ($1,000,000 of this amount has been set aside for the Canal Corridor Initiative which is being announced elsewhere in this **Federal Register**); and (2) the availability of a maximum of approximately $200,000,000—$250,000,000 in FY 1999 funding under the Section 108 Loan Guarantee program for small cities in New York State. Amounts available under the Section 108 Loan Guarantee program are not awarded competitively and are not rated under the criteria of this NOFA. Grants awarded under this NOFA for activities and projects for which Section 108 assistance will also be needed, however, will be conditioned upon approval of the requisite Section 108 application within a stated time.

The exact amount of funds that will be available from the approximately $53,558,000 of FY 1999 funds that communities will be able to compete for under this NOFA is not known at this time. In FY 1997 HUD carried out the Canal Corridor Initiative (see the NOFA for this initiative in the **Federal Register** on December 3, 1996 (61 FR 64196) and the amendment published in the **Federal Register** on December 12, 1996 (61 FR 66692)). Pursuant to that NOFA, HUD approved Canal Corridor applications for approximately $6.5 million in Fiscal Year 1997 New York Small Cities funds. HUD must also be prepared, pursuant to 24 CFR 570.432, to use CDBG funds each year, as necessary, for the sole purpose of paying any amounts due on debt obligations, for up to 20 years, issued by units of general local government (or their designated public agencies) and guaranteed by the Secretary pursuant to section 108 of the Housing and Community Development Act of 1974, as amended, for projects approved under the Canal Corridor Initiative NOFA. At this time, the exact amount of CDBG funds that will be needed to meet required debt obligation payments during Fiscal Year 1999 is not known. However, in the December 3, 1996 NOFA, HUD estimated that the average amount of CDBG funds required to meet the debt obligation payments would not exceed an average of $3 million per year over a 20-year period.

The funds announced in this NOFA provide small communities and counties in New York State with an opportunity to propose programs that focus on creating or expanding job opportunities, addressing housing needs, or meeting local public facilities needs. HUD encourages communities to propose programs that are creative and innovative in addressing the needs of their community. A community may propose a program that is ''single purpose'' in nature addressing a specific area of need. The maximum amount for a Single Purpose grant is $400,000 ($600,000 for counties).

DATES: Applications are due by February 8, 1999. Application kits may be obtained from and must be submitted to either HUD's New York or Buffalo Office. (The addresses for these offices are provided in Section II. of this NOFA.) In addition, application kits and additional information are available on HUD's website located at: www.hud.gov or by contacting Community Connections at (800) 998–9999.

Applications, if mailed, must be postmarked no later than midnight on February 8, 1999 and received within 10 calendar days of the deadline. If an application is hand-delivered to the New York or the Buffalo Office, the application must be delivered to the appropriate office by no later than 4:00 p.m. (local time) on February 8, 1999.

Application kits will be made available by a date that affords applicants no fewer than 45 days to respond to this NOFA. For further information on obtaining and submitting applications, please see Section II. of this NOFA.

The above-stated application deadline is firm as to date and hour. In the interest of fairness to all competing applicants, HUD will treat as *ineligible for consideration* any application that is not received by 4:00 p.m. on, or postmarked by, February 8, 1999. Applicants should take this procedure into account and make early submission of their materials to avoid any risk of loss of eligibility brought about by unanticipated delays or other delivery-related problems.

FOR FURTHER INFORMATION CONTACT: Yvette Aidara, State and Small Cities Division, Office of Community Planning and Development, Department of Housing and Urban Development, Room 7184, 451 Seventh Street SW, Washington, DC 20410; telephone (202) 708–1322 (this is not a toll-free number). Hearing or speech-impaired individuals may access this number via TTY by calling the toll-free Federal Information Relay Service at 1–800–877–8339.

SUPPLEMENTARY INFORMATION:

Contents

I. Purpose and Substantive Description

A. Authority and Background

1. Authority

Title I, Housing and Community Development Act of 1974 (42 U.S.C. 5301–5320) (1974 HCD Act); 24 CFR part 570, subpart F, for the New York State Small Cities program, and subpart M for the Section 108 Loan Guarantee program.

2. Background

Title I of the 1974 HCD Act authorizes the Community Development Block Grant (CDBG) Program. Section 106(d) of Title I permits States, in such manner and at such time as the Secretary shall prescribe, to elect to assume the administrative responsibility for the CDBG Program for nonentitled areas within their jurisdiction. Section 106 provides that HUD will administer the CDBG Program for nonentitled areas within any State that does not elect to assume the administrative responsibility for the program. HUD's regulations at 24 CFR part 570, subpart F describe the requirements for HUD's administration of the CDBG Program in nonentitled areas (Small Cities Program). This NOFA supplements subpart F of 24 CFR part 570.

In accordance with 24 CFR 570.421(b), and with the requirements of section 102 of the Housing and Urban Development Reform Act of 1989 (HUD Reform Act), HUD is issuing this NOFA for New York State's Small Cities Program for FY 1999. This NOFA announces the allocation of funds for a Single Purpose grant competition, and establishes the deadline for filing grant applications. The NOFA explains how HUD will apply the regulatory threshold requirements for funding eligibility, and the selection criteria for rating and scoring applications for Single Purpose grants.

Other information about the Small Cities Program will be provided in the application kit, which will be made available to applicants by HUD's New York Office and Buffalo Office (see Section II. of this NOFA). In addition, application kits and additional information are available on HUD's website located at: www.hud.gov or by contacting Community Connections at (800) 998–9999.

3. Other Program Requirements

a. Abbreviated Consolidated Plan. Each jurisdiction that applies for funds under this NOFA must have submitted a consolidated plan, as provided in 24 CFR part 91. An applicant for more than one grant under this NOFA or for the Canal Corridor Initiative NOFA published else where in this **Federal Register** need submit only one consolidated plan or abbreviated consolidated plan, as applicable, covering the activities proposed in all applications. A jurisdiction that does not expect to be a participating jurisdiction in the HOME program under 24 CFR part 92 may submit an abbreviated consolidated plan that is appropriate to the types and amounts of assistance sought from HUD (see 24 CFR 91.235). Any applicant that plans to undertake a housing activity with funds under this NOFA needs to prepare and submit, at a minimum, an abbreviated consolidated plan that is appropriate to the types and amounts of housing assistance sought under this NOFA.

Even if the community's Small Cities application is approved, HUD must also approve an abbreviated consolidated plan that covers activities proposed in such application(s) before the community may receive Small Cities funding. Further, that applicant must also include a certification that the housing activities in its CDBG Small Cities application are consistent with the consolidated plan. The applicant's consolidated plan must describe the jurisdiction's priority nonhousing community development needs eligible for assistance under the CDBG program by eligibility category, reflecting the needs of families for each type of activity, as appropriate, in terms of dollar amounts estimated to meet the priority need for the type of activity (see 24 CFR 91.235(c)(2)).

The abbreviated consolidated plan is subject to the same citizen participation requirements as is the jurisdiction's Small Cities CDBG application. Both must meet the citizen participation requirements before they may be submitted to HUD (see 24 CFR 570.431). A Section 108 Loan Guarantee application would also have to meet citizen participation requirements, as described in 24 CFR 570.704, if the jurisdiction submits one to HUD for consideration.

If possible, an applicant should submit the abbreviated consolidated plan in advance of the Small Cities application due date. The latest time at which the abbreviated consolidated plan will be accepted by HUD for the HUD-administered Small Cities Program in New York will be February 8, 1999 (the application due date for the Small Cities application). *Failure to submit the abbreviated consolidated plan by the due date is not a curable technical deficiency.* Questions regarding the abbreviated consolidated plan should be directed to the appropriate HUD field office.

Any application that is fundable but does not have an approved consolidated plan will receive a conditional approval subject to HUD's approval of the abbreviated consolidated plan. If HUD is unable to approve the abbreviated consolidated plan within a reasonable period of time (but not more than 60 days from the date that the conditional approval is announced), HUD will rescind the award. In such event the funding will be awarded to the highest rated fundable applicant that did not receive funding under this competition.

b. *Section 3.* Assistance provided under this NOFA is subject to the requirements of section 3 of the Housing and Urban Development Act of 1968 (12 U.S.C. 1701u), and HUD's implementing regulations in 24 CFR part 135. One of the purposes of this NOFA, which is consistent with section 3, is to give, to the greatest extent feasible and consistent with Federal, State, and local laws and regulations, job training, employment and other contracting opportunities generated from certain HUD financial assistance to low- and very low-income persons. Public entities awarded funds under this NOFA that intend to use the funds for housing rehabilitation, housing construction, or other public construction must comply with the applicable requirements set forth in 24 CFR part 135.

4. Accountability in the Provision of HUD Assistance: Documentation and Public Access Requirements; Applicant/Recipient Disclosures

Section 102 of the Department of Housing and Urban Development Reform Act of 1989 (42 U.S.C. 3545) (HUD Reform Act) and the regulations

codified in 24 CFR part 4, subpart A, contain a number of provisions that are designed to ensure greater accountability and integrity in the provision of certain types of assistance administered by HUD. On January 14, 1992 (57 FR 1942), HUD published a notice that also provides information on the implementation of section 102. The documentation, public access, and disclosure requirements of section 102 are applicable to assistance awarded under this NOFA as follows:

a. *HUD Responsibilities.*

(1) *Documentation and Public Access.* HUD will ensure that documentation and other information regarding each application submitted pursuant to this NOFA are sufficient to indicate the basis upon which assistance was provided or denied. This material, including any letters of support, will be made available for public inspection for a 5-year period beginning not less than 30 days after the award of the assistance. Material will be made available in accordance with the Freedom of Information Act (5 U.S.C. 552) and HUD's implementing regulations at 24 CFR part 15. In addition, HUD will include the recipients of assistance pursuant to this NOFA in its **Federal Register** notice of all recipients of HUD assistance awarded on a competitive basis.

(2) *Disclosures.* HUD will make available to the public for 5 years all applicant disclosure reports (HUD Form 2880) submitted in connection with this NOFA. Update reports (also Form 2880) will be made available along with the applicant disclosure reports, but in no case for a period less than 3 years. All reports—both applicant disclosures and updates—will be made available in accordance with the Freedom of Information Act (5 U.S.C. 552) and HUD's implementing regulations at 24 CFR part 15.

b. *Units of General Local Government Responsibilities.*

Units of general local government awarded assistance under this NOFA must ensure that documentation and other information regarding each application submitted to the recipient by a subsequent recipient applicant are adequate to indicate the basis upon which assistance was provided or denied. The unit of general local government must make this material, including any letters of support, available for public inspection for a 5-year period beginning not less than 30 days after the award of the assistance. Unit of general local government recipients must also notify the public of the subsequent recipients of the assistance. Each recipient will develop documentation, public access, and notification procedures for its programs.

B. Allocation Amounts

1. Total Available Funding

The nonentitlement CDBG funds for New York State for FY 1999 total approximately $54,558,000. The exact amount of funds available for this Small Cities CDBG funding competition is not known at this time. In FY 1997 HUD carried out the Canal Corridor Initiative (see the NOFA for this initiative in the **Federal Register** on December 3, 1996 (61 FR 64196) and as amended on December 18, 1996 (61 FR 66692)). HUD must be prepared, pursuant to 24 CFR 570.432, to use CDBG funds each year, as necessary, for the sole purpose of paying any amounts due on debt obligations, for up to 20 years, issued by units of general local government (or their designated public agencies) and guaranteed by the Secretary pursuant to section 108 of the Housing and Community Development Act of 1974, as amended, for projects approved under the Canal Corridor Initiative NOFA. HUD approved approximately $6.55 million in FY 1997 Small Cities funds for Canal Corridor grants. However, at this time, the exact amount of CDBG funds that will be needed to meet required debt obligation payments during Fiscal Year 1999 is not known. Of the approximately $53,558,000 available under this NOFA, approximately $47,024,000 is allocated for distribution to eligible units of general local government within the jurisdiction of HUD's New York Buffalo Field Office. Approximately $6,534,000 is allocated for distribution to eligible units of general local government within the jurisdiction of HUD's New York Office. Once HUD has determined the final amount of funds available for competitive distribution under this NOFA, HUD will allocate such funds in the same ratio as above to HUD's Buffalo and New York Offices. However, HUD has the option to revise these final allocations between offices by up to $400,000 in order to assure full distribution of funds. Finally, HUD reserves the right, in its sole discretion, not to award all of the funds available under this NOFA and to make any such funds available in a future NOFA, if an insufficient number of applications are determined fundable under this NOFA.

2. Imminent Threats

All imminent threat projects must meet the national objective of benefitting low- and moderate-income persons. HUD may elect to set aside up to 15 percent of the FY 1999 allocations for imminent threat projects. These funds will be available until the rating and ranking process for funds distributed under this NOFA is completed.

C. Eligibility

1. Eligible Applicants

Eligible applicants are units of general local government in New York State, excluding: (1) metropolitan cities; (2) urban counties; (3) units of government which are participating in urban counties or metropolitan cities even if only part of the participating unit of government is located in the urban county or metropolitan city; and (4) Indian tribes (as defined in section 102(a)(17) of the 1974 HCD Act). Applications may be submitted individually, or jointly, as described in 24 CFR 570.422.

2. Previous Grantees

Eligible applicants that previously have been awarded Small Cities Program CDBG grants are also subject to an evaluation of capacity and performance (see generally, section I.E.2. of this NOFA). Numerical thresholds for drawdown of funds have been established to assist HUD in evaluating a grantee's progress in implementing its program activities. (These standards apply to all CDBG Program grants received by the community.) In FY 1996 an additional threshold was established which relates to the submission of annual Performance Assessment Reports (PARs). A PAR was due on October 31, 1998, for each grant which a local government received prior to April 1, 1997. *Failure to submit a PAR is not a curable technical deficiency.*

Applicants generally will be determined to have performed adequately in the area(s) where the thresholds are met. Where a threshold has not been met, HUD will evaluate the documentation of any mitigating factors, particularly with respect to actions taken by the applicant to accelerate the implementation of its program activities.

3. Eligible Activities and National Objectives

Eligible activities under the Small Cities CDBG Program are those identified in subpart C of 24 CFR part 570. With respect to the Section 108 Loan Guarantee program, eligible activities are identified in § 570.703. Note that § 570.703 does not include all CDBG-eligible activities. Each activity under both programs must meet one of the national objectives (i.e., benefit to

low- and moderate-income persons, elimination of slums or blighting conditions, or meeting imminent threats to the health and safety of the community; see § 570.208), and each grant and use of Section 108 Loan Guarantee proceeds must meet the requirements for compliance with the primary objective of principally benefitting low- and moderate-income persons, as required under § 570.420(e). The CDBG program requires that not less than 70 percent of the total of grant funds from a grant made under this NOFA and Section 108 Loan Guarantee funds received within a fiscal year must be expended for activities that benefit low- and moderate-income persons under the criteria of 24 CFR § 570.208(a). The method of calculating the use of these funds for compliance with the 70 percent overall benefit requirement is set forth in § 570.420(e). In general, all applications must describe the projects and activities proposed in sufficient detail that compliance with these and other applicable statutory, regulatory, and NOFA provisions can be determined.

4. Anti-pirating Prohibition

Section 588 of the Quality Housing and Work Responsibility Act of 1998, P.L. 105–276, amended section 105(h) of the Housing and Community Development Act of 1974 as follows:

''(h) PROHIBITION ON USE OF ASSISTANCE FOR EMPLOYMENT RELOCATION ACTIVITIES. Notwithstanding any other provision of law, no amount from a grant under section 106 made in fiscal year 1999 or any succeeding fiscal year may be used to assist directly in the relocation of any industrial or commercial plant, facility, or operation, from 1 area to another area, if the relocation is likely to result in a significant loss of employment in the labor market area from which the relocation occurs.''

Accordingly, HUD will not award any grant for any project that would violate this prohibition.

5. Environmental Review Requirement

The HUD environmental review procedures contained in 24 CFR part 58 apply to this program. Under part 58, grantees assume all of the responsibilities for environmental review, decisionmaking and action pursuant to the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.) and the other provisions of law specified by the Secretary in 24 CFR part 58 that would apply to the Secretary were he to undertake such projects as Federal projects.

D. Grants

1. Single Purpose Grants

1. *General.* HUD will fund only Single Purpose grants which are designed to address and resolve a specific community development need. A Single Purpose grant may consist of more than one project. A project may consist of one activity or a set of activities. Each project must address community development needs in one of the following problem areas:

- Housing
- Public Facilities
- Economic Development.

Each project will be rated against all other projects addressing the same problem area, according to the criteria outlined below. It should be noted that each project within an application will be given a separate impact rating, if each one is clearly designated by the applicant as a separate and distinct project (i.e., separate Needs Description, Community Development Activities, Impact Description and Program Schedule forms have been filled out, indicating project names). In some cases, it may be to the applicant's advantage to designate separate projects for activities that can ''stand on their own'' in terms of meeting the described need, especially where a particular project would tend to weaken the impact rating of the other activities, if they were rated as a whole, as has been the case with some economic development and housing projects. If, however, the projects tend to meet impact criteria to the same extent, or the weaker element is only a small portion of the overall project, there is no discernable benefit in designating separate projects.

2. Grant Limits and Funding Requirements

The maximum annual grant for a Single Purpose grant is $400,000, except that counties may apply for up to $600,000 in Single Purpose funds, if the project will be carried out in more than one community. If other sources of funds are to be used with respect to a project, the source of those funds must be identified and the level of commitment indicated. With respect to grant limits for joint applicants, the maximum amount that may be awarded pursuant to a joint application is the maximum single grant limit established above for communities and counties multiplied by the number of participants in the cooperation agreement, provided that for purposes of determining such a multiple grant limit, and in order to receive that amount, a participating joint applicant must receive a substantial direct benefit from the activities proposed in the application and must not be acting solely on behalf of or in conjunction with another jurisdiction for the sole purpose of raising the maximum grant amount that may be awarded. In addition, the statistics of each participant counted for maximum grant limits purposes shall also be used for purposes of the selection factors under section I.E.3. of this NOFA.

3. Applications with Multiple Projects

If an application contains more than one project, each project will be rated separately for program impact. Applicants should note that regardless of the number of projects, the total grant amount cannot exceed the limits identified in section I.D.2. of this NOFA.

E. Selection Criteria/Ranking Factors and Final Selection

1. General

Complete applications received from eligible applicants by February 8, 1999 will be rated and scored by HUD. Applications are rated and scored against five factors. These five factors are discussed in more detail in section I.E.3. of this NOFA. Note that when an applicant proposes to use Section 108 Loan Guarantee assistance as a partial funding resource for a proposed project under this NOFA, HUD, when applying the rating factors to such projects, will consider the applicant's description of the Section 108 assisted project in arriving at the score for a particular factor. An applicant may have an approved 108 Loan Guarantee application, submit a full Section 108 Loan Guarantee application or provide a description of the Section 108 Loan Guarantee application. (The description must be specific as to the amount of the Section 108 Loan Guarantee commitment that the applicant will request and the purpose for which the 108 Loan Guarantee proceeds will be used. See section II.C.1. of this NOFA for more information on this subject.) However, any such CDBG application under this NOFA that is fundable and relies upon Section 108 Loan Guarantee assistance to partially carry out the activities and does not have an approved Section 108 Loan Guarantee commitment will receive a conditional approval. If the applicant does not submit and HUD does not approve the required Section 108 Loan Guarantee application within a reasonable period of time (see section II.C.1.(f)(2) of this NOFA), HUD may rescind the award. In such event the funding will be awarded to the highest rated fundable applicant

that did not receive funding under this competition.

2. Performance Evaluation

As noted in section I.C. of this NOFA, previous recipients of Small Cities Program CDBG grants are subject to an evaluation of performance and continuing capacity to undertake the proposed program. For purposes of making performance evaluations, HUD will use any information that becomes available before grant awards are announced. Performance also will be evaluated using information which may be available already to HUD, including previously submitted performance reports, site visit reports, audits, monitoring reports and annual community assessments. The HUD Office may request and consider additional information in cases where it is essential to make the required performance judgments (see 24 CFR 570.423(d), Thresholds). No grants will be made to an applicant that does not have the capacity to undertake the proposed program. A performance determination will be made by an evaluation of the following areas:

a. *Community Development Activities.* The following thresholds for performance in expending CDBG funds have been established for FY 1999 and pertain to all Single Purpose Grants, including grants pursuant to approved multiyear plans:

FY 1993 and earlier—Grants must be closed out
FY 1994—Grant funds 100 percent expended
FY 1995—Grant funds 75 percent expended
FY 1996—Grant funds 30 percent expended
FY 1997 and FY 1998—Recipients must be on target with respect to the latest Small Cities Program Schedule received by HUD.

Note: These standards will be used as benchmarks in judging program performance, but will not be the sole basis for determining whether the applicant is ineligible for a grant due to a lack of capacity to carry out the proposed project or program. Any applicant that fails to meet the percentages specified above may wish to provide updated data to HUD, either in conjunction with the application submission or under separate cover, but in no case will data received by HUD after February 8, 1999 be accepted, unless specifically requested by HUD.

b. *Compliance with Applicable Laws and Regulations.* An applicant will be considered to have performed inadequately if the applicant:

(1) Has not substantially complied with the laws, regulations, and Executive Orders applicable to the CDBG Program, including applicable civil rights laws as may be evidenced by: (1) an outstanding finding of civil rights noncompliance, unless the applicant demonstrates that it is operating in compliance with a HUD-approved compliance agreement designed to correct the area(s) of noncompliance; (2) an adjudication of a civil rights violation in a civil action brought against it by a private individual, unless the applicant demonstrates that it is operating in compliance with a court order designed to correct the area(s) of noncompliance; (3) a deferral of Federal funding based upon civil rights violations; (4) a pending civil rights suit brought against it by the Department of Justice; or (5) an unresolved charge of discrimination issued against it by the Secretary under section 810(g) of the Fair Housing Act, as implemented by 24 CFR 103.400;

(2) Has not resolved or attempted to resolve findings made as a result of HUD monitoring; or

(3) Has not resolved or attempted to resolve audit findings.

An applicant will be ineligible for a grant where the inadequate performance in compliance with applicable laws and regulations evidences a lack of capacity to carry out the proposed project or program. For example, an application will not be accepted from a unit of general local government which has an outstanding audit finding or monetary obligation for any HUD program. Additionally, applications will not be accepted from any entity which proposes an activity in a unit of general local government that has an outstanding audit finding or monetary obligation for any HUD program. The Director of the Community Planning and Development Division of the HUD field office may provide an exception to this prohibition if the unit of general local government has made a good faith effort to clear the audit finding. No exception will be provided if funds are due HUD, unless a satisfactory arrangement for repayment of the debt has been made.

c. *Performance Assessment Reports.* Under 24 CFR 570.507, Small Cities CDBG grantees are required to submit Performance Assessment Reports (PARs) on October 31st, for the period ended September 30th, for all open grants awarded before April 1st of the same year. For an application for FY 1999 funds to be considered for funding, the applicant must be current in its submission of PARs. Failure to submit a PAR is not a curable technical deficiency under section V. of this NOFA.

3. *Five Factor Rating.*

As noted in section I.E.1. of this NOFA, all applications are rated and scored against five factors. These five factors are:

- Need based on absolute number of persons in poverty;
- Need based on the percent of persons in poverty;
- Program Impact;
- Outstanding performance in fair housing and equal opportunity; and
- Welfare to Work Initiative

A maximum of 605 points is possible under this system with the maximum points for each factor being:

Need—absolute number of persons in poverty.	75 points.
Need—percent of persons in poverty.	75 points.
Program Impact	400 points.
Outstanding performance—FHEO:	
a. Provision of fair housing choice.	20 points.
b. New Horizons Fair Housing Assistance Project.	20 points.
c. Equal opportunity employment.	10 points.
Welfare to Work Initiative	5 points.
Total	605 points

Each of the five factors is outlined below. All awarded points for each factor will be rounded to the nearest whole number.

a. *Need—Absolute number of persons in poverty.* HUD uses 1990 census data to determine the absolute number of persons in poverty residing within the applicant unit of general local government. Applicants which are county governments are rated separately from all other applicants. For applications from joint applicants, data from each participating unit of general local government (as described in 24 CFR 570.422) will be aggregated. Applicants in each group are compared in terms of the number of persons whose incomes are below the poverty level. Individual scores are obtained by dividing each applicant's absolute number of persons in poverty by the greatest number of persons in poverty of any applicant and multiplying by 75.

b. *Need—Percent of persons in poverty.* HUD uses 1990 census data to determine the percent of persons in poverty residing within the applicant unit of general local government. Applicants in each group are compared in terms of the percentage of their population below the poverty level. For applications from joint applicants, data from each participating unit of general local government will be aggregated. Individual scores are obtained by dividing each applicant's percentage of

persons in poverty by the highest percentage of persons in poverty of any applicant and multiplying by 75.

c. *Program Impact.* In evaluating program impact, HUD will consider various factors. Within each activity type described below is a set of factors and scoring weights that will be used. Each proposal will be rated using the factors and scoring weights described in the selection criteria below.

Assessments are done on a comparative basis and, as a result, it is important that each applicant present information in a detailed and uniform manner.

For projects consisting of more than one activity, the activity that directly addresses the need must represent at least the majority of funds requested. Other activities must be incidental to and in support of the principal activity. For example, public improvements included in a rehabilitation project that addresses housing need must: (1) be a relatively small amount in terms of funds requested; (2) clearly be in support of the housing objective; and (3) demonstrate a positive and direct link to the national objective. For incidental activities claiming benefit to low -and moderate-income persons on an area basis, the application must document that at least 51 percent of the residents of the service area meet the low -and moderate-income requirement. Funds should not be requested for activities that are not incidental to and in support of the principal activity.

In addressing Program Impact criteria, applicants should adhere to the following general guidelines for quantification. Where appropriate, absolute and percentage figures should be used to describe the extent of community development needs and the impact of the proposed program. This includes, but is not limited to, appropriate units of measure (e.g., number of housing units or structures, linear feet of pipe, pounds per square inch, etc.), and costs per unit of measure. These quantification guidelines apply to the description of need, the nature of proposed activities and the extent to which the proposed program will address the identified need.

Appropriate documentation should be provided to support the degree of need described in the application. Basically, the sources for all statements and conclusions relating to community needs should be included in the application or incorporated by reference. Examples of appropriate documentation include planning studies, letters from public agencies, newspaper articles, photographs and survey data.

Generally, the most effective documentation is that which specifically addresses the subject matter and has a high degree of credibility. Applicants which intend to conduct surveys to obtain data are advised to contact the appropriate HUD office prior to conducting the survey for a determination as to whether the survey methodology is statistically acceptable.

There are a number of program design factors related to feasibility which can alter significantly the award of impact points. Accordingly, it is imperative that applicants provide adequate documentation in addressing these factors. Common feasibility issues include site control, availability of other funding sources, validity of cost estimates, and status of financial commitments as well as evidence of the status of regulatory agency review and approval.

Past productivity and administrative performance of prior grantees will be taken into consideration when reviewing the overall feasibility of the program. Overall program design, administration and guidelines are other feasibility issues that should be articulated and presented in the application, since they are critical in assessing the effectiveness and impact of the proposed program.

Each project will be rated against other projects addressing the same problem area, so that, for example, housing projects only will be compared with other housing projects, according to the criteria outlined below. It should be noted that each project within an application will be given a separate impact rating, if each one is clearly designated by the applicant as a separate and distinct project (i.e., separate Needs Descriptions, Community Development Activities, and Impact Description and Program Schedule forms have been filled out, indicating separate project names).

In some cases, it may be to the applicant's advantage to designate separate projects for activities that can ''stand on their own'' in terms of meeting the described need, especially where a particular project would tend to weaken the impact rating of the other activities, if they were all related as a whole, as has been the case with some economic development projects. If, however, the projects tend to meet the impact criteria to the same extent, or the weaker element is only a small portion of the overall program, there is no discernable benefit in designating separate projects.

Applicants should bear in mind that the impact of the proposed project will be judged by persons who may not be familiar with the particular community. Accordingly, individual projects will be rated according to how well the application demonstrates in specific, measurable terms, the extent to which the impact criteria are met. General statements of need and impact alone will not be sufficient to obtain a favorable rating. HUD will not make a Small Cities grant when it determines that the grant will only have a minimal or insignificant impact on the grantee. For the purposes of this NOFA, any application not scoring above 100 points of the possible 400 points for the Program Impact factor will be deemed to have a minimal or insignificant impact on the grantee and will not be funded regardless of the number of points the applicant may otherwise receive or the ranking it attains as a result of its score due to points received on other rating factors.

(1) *Program Impact—Housing.* There are three distinct types of Housing projects: Housing Rehabilitation, Creation of New Housing and Direct Homeownership Assistance. Separate rating criteria are provided for each type of project.

(a) *Housing Rehabilitation.* The following factors and weights will be used to evaluate proposed housing rehabilitation projects:

(i) Severity of Need (proportion of units that are substandard and extent of disrepair) (up to 160 points of the total Program Impact score). Each application should provide information on the total number of units in the project area, the number that are substandard, and the number of substandard units occupied by low- and moderate-income households. The purpose of this information is to establish the relative severity of housing conditions within the designated project area compared to other housing rehabilitation applications. The application also should describe the date and methodology of any surveys used to obtain the information, including any explicit and detailed definition of ''substandard.''

Surveys of Housing Conditions. Surveys of housing conditions serve several purposes in evaluating applications for housing rehabilitation activities. These include establishing the seriousness of need for such assistance in the project area, providing a basis for estimating overall budgetary needs, and providing an indication of the marketability of the project.

(ii) Extent to which proposed program will resolve the identified problem (up

to 50 points of the total Program Impact score). Note that programs that propose minimal rehabilitation may not necessarily be addressing the identified problem.

(iii) Feasibility (marketability, project design affecting timely completion of the project) (up to 50 points of the total Program Impact score). The application should describe the project in sufficient detail to allow the reviewer to assess its feasibility and its probable impact on the conditions described. It also should describe project requirements in such a way that regulatory and policy concerns will be addressed.

HUD encourages communities to support the Healthy Homes Secretarial initiative. Applicants applying for Small Cities CDBG funds to rehabilitate housing and/or construct new housing units may support these initiatives by including Healthy Homes features in their program design, such as window locks, deadbolt locks on doors, locks or safety latches on medicine cabinets, smoke detectors, carbon monoxide detectors, energy efficient windows, elimination of lead-based paint, and any other activities that contribute to Healthy Homes, especially regarding children.

(iv) Leveraging of other resources (up to 60 points of the total Program Impact score). HUD encourages communities to design projects supplementing Small Cities rehabilitation funds with private funds wherever feasible and appropriate, especially in the case of rental units and housing not occupied by lower-income persons. In such cases, the Small Cities grant subsidy should be as low as possible, while retaining sufficient incentive to attract local participants. On the other hand, projects designed for low-income homeowners should not require private contributions at a level that puts the project out of reach of potential participants.

(v) Cost per unit (up to 80 points of the Program Impact score). HUD will review the applicant's documentation to determine whether the applicant's cost-per-unit is lower than other applicants' costs-per-unit. All applications should provide documentation to justify the cost-per-unit estimates, particularly grantees where past performance does not support the estimates in the applications. In reviewing applications from grantees with prior housing rehabilitation projects, reasonableness of cost-per-unit, stated in the application, will be compared against the grantee's actual past performance.

(b) *Creation of New Housing.* CDBG funds may be used to support the construction of new housing units, the creation of new units proposed through conversion of existing structures (currently vacant structures or conversion of nonresidential structures for residential use) and, in certain circumstances, to finance the actual cost of constructing new units. New construction may be carried out by an eligible nonprofit entity pursuant to 24 CFR 570.204, or as last resort housing. Note that for purposes of specific uses of Section 108 Loan Guarantee proceeds, eligibility is limited to assistance for community economic development projects under § 570.204(a)(2). See also 24 CFR 570.703(i)(2). Support of new construction could include nonconstruction assistance such as the acquisition and/or clearance of land, the provision of infrastructure, or the payment of certain planning costs.

The following factors and weights will be used to evaluate proposed projects for the creation of new housing:

(i) Severity of need for new housing affordable to low- and moderate-income persons shown in the project area (up to 160 points of the total Program Impact score). Where the creation of new units is proposed, the application should document the need for additional units based on vacancy rates, waiting lists, and other pertinent information.

(ii) Extent to which the proposed program will create new housing units affordable to low- and moderate-income persons (up to 50 points of the total Program Impact score). The proposed project clearly must support, or result in, additional units for low- and moderate-income persons. The units may result from new construction projects for which the proposed project will provide nonconstruction assistance.

(iii) Feasibility (marketability, project design affecting timely completion of the project) (up to 50 points of the total Program Impact score). Applicants should address issues of site control and marketability, in addition to addressing feasibility from the standpoint of market financing.

(iv) Leveraging of other resources (up to 60 points of the total Program Impact score). Where the proposed project involves the use of Federally assisted housing, the applicant must identify and document the current commitment status of the Federal assistance. Lack of a firm financial commitment for assistance may adversely affect project impact.

(v) Cost per unit (up to 60 points of the total Program Impact score). HUD will review the applicant's documentation to determine whether the applicant's cost-per-unit is lower than other applicants' costs-per-unit. All applications should provide documentation to justify the cost-per-unit estimates, particularly grantees where past performance does not support the estimates in the applications. In reviewing applications from grantees with prior housing projects, reasonableness of cost-per-unit, stated in the application, will be compared against the grantee's actual past performance.

(vi) Extent to which the project would affirmatively further fair housing (either through spatial deconcentration of minorities throughout the community or through spatial deconcentration of low- and moderate-income households if there are no areas of minority concentration) (up to 20 points of the total Program Impact score).

(c) *Direct Homeownership Assistance.* Homeownership activities are defined as activities which would promote homeownership within the applicant jurisdiction, focusing particularly on aiding low- and moderate-income persons in becoming homeowners. This may include activities authorized under 24 CFR 570.201(n) for purposes of use of Small Cities grant funding. However, activities eligible solely under 24 CFR 570.201(n) are not permitted uses of Section 108 loan guarantee proceeds. While declining to identify any particular type of proposed project as superior, HUD is identifying several criteria which must be addressed within the project design, in order for the application to receive the maximum project impact.

Applications must include a well developed description of homeownership needs in the applicant jurisdiction, focusing particularly on the needs of low- and moderate-income persons. The description also should include, if applicable, any alternative approaches which have been considered in meeting homeownership needs. Project feasibility must be addressed as part of the application.

The application must demonstrate that the proposed project would make effective use of all available funds. This would include any local, State or other Federal funds which would be utilized by the proposed project. If other such funds are included as part of the proposed project, the applicant must demonstrate that such funds are committed and truly available for the project. Any efforts which would affirmatively further fair housing, by promoting homeownership among minorities as well as homeownership throughout the community, must be outlined in the application.

The application must explain how the project would benefit low- and moderate-income homebuyers,

particularly focusing on first-time and minority homebuyers. The application also should address any homeownership counseling services, including counseling pertaining to Federal, State, and local fair housing laws and requirements, which would be provided to persons selected to participate in the proposed project. Finally, the application should describe how the project would utilize public/private partnerships to promote homeownership, particularly in the sense that private sector financing would be accessible, as necessary, to project participants to complement available public sector funds, including CDBG money.

The following factors and weights will be used to evaluate proposed direct homeownership assistance projects:

(i) The extent to which the application demonstrates severity of homeownership needs in the community (up to 160 points of the total Program Impact score).

(ii) The extent to which: the project design is appropriate to meet demonstrated homeownership needs; the project would make effective us of available funds; alternative approaches to meeting the homeownership needs have been considered; and the proposed project would target first-time homebuyers (up to 60 points of the total Program Impact score).

(iii) The extent to which the project is feasible and likely to be implemented in accordance with a project schedule (up to 50 points of the total Program Impact score).

(iv) The extent to which the proposed project would: complement other Federal, State or local programs that promote homeownership; and utilize public/private partnerships in attempting to promote homeownership, particularly in regard to participation by local financial institutions considering the cost per unit (up to 80 points of the total Program Impact score).

(v) The extent to which the proposed project would provide homeownership counseling to project participants (up to 30 points of the total Program Impact score).

(vi) The extent to which the project would affirmatively further fair housing through proposed initiatives to reach out to potential minority homeowners and/or to promote homeownership opportunities throughout the community (up to 20 points of the total Program Impact score).

(2) *Program Impact—Public Facilities Affecting Public Health and Safety.* In the case of public facility projects, documentation of the problem by outside, third-party sources is of primary importance. In the case of water and sewer projects, documentation from public agencies is particularly helpful, especially where such agencies have pinpointed the exact cause of the problem and have recommended courses of action which would eliminate the problem. Such supporting documentation should be as up-to-date as possible; the older the supporting material, the more doubt arises that the need is current and immediate. Applicants also should be sure to indicate how the project would address public health and safety needs and conditions. Quantification also is essential in describing needs. Documentation from those affected should be included.

The following factors and weights will be used to evaluate proposed public facilities projects affecting the public health and safety:

(a) Severity of Need (up to 160 points of the total Program Impact score). The applicant should describe, including appropriate documentation, as best as possible, the degree to which the need is serious, current and requires prompt attention.

(b) Extent to which the proposed program will resolve the identified problem and public health and safety concerns (up to 50 points of the total Program Impact score). The applicant should demonstrate that the project will completely solve the problem and, if applicable, the applicant should address whether the proposal would be satisfactory to other State/local agencies which have jurisdiction over the problem.

(c) Feasibility (up to 50 points of the total Program Impact score). The applicant should address whether the proposal is the most cost effective and efficient among the possible alternatives considered, and the funding requested will be sufficient to resolve the problem. Total project costs should be documented by qualified third-party estimates, and be as recent as possible.

(d) Extent of benefit to affected persons and the cost per household (up to 80 points of the total Program Impact score).

(e) Leveraging other resources to minimize project costs (up to 40 points of the total Program Impact score). To the extent that Small Cities grant funds will not cover all costs, the source of other funds should be identified and committed. If local funds are to be used, the applicant should show both the willingness and the ability to provide the funds.

(f) Extent to which the project addresses deficiencies in accessibility for disabled persons and/or provides a significant increase in the number of public facilities accessible to disabled persons (up to 20 points of the total Program Impact score).

(3) *Program Impact—Economic Development Projects.* As discussed earlier in this section of the NOFA, each individual Single Purpose project will receive a separate impact rating. Applicants whose proposed economic development program will include multiple proposals should determine the most appropriate form of submission. This determination will require a choice as to either the incorporation of all proposals into a single project or the submission of separate projects for each proposal (each transaction will be considered a separate project). The single project format presents an ''all or nothing'' situation. In determining the appropriate submission format, applicants should consider the ability of a transaction to rate well on its own, based on the magnitude of employment impact, size of the financial transaction and the other factors discussed in this section.

The submission of proposals as separate projects must be clearly designated by the applicant with individual Needs Descriptions, Community Development Activities, Impact Descriptions and Program Schedule forms, including an appropriate name for each project on HUD Form 4124.1.

Section 807(c)(3) of the Housing and Community Development Act of 1992 (42 U.S.C. 5305 note) provides that it is the sense of Congress that each grantee should devote one percent of its grant for the purpose of providing assistance under section 105(a)(23) of the 1974 HCD Act to facilitate economic development through commercial microenterprises. A ''microenterprise'' is defined as a commercial enterprise with five or fewer employees, one or more of whom owns the enterprise. While not a requirement, this intent should be considered in developing an economic development application.

It is noted that in accordance with section 105 of the 1974 HCD Act, HUD published on January 5, 1995 (60 FR 1922), a final rule relating to evaluation and selection of Economic Development activities by grantees, including evaluation of public benefit (generally codified at 24 CFR 570.209). Economic Development applications must be specific enough to permit a determination that such threshold public benefit standards are met.

(a) Scoring. The following factors and weights will be used to evaluate

proposed economic development projects:

(i) The extent to which the project will have a direct and positive impact on employment opportunities for persons from low-and moderate-income households (up to 160 points of the total Program Impact score). Applicants are reminded that for an activity to be consistent with the statutory objective of low-and moderate-income benefit, as a result of the creation or retention of jobs, at least 51 percent of created or retained employment opportunities must be held by, or made available to, persons from low-and moderate-income families. Applicants must fully document and describe employment benefits. In addition, applicants should address the following issues:

a. All employment data must be expressed in terms of full-time equivalents (FTEs). Only permanent jobs may be counted, and applicants must take into account such factors as seasonal and part-time employment. A seasonal job may be considered permanent if the season is long enough to be considered the person's principal occupation; permanent part-time jobs must be converted to the full-time equivalent.

b. The amount of CDBG assistance required to produce each full-time equivalent job will affect the impact assessment by HUD. Lower CDBG costs per job are preferable to higher CDBG costs per job. Such assessments of impact will be done on a comparative basis among all projects submitted, rather than by comparison to a given standard.

c. The use of CDBG funds to assist a business with transferring to a different community will generally be considered as having no employment impact. Exceptions to this rule may include an expansion to the business as a result of, or concurrent with, the transfer; or if the business can demonstrate that it is infeasible to continue operations at the current site. An applicant that fails to document a basis for such an exception could receive a substantially lower score under this ranking factor. Applicants are encouraged to use CDBG funds for projects that provide as many jobs as possible for individuals that are currently receiving public assistance. Providing employment to recipients of public assistance will help break the cycle of dependency and empower low-income citizens to take control of their lives.

(ii) The extent to which market analysis and other risk data provides assurance that the proposed project will be successful (up to 50 points of the total Program Impact score).

(iii) The extent to which the proposed project addresses all appropriate feasibility issues (including extent of firm private financing commitments) and the extent to which there is reasonable assurance that the project will be completed in a timely manner (up to 50 points of the total Program Impact score). Projects that are likely to encounter feasibility issues which would hinder the timely completion of the project will receive a lower score under this criterion. Such issues include, but are not limited to: site control, zoning, public approvals and permits, infrastructure, environment, and relocation. Applicants should address these and any other applicable issues and provide documentation where appropriate.

Applicants also must demonstrate the reasonable likelihood of the project's success, from both a financial and employment standpoint. An analysis or market data, which indicates an inordinate risk in the undertaking of the project, will affect the overall rating of program impact. In order to receive a higher rating, the costs must be reasonable (i.e., not inflated).

(iv) Extent to which the project provides Public Benefits relative to other proposals' cost per job (up to 80 points of the total Program Impact score).

(v) The extent to which Small Cities grant funds will leverage the investment of private and other dollars and the extent to which Small Cities grant funds are NOT used to substitute for private financing (up to 60 points of the total Program Impact score). Leverage is defined as the amount of private debt and equity to be invested as a direct result of the CDBG-funded activity. Projects which provide the maximum feasible level of private investment will be considered as having appropriate leverage. The extent of firm commitments for private financing will be reviewed as well as the amount of equity investment. The project will be reviewed to determine whether CDBG funds are replacing private sources of funds. In order to receive maximum impact CDBG funds may not replace private financing, CDBG assistance must be limited to the amount necessary to fund the project without replacing CDBG funds for private funds, and equity funds should bear the greatest risk in the project.

In addition to the standard submission requirements, HUD will evaluate the following as part of its Eligibility Review prior to considering an application for funding in the FY 1997/1998 competition.

(b) *The Appropriate Determination.* HUD has developed guidelines for review of economic development activities undertaken with CDBG funds. These guidelines are composed of two components: guidelines for evaluating project costs and financial requirements; and standards for evaluating public benefit. The standards for evaluating public benefit are mandatory, but the guidelines for evaluating project costs and financial requirements are not. The guidelines for evaluating project costs are to ensure:

(i) *Reasonableness of Proposed Costs.* The applicant must review each project cost element and determine that the cost is reasonable and consistent with third-party, fair-market prices for that cost element. The general principle is that the level of CDBG assistance cannot be adequately determined if the project costs are understated or inflated.

(ii) *Commitment of Other Sources of Funds.* The applicant shall review all projected sources of funds necessary to complete the project and shall verify that all sources (in particular private debt and equity financing) have been firmly committed to the extent practicable, and are available to be invested in the project. Verification means ascertaining that: the source of funds is committed; that the terms and conditions of the committed funds are known; and the source has the capacity to deliver.

(iii) *No Substitution of CDBG Funds (including Section 108 Loan Guarantee proceeds) for Private Sources of Funds.* The applicant shall financially underwrite the project and ensure to the extent possible that CDBG funds are not being substituted for available private debt financing or equity capital. The analysis must be tailored to the type of project being assisted (e.g., real estate, user project, capital equipment, working capital, etc.). Real estate projects require different financial analysis than working capital or machinery and equipment projects. Applicants should ensure that both a significant equity commitment by the for-profit business exists and that the level of certainty of the end use of the property or project is sufficient to ensure the achievement of national objectives within a reasonable period of time.

(iv) *Establishment of Small Cities Grant Financing Terms.* The amount of Small Cities grant assistance provided to a for-profit business ideally should be limited to the amount, with appropriate repayment terms, sufficient to go forward without substituting Small Cities grant funds for available private debt or cash equity. The applicant should structure its repayment terms so

that the business is allowed a reasonable rate of return on invested equity, considering the level of risk of the project. Equity funds generally should bear the greatest risk of all funds invested in a project.

(v) *Public Benefit Determination.* The applicant's activities must meet the public benefit standards found in 24 CFR 570.209(b). Activities covered by these guidelines (subject to certain exceptions) must, in the aggregate, either:

- Create or retain at least one full-time equivalent, permanent job per $35,000 of CDBG funds used; or
- Provide goods or services to residents of an area, such that the number of low- and moderate-income persons residing in the areas served by the assisted businesses amounts to at least one low- and moderate-income person per $350 of CDBG funds used.

(c) *CDBG Assistance Must Minimize Business and Job Displacement.* Each applicant will evaluate the potential of each economic development project for causing displacement of existing businesses and lost jobs in the neighborhood where the project is proposed to be located. When the grantee concludes that the potential exists to cause displacement, given the size, scope or nature of the business, then the grantee must, to the extent practicable, take steps to minimize such displacement. The project file must document the grantee's review conclusions and, if applicable, the steps the grantee will take to minimize displacement.

(d) *Section 105(a)(17) Requirements.* Section 105(a)(17) of the 1974 HCD Act requires that an activity assisted under that section achieve one of the following criteria:

(i) Creates or retains jobs for low- and moderate-income persons (note that a project which meets the national objective of principally benefitting low- and moderate-income persons by creating or retaining jobs, 51 percent of which are for low- and moderate-income persons, will be deemed to have met this criterion without any additional documentation);

(ii) Prevents or eliminates slums or blight (note that a project which meets the national objective of aiding in the prevention or elimination of slums or blight on an area basis will be deemed to have met this criterion without any additional documentation);

(iii) Meets an urgent need (note that a project which meets the national objective of meeting community development needs having a particular urgency will be deemed to have met this criterion without any additional documentation);

(iv) Creates or retains businesses owned by community residents;

(v) Assists businesses that provide goods or services needed by and affordable to low- and moderate-income residents;

(vi) Provides technical assistance to promote any of the activities under (i) through (v) of this subsection.

(e) *National Objectives.* As previously stated in this NOFA, all CDBG-assisted activities must address one of the three broad national objectives. Since economic development projects usually result in new employment or the retention of existing jobs, these activities most likely would be categorized as principally benefitting low- and moderate-income persons in this manner. Such projects will be considered to benefit low- and moderate-income persons where the criteria of 24 CFR 570.208(a)(4) are met. HUD will consider an activity to qualify under this provision where the activity involves jobs at least 51 percent of which are taken by or made available to such persons, or retained by such persons. The extent to which the proposed project will directly address employment opportunities for low- and moderate-income persons in the applicant jurisdiction will be a primary factor in HUD's assessment of the proposed program.

The application must contain adequate documentation to explain fully, and to support, the process that will be used to ensure that project(s) comply with the low- and moderate-income employment requirements. The documentation must be sufficient to show that the process has been developed and that program participants have agreed to adhere to that process. In determining whether the person is a low- and moderate-income person for these activities, it is the person's family income at the time the CDBG assistance is provided that is determinative. When making judgments concerning whether an individual qualifies as a low- and moderate-income person, both family size and the income of the entire family must be considered. This consideration is necessary because a ''low- and moderate-income person'' is defined as a member of a low- and moderate-income family.

HUD will accept a written certification by a person of his or her family income and size to establish low- and moderate-income status. The certification may simply state that the person's family income is below that required to be low- and moderate-income in that area. The form for such certification must include a statement that the information is subject to verification.

In addition to person-by-person income certifications discussed above, under section 105(c)(4) of the 1974 HCD Act, an employee may be presumed to be a low- and moderate-income person if the employee resides in a census tract where not less than 70 percent of the residents are low- and moderate-income persons, and a presumption of low- and moderate-income may also be made if the business is located in and/or the employee resides in a census tract (or block numbering group) where 20 percent of the residents are in poverty. The key consideration in this presumption is the location of the business or employee. The documentation to support the presumption must contain the location. (See 24 CFR 570.209(b)(2)(v) for more information on this subject.)

In cases where an activity (e.g., a shopping center or a super market) provides goods and services to residents of an area, the low- and moderate-income objective may be met by the area benefit requirements at 24 CFR 570.208(a)(1). To document low and moderate income, 51 percent of the residents of the area or block numbering group must be low- and moderate-income persons.

(f) *Application Requirements.* To the extent feasible, the material listed below should be submitted for economic development projects. The material should be submitted for each proposed activity, whether the proposed activity is presented as a separate project or as part of a project involving multiple activities. Since economic development projects are rated against each other, the more completely these submission requirements are met, the greater the potential exists for enhancing the impact score of the project.

(i) A letter from each appropriate developmental entity which includes at least the following information:

a. A detailed physical description of the project with a schedule of events and maps or drawings as appropriate.

b. The estimated costs for the project, including any working capital requirements.

c. A discussion of all financing sources, including the need for CDBG, the terms of the CDBG assistance, and the proposed lien structure. The amount, source, and nature of any equity investment(s) must also be provided as well as a commitment to invest the equity.

d. A discussion of employment impact which includes a schedule of newly created positions. The schedule

should identify the number, salary and skill level of each permanent position to be created. If jobs are made available to low- and moderate-income persons, the applicant must also demonstrate and document how persons from low- and moderate-income households will be accorded first consideration for employment opportunities.

e. A discussion of all appropriate feasibility issues including, but not limited to: site control, zoning, public approvals and permits, impact fees, corporate authorizations, infrastructure, environment and relocation.

f. An analysis and summary of market and other data which supports the anticipated success of the project.

g. A statement as to whether or not the project will result in the relocation of any industrial or commercial plant, facility, or operation from one area to another. If the CDBG funded project will result in the relocation of a plant, facility, or operation, then the application shall include a statement as to the total number of jobs that are currently filled at the existing/current plant, facility, or operation and the number of jobs that are projected to exist at that former plant, facility, or operation after the proposed CDBG funded project is complete and fully operational.

(ii) A development budget showing all costs for the project, including professional fees and working capital.

(iii) Documentation to support project costs. Documentation generally should be from a third-party source and be consistent with the following guidelines:

a. Acquisition costs should be supported by an appraisal.

b. Construction/renovation costs should be certified by an architect, engineer or contractor. Use of Federal Prevailing Wage Rates should be cited where applicable.

c. Machinery and equipment costs should be supported by vendor quotes.

d. Soft costs (e.g., legal, accounting, title insurance) need be substantiated only where such costs are anticipated to be abnormally high.

(iv) Letters from all financing sources discussing (at a minimum) the amount and terms of the proposed financing, and the current status of the application for funding.

(v) Historical financial data of the development entity, preferably for the last 3 years. This information may be submitted under separate cover with confidentiality requested. It is recognized that historical financial data may be unavailable or inappropriate for some projects (e.g., start-up companies and real estate transactions).

(vi) A 2- to 5-year cash flow pro forma with accompanying notes citing basic assumptions.

(vii) The applicant's assessment of the project's consistency with the CDBG program eligibility requirements and standards for evaluating project cost, financial requirements and public benefit.

d. *Fair Housing and Equal Opportunity Evaluation.* Documentation for the 50 points for these items is the responsibility of the applicant. Claims of outstanding performance must be based upon actual accomplishments. Clear, precise documentation will be required. Maps must have a census tract or block numbering area (BNA), and they must be in accordance with the 1990 Census data. Additionally, maps must identify the locations of areas with minorities by census tract or BNA. If there are no minority areas, state so on the map. Only population data from the 1990 Census will be acceptable for purposes of this section.

Please note that a ''minority'' is a person belonging to, or culturally identified as, a member of any one of the following racial/ethnic categories: Black, Hispanic, Asian or Pacific Islander, and American Indian or Alaskan Native. For the purposes of this section, the separate category of ''women'' is not considered a minority.

Counties claiming points under this criterion must use county-wide statistics (excluding entitlement communities). In the case of joint applications, points will be awarded based on the performance of the lead entity only.

The following factors will be used to judge outstanding performance in these areas. Please note that points for outstanding performance may be claimed under each criterion:

(1) *Housing Achievements* (40 points total).

(a) *Provision of Fair Housing Choice (20 points)*

(i) HUD will consider the extent to which the applicant demonstrates that it has provided housing assistance for low- and moderate-income families that results in housing choice in areas outside of minority or low- and moderate-income concentration. Such actions may include the construction or rehabilitation of housing in areas outside of minority or low- and moderate-income concentration; the provision of Section 8 Existing Certificate or Voucher assistance in ways that lessen concentration of such assisted units within minority and low- and moderate-income concentrated areas; or the provision of direct homeownership assistance such as homeownership counseling, downpayment assistance, or first-time homebuyer assistance. If applicable, the applicant may use a map to show the general location(s) of individual projects and/or housing occupied by Section 8 Existing Program participants.

(ii) Points also may be awarded for efforts which enable low- and moderate-income persons to remain in their neighborhood when such neighborhoods are experiencing revitalization and substantial displacement as a result of private reinvestment. Applicants requesting points under this criterion would not need to meet the requirements of paragraphs (a) and (b) in order to receive points. Points will be awarded where more than one-half of the families displaced were able to remain in their original neighborhood through the assistance of the applicant. Applicants must show that:

- The neighborhood experienced revitalization;
- The amount of displacement was substantial;
- Displacement was caused by private reinvestment;
- Low- and moderate-income persons were permitted to remain in the neighborhood as a result of action taken by the applicant.

If the community is inhabited predominantly by persons who are members of minority and/or low-income groups, points will be awarded where there is a balanced distribution of assisted housing throughout the community.

(b) *Implementation of a Fair Housing Strategy that Affirmatively Furthers Fair Housing (20 points).* The applicant must demonstrate that it is implementing or plans to implement a Fair Housing Strategy on its own or demonstrate that it does or plans to participate in a county/State or regional analysis of impediments to fair housing choice. A fair housing strategy must include the following elements:

- Local compliance activities;
- Educational programs to enhance the clarity and understanding of the community's fair housing policy. For communities with few or no minorities, this should include publication in the surrounding communities of the applicant's policy of fair housing for minorities and persons with disabilities;
- Assistance to minority families; and
- Special programs (e.g., utilization of Community Housing Resource Board (CHRB) Programs, efforts to encourage local realtors to enter into voluntary agreements to encourage equal access to financial institutions, etc.).
- Assistance to minority families through mobility counseling programs

and other activities that encourage such families to pursue such housing opportunities outside of minority concentrated areas;

- Special programs targeted at lenders, builders, realtors, and other housing industry groups;
- Affirmative marketing strategies targeted at those groups in the eligible population considered least likely to apply without special outreach.

The fair housing strategy must include goals for each of the above elements. The date of adoption or development of the strategy should be indicated, as well as the date proposed activities will be or have been implemented.

(2) *Entrepreneurial Efforts and Local Equal Opportunity Performance.* HUD encourages the use of minority contracting, although it will not be used as an evaluation factor in this NOFA.

(3) *Equal Opportunity Employment.* (10 points) Under this factor, the applicant must document that its percentage of minority, permanent full-time employees is greater than the percentage of minorities within the county or the community, whichever is higher. Applicants with no full-time employees may claim points based on part-time employment provided that they document that the only permanent employment is on a part-time basis.

e. *Welfare to Work Initiative.* (5 points) Five bonus points will be added to proposals which support the Welfare to Work Initiative. These points will be added to those proposals that include activities which will provide assistance to persons moving from welfare to work. Examples of such activities are: jobs, day care slots, training or transportation assistance.

4. *Final Selection*

The total points received by a project for all of the selection factors are added, and the project is ranked against all other projects from all applications, regardless of the program areas in which the projects were rated. The highest ranked projects will be funded to the extent funds are available. If an applicant submits two applications under this NOFA, it may receive up to two single grants in the amounts of the project or projects applied for in those applications which were ranked high enough to be funded. In the case of ties at the funding line, HUD will use the following criteria in order to break ties:

- The project receiving the highest program impact rating will be funded;
- If tied projects have the same program impact rating, the project having the highest combined score on the needs factors will be funded;
- If tied projects have the same program impact ratings and equal needs factor scores, the project having the highest score on the percent of persons in poverty needs factor will be funded; and
- If tied projects have the same program impact ratings, equal needs factor scores, and an equal percent of persons in poverty needs factor score, the application having the most outstanding performance in fair housing and equal opportunity will be funded.

As soon as possible after the rating and ranking process has been completed, HUD will notify all applicants regarding their rating scores and funding status. Thereafter, applicants may contact HUD to discuss scores or any aspects of the selection process.

II. Application and Funding Award Process

A. Obtaining Applications

All nonentitled communities in New York State may obtain application kits through HUD's New York or Buffalo Offices. The addresses for HUD's Buffalo and New York offices are:

Department of Housing and Urban Development, Office of Community Planning and Development, Attention: Small Cities Coordinator, 26 Federal Plaza, New York, NY 10278–0068, Telephone (212) 264–2885 x3401.

Department of Housing and Urban Development, Community Planning and Development Division, Attention: Small Cities Coordinator, 465 Main Street, Lafayette Court, Buffalo, NY 14203, Telephone (716) 551–5755 x5800.

In addition, application kits and additional information are available on the HUD website located at: www.hud.gov or by contacting Community Connections at (800) 998–9999.

B. Submitting Applications

A final application must be submitted to HUD no later than February 8, 1999. A final application includes an original and two photocopies. Final applications may be mailed, and if they are received after the deadline, must be postmarked no later than midnight, February 8, 1999. If an application is hand-delivered to the New York or Buffalo Offices, the application must be delivered by 4:00 p.m. on the application deadline date. Applicants in the counties of Sullivan, Ulster, Putnam, and in nonparticipating jurisdictions in the urban counties of Dutchess, Orange, Rockland, Westchester, Nassau, and Suffolk should submit applications to the New York Office. All other nonentitled communities in New York State should submit their applications to the Buffalo Office. Applications must be submitted to the HUD office at the addresses listed above in section II.A.

The above-stated application deadline is firm as to *date* and *hour.* In the interest of fairness to all competing applicants, HUD will treat as *ineligible for consideration* any application that is not received on, or postmarked by February 8, 1999. Applicants should take this practice into account and make early submission of their materials to avoid any risk of loss of eligibility brought about by unanticipated delays or other delivery-related problems.

C. The Application

1. Application Requirements

An application for the Small Cities Program CDBG Grants is made by the submission of:

(a) A completed HUD Form 4124, including HUD Forms 4124.1 through 4124.6 and all appropriate supporting material;

(b) A completed Standard Form 424;

(c) A signed copy of certifications required under the CDBG Program, including, but not limited to the Drug-Free Workplace Certification, and the Certification Regarding Lobbying pursuant to section 319 of the Department of Interior Appropriations Act for Fiscal Year 1990 (31 U.S.C. 1352), generally prohibiting use of appropriated funds, and, if applicable, Disclosure of Lobbying Activities (SF–LLL);

(d) Form HUD–2880, Applicant/Recipient Disclosure/Update Report, as required under subpart A of 24 CFR part 4 (Accountability in the Provision of HUD Assistance); and, if applicable,

(e) Abbreviated Consolidated Plan.

(f) A Section 108 Loan Guarantee application or request, if applicable, consisting of one of the following:

(1) A formal application for Section 108 Loan Guarantee(s), including the documents listed at § 570.704(b);

(2) A brief description of a Section 108 Loan Guarantee application(s) to be submitted within 60 days (with HUD reserving the right to extend such period for good cause on a case-by-case basis) of a notice of CDBG Small Cities grant award. (The CDBG grant award will be conditioned on approval of actual Section 108 Loan Guarantee commitments within a stated period of time.) This description must be sufficient to support the basic eligibility of the proposed project or activities for Section 108 assistance; or

(3) If applicable, a copy of a Section 108 Loan Guarantee approval document with grant number and date of approval.

2. Streamlined Application Requirements for Certain Applicants

Single Purpose applications submitted under the FY 1997/98 NOFA but not selected for funding will be reactivated for consideration under this NOFA, if the applicant notifies HUD in writing by February 8, 1999 that the applicant wishes the prior application to be considered in this competition. Applications which are reactivated may be updated, amended or supplemented by the applicant provided that such amendment or supplementation is received no later than the due date for applications under this NOFA. If there is no significant change in the application involving new activities or alteration of proposed activities that will significantly change the scope, location or objectives of the proposed activities or beneficiaries, there will be no further citizen participation requirement to keep the application active for a succeeding round or competition.

D. Funding Award Process

In accordance with section 102 of the HUD Reform Act and HUD's regulation in 24 CFR part 4, HUD will notify the public by notice published in the **Federal Register** of all award decisions made by HUD under this competition. In accordance with the requirements of section 102 of the Reform Act and HUD's regulations at 24 CFR part 4, HUD also will ensure that documentation and other information regarding each application submitted under this NOFA is sufficient to indicate the basis upon which assistance was provided or denied. Additionally, in accordance with § 4.5(b) of these regulations, HUD will make this material available for public inspection for a period of 5 years, beginning not less than 30 calendar days after the date on which assistance is provided.

III. Technical Assistance

Prior to the application deadline, the Buffalo and New York offices will provide technical assistance on request to individual applicants, including explaining and responding to questions regarding program regulations, and defining terms in the application package. In addition, HUD will conduct informational meetings around the State to discuss the Small Cities Program, and will conduct application workshops in conjunction with these meetings. Please contact the New York or Buffalo Office for further information regarding these meetings. Application kits will be available at these meetings, as well as from the New York or Buffalo Offices. In order to ensure that the application deadline is met, it is strongly suggested that applicants begin preparing their applications immediately and not wait for the informational meetings.

IV. Checklist of Application Submission Requirements

The following checklist is intended to aid applicants in determining whether their application is complete:

Application Completeness Checklist

Applicant: _____
Amount Requested $_____
1. Is amount of funds requested within established maximum?
2. Part I—Needs Description (HUD Form 4124.1)
   a. Program Area
   ____Housing
   ____Target Area
   ____Nontarget Area
   ____Public Facilities
   ____Economic Development (If an ''appropriate'' analysis is required but is not included, the application cannot be rated.)
   b. Is description of community development needs included in application?
3. Part II—Community Development Activities (HUD Form 4124.2)
   a. Has national objective been identified for each activity?
   b. Will 70 percent of grant funds primarily benefit low- and moderate-income persons? (If not, the application cannot be rated.)
4. Part III—Impact Description (HUD Form 4124.3)
5. Part IV—Outstanding Performance (HUD Form 4124.4)
6. Part V—Program Schedule (HUD Form 4124.5)
7. Part VI—Maps
   a. Location of proposed activities. (Applicants must show the boundaries of the defined area or areas.)
   b. Location of areas with minorities by census tract. (If there are no minority areas, state so on the map.)
   c. Housing conditions if project involves housing rehabilitation. (Number and location of each standard and substandard unit should be clearly identified.)
8. a. Is Standard Form 424 complete? Yes No
   b. Is original signature on at least one copy? Yes No
9. Is Certification signed with original signature? Yes No
10. Has the abbreviated consolidated plan been prepared and submitted to HUD (or included with this application)?
11. Form HUD–2880, Application/Recipient Disclosure/Update Report.
12. Do proposed economic development activities meet the public benefit standards as defined in 24 CFR 570.209?

V. Corrections to Deficient Applications

Under no circumstances will HUD accept from the applicant unsolicited information regarding the application after the application deadline has passed.

HUD may advise applicants of technical deficiencies in applications and permit them to be corrected. A technical deficiency would be an error or oversight which, if corrected, would not alter, in either a positive or negative fashion, the review and rating of the application. Examples of curable technical deficiencies would be a failure to submit the proper certifications or failure to submit an application containing an original signature by an authorized official. Situations not considered curable would be, for example, a failure to submit program impact descriptions.

HUD will notify applicants in writing of any curable technical deficiencies in applications. Applicants will have 14 calendar days from the date of HUD's correspondence to reply and correct the deficiency. If the deficiency is not corrected within this time period, HUD will reject the application as incomplete.

Applicants should note that if an abbreviated consolidated plan is not submitted, the failure to submit it in a timely manner is not considered a curable deficiency.

VI. Findings and Certifications

Paperwork Reduction Act Statement

The information collection requirements related to this CDBG program have been approved by the Office of Management and Budget (OMB) in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520), and have been assigned OMB approval number 2506–0020. *An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection displays a valid control number.*

Environmental Impact

This NOFA provides funding under, and does not alter environmental requirements of, a regulation previously published in the **Federal Register**. Accordingly, under 24 CFR 50.19(c)(5), this NOFA is categorically excluded

from environmental review under the National Environmental Policy Act. The environmental review provisions of this regulation are in 24 CFR 570.604.

Federalism

The General Counsel, as the Designated Official under section 6(a) of Executive Order 12612, *Federalism*, has determined that this NOFA will not have substantial, direct effects on States, on their political subdivisions, or on their relationship with the Federal Government, or on the distribution of power and responsibilities between them and other levels of government. While the NOFA will provide financial assistance to the Small Cities Program of New York State, none of its provisions will have an effect on the relationship between the Federal Government and New York State, or the State's political subdivisions.

Accountability in the Provision of HUD Assistance

See Section I.A.4. of this NOFA.

Prohibition Against Lobbying Activities

Applicants for funding under this NOFA are subject to the provisions of section 319 of the Department of Interior and Related Agencies Appropriation Act for Fiscal Year 1991 (31 U.S.C. 1352) (the Byrd Amendment) and to the provisions of the Lobbying Disclosure Act of 1995 (Pub. L. 104–65; December 19, 1995).

The Byrd Amendment, which is implemented in regulations at 24 CFR part 87, prohibits applicants for Federal contracts and grants from using appropriated funds to attempt to influence Federal executive or legislative officers or employees in connection with obtaining such assistance, or with its extension, continuation, renewal, amendment or modification. The Byrd Amendment applies to the funds that are the subject of this NOFA. Therefore, applicants must file a certification stating that they have not made and will not make any prohibited payments and, if any payments or agreement to make payments of nonappropriated funds for these purposes have been made, a form SF–LLL disclosing such payments must be submitted. The certification and the SF–LLL are included in the application package.

The Lobbying Disclosure Act of 1995, which repealed section 112 of the HUD Reform Act and resulted in the elimination of the regulations at 24 CFR part 86, requires all persons and entities who lobby covered executive or legislative branch officials to register with the Secretary of the Senate and the Clerk of the House of Representatives and file reports concerning their lobbying activities.

Prohibition Against Advance Information on Funding Decisions

Section 103 of the Department of Housing and Urban Development Reform Act of 1989, and HUD's implementing regulation codified at subpart B of 24 CFR part 4, applies to the funding competition announced today. These requirements continue to apply until the announcement of the selection of successful applicants. HUD employees, including those conducting technical assistance sessions or workshops and those involved in the review of applications and in the making of funding decisions, are limited by section 103 from providing advance information to any person (other than an authorized employee of HUD) concerning funding decisions, or from otherwise giving any applicant an unfair competitive advantage. Persons who apply for assistance in this competition should confine their inquiries to the subject areas permitted under section 103 and subpart B of 24 CFR part 4.

Applicants who have ethics related questions should contact the HUD Office of Ethics, (202) 708–3815. (This is not a toll-free number.)

Catalog of Federal Domestic Assistance. The Catalog of Federal Domestic Assistance Number for this program is 14.219.

Dated: November 20, 1998.

Joseph A. D'Agosta,

Acting General Deputy Assistant Secretary for Community Planning and Development.

[FR Doc. 98–31516 Filed 11–20–98; 1:30 pm]

BILLING CODE 4210–29–P

Federal Register

Wednesday
November 25, 1998

Part VII

Department of Justice

Bureau of Prisons

28 CFR Part 551

Smoking/No Smoking Areas; Proposed Rule

DEPARTMENT OF JUSTICE

Bureau of Prisons

28 CFR Part 551

[BOP–1084–P]

RIN 1120–AA79

Smoking/No Smoking Areas

AGENCY: Bureau of Prisons, Justice.

ACTION: Proposed rule.

SUMMARY: In this document the Bureau of Prisons is proposing to revise its regulations on smoking in order to limit smoking in Bureau of Prisons facilities to visibly designated outdoor locations, unless an indoor area has been designated as a smoking area to be used exclusively for authorized religious activities. Previously, smoking areas at medical referral centers and minimum security institutions were ordinarily located outside of all buildings, and Wardens at other institutions could, but were not required to, identify certain indoor areas as designated smoking areas where the needs of effective operations so required (for example, for those who may be employed in, or restricted to, a nonsmoking area for an extended period of time). This amendment is intended to promote a clean air environment and to protect the health and safety of staff and inmates.

DATES: Comments due by January 25, 1999.

ADDRESSES: Rules Unit, Office of General Counsel, Bureau of Prisons, HOLC Room 754, 320 First Street, NW., Washington, DC 20534.

FOR FURTHER INFORMATION CONTACT: Roy Nanovic, Office of General Counsel, Bureau of Prisons, phone (202) 514–6655.

SUPPLEMENTARY INFORMATION: The Bureau of Prisons is proposing to amend its regulations on Smoking/No Smoking Areas (28 CFR part 551, subpart N). A final rule on this subject was published in the **Federal Register** on July 6, 1994 (59 FR 34742).

The hazards of tobacco smoke (including the health risks associated with passive inhalation of second-hand smoke by nonsmokers) are well established by medical and public health authorities. The national health promotion disease prevention objectives of the Public Health Service study Healthy People 2000 have identified health status, risk reduction, and services and protection objectives in relation to tobacco. One of the objectives calls for stricter policies in the workplace that prohibit or severely restrict smoking. Cigarette smoking is responsible for an estimated 21 percent of all coronary heart disease deaths, 30 percent of all cancer deaths, and 87 percent of lung cancer deaths. The known health risks associated with smoking and the increasing societal concern about passive tobacco smoke, provide ample evidence and support for the Bureau to enact stricter smoking/no smoking rules to protect the health and safety of both staff and inmates.

In the previous revision of its regulations on smoking/no smoking areas (59 FR 34742), the Bureau limited smoking at medical referral centers and minimum security institutions ordinarily to outside locations. Under the revised regulations, Wardens at low, medium, high, and administrative institutions could identify certain indoor areas as designated smoking areas for those who may be employed in, or restricted to, a nonsmoking area for an extended period of time. The regulations, however, did not require the Wardens at these institutions to designate indoor smoking areas.

The Bureau has an obligation to its employees and to the inmates in its custody to provide the safest and healthiest environment possible. Therefore, the Bureau is now proposing that the restriction on designated indoor smoking areas be extended to all Bureau of Prisons institutions. Smoking will only be permitted outdoors in visibly designated locations with the exception that an indoor smoking area may be designated to be used exclusively for authorized religious activities. Individuals who do not observe the smoking restrictions are subject to appropriate disciplinary action.

Programs to assist those persons wishing assistance in quitting smoking are available through normal health care programs offered to inmates.

This rule falls within a category of actions that the Office of Management and Budget (OMB) has determined not to constitute ''significant regulatory actions'' under section 3(f) of Executive Order 12866 and, accordingly, it was not reviewed by OMB. After review of the law and regulations, the Director, Bureau of Prisons certifies that this rule, for the purpose of the Regulatory Flexibility Act (5 U.S.C. 601 et seq.), does not have a significant economic impact on a substantial number of small entities, within the meaning of the Act. Because this rule pertains to the correctional management of offenders committed to the custody of the Attorney General or the Director of the Bureau of Prisons, its economic impact is limited to the Bureau's appropriated funds.

Interested persons may participate in this proposed rulemaking by submitting data, views, or arguments in writing to the Rules Unit, Office of General Counsel, Bureau of Prisons, 320 First Street, NW., HOLC Room 754, Washington, DC 20534. Comments received during the comment period will be considered before final action is taken. Comments received after the expiration of the comment period will be considered to the extent practicable. All comments received remain on file for public inspection at the above address. The proposed rule may be changed in light of the comments received. No oral hearings are contemplated.

List of Subjects in 28 CFR Part 551

Prisoners.

Kathleen Hawk Sawyer,

Director, Bureau of Prisons.

Accordingly, pursuant to the rulemaking authority vested in the Attorney General in 5 U.S.C. 552(a) and delegated to the Director, Bureau of Prisons in 28 CFR 0.96(p), part 551 in subchapter C of 28 CFR, chapter V is proposed to be amended as set forth below.

Subchapter C—Institutional Management

PART 551—MISCELLANEOUS

1. The authority citation for 28 CFR part 551 is revised to read as follows:

Authority: 5 U.S.C. 301; 18 U.S.C. 1512, 3621, 3622, 3624, 4001, 4005, 4042, 4081, 4082 (Repealed in part as to offenses committed on or after November 1, 1987), 4161–4166 (Repealed as to offenses committed on or after November 1, 1987), 5006–5024 (Repealed October 12, 1984 as to offenses committed after that date), 5039; 28 U.S.C. 509, 510; Pub. L. 99–500 (sec. 209); 28 CFR 0.95–0.99; Attorney General's May 1, 1995 Guidelines for Victim and Witness Assistance.

2. Subpart N is revised to read as follows:

Subpart N—Smoking/No Smoking Areas

Sec.

Subpart N—Smoking/No Smoking Areas

§ 551.160 Purpose and scope.

To promote a clean air environment and to protect the health and safety of staff and inmates, the Bureau of Prisons restricts areas and circumstances where smoking is permitted within its institutions and offices.

§ 551.161 Definitions.

For purpose of this subpart, *smoking* is defined as carrying or inhaling a lighted cigar, cigarette, pipe, or other lighted tobacco products.

§ 551.162 Designated smoking areas.

The Warden is responsible for designating smoking areas. Smoking is permitted only in these visibly designated areas. Designated areas are to be outdoors, with the exception that an indoor area may be designated if the indoor designated smoking area is to be used exclusively for authorized religious activities.

§ 551.163 Disciplinary action.

Appropriate disciplinary action may be taken for failure to observe smoking restrictions.

[FR Doc. 98–31556 Filed 11–24–98; 8:45 am]
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Wednesday
November 25, 1998

Part VIII

Department of Labor

Pension and Welfare Administration

Notice on Annual Reporting Enforcement Policy

DEPARTMENT OF LABOR

Pension and Welfare Benefits Administration

RIN 1210 AA57

Notice on Annual Reporting Enforcement Policy

AGENCY: Pension and Welfare Benefits Administration, Department of Labor.

ACTION: Notice.

SUMMARY: The purpose of this notice is to announce the Department of Labor's decision not to adopt the proposed annual reporting enforcement policy described in a notice published in the **Federal Register** on March 13, 1997 (62 FR 11929). Under the proposal, the Department would not have rejected the annual report (Form 5500) of a multiemployer welfare benefit plan solely because the accountant's opinion accompanying the report was ''qualified'' or ''adverse'' due to a failure to account and report for post-retirement benefit obligations in accordance with American Institute of Certified Public Accountants (AICPA) Statement of Position (SOP) 92–6, or otherwise was affected by or reflected noncompliance with the financial statement disclosure requirements of SOP 92–6. The proposed enforcement relief also was made available on an interim basis for the 1996, 1997, and 1998 plan years to provide time for consideration of public comments on the proposal. Although the Department has decided not to adopt the proposed enforcement policy, to provide multiemployer welfare benefit plans with adequate time to comply with SOP 92–6's requirements, the Department, by this notice, is extending the interim reporting relief to cover 1999 plan year annual reports filed by multiemployer welfare benefit plans. Annual reports of multiemployer welfare benefit plans filed for plan years commencing on or after January 1, 2000, however, will be subject to rejection if there is any material qualification in the accountant's opinion accompanying the annual report due to a failure to comply with the requirement of SOP 92–6.

FOR FURTHER INFORMATION CONTACT: Eric A. Raps, Office of Regulations and Interpretations, Pension and Welfare Benefits Administration (PWBA), U.S. Department of Labor, Washington, DC 20210, (202) 219–8515 (not a toll free number).

SUPPLEMENTARY INFORMATION:

A. Background

In general, the administrator of an employee benefit plan with 100 or more participants at the beginning of a plan year is required under Title I of the Employee Retirement Income Security Act of 1974, as amended (ERISA), and the Department's regulations issued thereunder, to file an annual report and to include as part of that report the opinion of an independent qualified public accountant.[1] These annual reporting requirements are satisfied by filing the Form 5500 Annual Return/Report in accordance with its instructions and related regulations. The requirements governing the content of the opinion and report of the independent qualified public accountant are set forth in ERISA section 103(a)(3)(A) and 29 CFR 2520.103–1(b)(5). ERISA section 104(a)(4) permits the Department to reject an annual report if it determines that there is a material qualification by an accountant contained in the opinion required to be submitted pursuant to section 103(a)(3)(A). If the Department rejects a filing under section 104(a)(4), and the administrator fails to submit a satisfactory filing within 45 days, the Department may, among other things, assess a civil penalty of up to a $1,000 a day against the administrator for failing or refusing to file an annual report.[2]

On March 13, 1997, the Department published a notice in the **Federal Register** (62 FR 11929) inviting public comment on a proposed annual reporting policy for multiemployer welfare benefit plans. Under this proposed policy, the Department would not reject the annual report of a multiemployer welfare benefit plan solely because the accountant's opinion accompanying the report is ''qualified'' or ''adverse'' due to a failure to account and report for post-retirement benefit obligations in accordance with the financial statement disclosure requirements of SOP 92–6. To allow sufficient time for considering public comments on the proposal, the Department announced in the **Federal Register** notice that the Department would not reject 1996 and 1997 plan year multiemployer welfare benefit plan annual reports due to such qualified or adverse accountant's opinions. In response to questions, the Department subsequently clarified the scope of the relief indicating that it would not reject the subject annual reports because the accountant's opinion reflects or is otherwise affected by noncompliance with any aspect of SOP 92–6.[3] This interim report relief was later extended to the 1998 annual reports filed by multiemployer welfare benefit plans.

B. Non-Adoption of Proposed Enforcement Policy

The Department received public comments supporting and opposing adoption of the proposed policy. After carefully evaluating all of the comments received, the Department has decided not to adopt the proposed enforcement policy.

Section 103(a)(3)(A) of ERISA provides, in relevant part, that the administrator of an employee benefit plan must engage an independent qualified public accountant to conduct an examination of any financial statements, books and records of the plan necessary to enable the accountant to form an opinion as to whether the financial statements and schedules, required to be included in the annual report, are presented fairly and in conformity with Generally Accepted Accounting Principles or ''GAAP,'' Because the accounting profession establishes the requirements pertaining to GAAP, it has been the Department's longstanding position that it generally will not rule as to the acceptability of methods of accounting or auditing for purposes of the accountant's opinion required to be attached to the annual report. *See, e.g.*, Advisory Opinion 84–45A (November 16, 1984).

Although the Department believes that the questions raised relating to the usefulness of the post-retirement benefit obligation disclosure required under SOP 92–6 for multiemployer and other welfare benefit plans have merit, the Department, following consideration of the comments, has concluded that the accounting profession, rather than the Department through reporting enforcement policies, should be responsible for addressing problems attendant to the application of accounting principles. For this reason, the Department has determined not to adopt the proposed enforcement policy. The Department, however, continues to encourage the AICPA, as well as the Financial Accounting Standards Board, as they review SOP 92–6 to continue to work with the multiemployer plan community and other interested parties and develop accounting methodologies for assessing post-retirement benefit obligations that will serve to produce

[1] See ERISA sections 101(b)(1) and 103, and 29 CFR 2520.103–1.

[2] ERISA sections 104(a)(5) and 502(c)(2), and 29 CFR 2560.502c–2. See 29 CFR 2570.502c–2 which, in accordance with the requirements of the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended, increased the civil penalty from $1,000 a day to $1,100 a day for violations occurring after July 29, 1997.

[3] *See* letter to Cary Hammond from Assistant Secretary Olena Berg (July 11, 1997).

meaningful financial information that will be useful to plan fiduciaries, plan participants and beneficiaries and the Department of Labor.

C. Interim Relief and Applicability Date

This notice does not affect the Department's previous announced interim reporting relief for annual reports filed by multiemployer welfare benefit plans for 1996, 1997 and 1998 plan years. In addition, to ensure that multiemployer welfare benefit plans have an adequate opportunity to prepare their financial recordkeeping and other related systems so that financial statements can be prepared to comply with SOP 92–6, the Department hereby announces that this same interim reporting relief will apply for the 1999 plan year annual reports filed by multiemployer welfare benefit plans. In particular, the Department understands that multiemployer welfare benefit plans may need this additional time to be able to present plan year 1999 and plan year 2000 comparative financial statements for Form 5500 filings made for the 2000 plan year. Multiemployer welfare benefit plan administrators who rely on the interim reporting relief must comply with the AICPA's pre-SOP 92–6 requirements in their financial statement treatment of the matters now covered by SOP 92–6. Annual reports of multiemployer welfare benefit plans filed for plan years commencing on or after January 1, 2000, however, will be subject to rejection if there is any material qualification in the accountant's opinion accompanying the annual report due to a failure to comply with the requirements of SOP 92–6.

Signed at Washington DC, this 18th day of November 1998.

Meredith Miller,

Deputy Assistant Secretary for Policy, Pension and Welfare Benefits Administration, Department of Labor.

[FR Doc. 98–31524 Filed 11–24–98; 8:45 am]

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Federal Register

Wednesday
November 25, 1998

Part IX

The President

Federal Register
Vol. 63, No. 227
Wednesday, November 25, 1998

Presidential Documents

Title 3—

The President

Proclamation 7150 of November 20, 1998

World Fisheries Day, 1998

By the President of the United States of America

A Proclamation

As a coastal Nation, America has a proud fishing heritage, and we have long benefited from the bounty of the oceans. Generations of our people have made their living from the sea, fishing for cod off the rocky coast of New England, shrimp in the Gulf of Mexico, or Pacific salmon along the West Coast and Alaska. In this Year of the Ocean, it is fitting that we set aside a special day to celebrate one of our Nation's oldest industries and the source of so much of our sustenance.

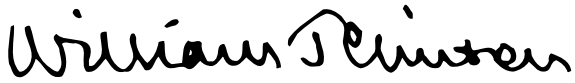
World Fisheries Day is not only an occasion for celebration, it is also a time to raise awareness of the plight of so many of the world's fish resources. A recent United Nations study reported that more than two-thirds of the world's fisheries have been overfished or are fully harvested and more than one third are in a state of decline because of factors like the loss of essential fish habitats, pollution, and global warming.

My Administration is committed to restoring our marine resources and preserving their diversity through careful stewardship. At the National Oceans Conference in June of this year, I announced our goal of creating sustainable fisheries and rebuilding fish stocks by working with industry to improve fishing practices and technologies that catch only targeted species, devoting additional resources to fisheries research, and protecting essential fish habitats. We have also launched the Clean Water Action Plan that, among other things, reduces the runoff from farms and city streets that flow into our streams, rivers, and oceans.

While these efforts are important, the United States acting alone cannot preserve the health of the world's oceans and their marine life. It will take concerted international action—both at the government level and from fish harvesters, workers, and consumers themselves—and a commitment to scientifically based fishing limits to rebuild the world's fisheries and ensure that future generations will benefit from their abundance.

NOW, THEREFORE, I, WILLIAM J. CLINTON, President of the United States of America, by virtue of the Constitution and laws of the United States, do hereby proclaim Saturday, November 21, 1998, as World Fisheries Day. I call upon Government officials, fishing industry professionals, scientists, environmental experts, and the people of the United States to observe this day and to recognize the importance of conserving the world's fisheries, sustaining the health of the oceans, and protecting their precious and abundant variety of marine life.

IN WITNESS WHEREOF, I have hereunto set my hand this twentieth day of November, in the year of our Lord nineteen hundred and ninety-eight, and of the Independence of the United States of America the two hundred and twenty-third.



[FR Doc. 98–31750
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Presidential Documents

Proclamation 7151 of November 20, 1998

National Family Caregivers Week, 1998

By the President of the United States of America

A Proclamation

As American families enjoy Thanksgiving this year, millions of aging parents and grandparents or relatives with disabilities will be able to join these celebrations because of the loving support of family caregivers. Each day these generous women and men devote their time and energies to care for family members who can no longer live independently or who need assistance to remain in the familiar surroundings of their own homes.

The need for such caregivers in our Nation is growing. We are blessed to live in a time when medicine and technology have helped us live longer; as a result, people 85 years of age and older constitute America's fastest-growing age group. For these older Americans, however, the blessing of longevity also brings with it an increased likelihood of disability and chronic disease, reduced physical and mental agility, and higher risk of injury or illness—all of which create a greater need for care.

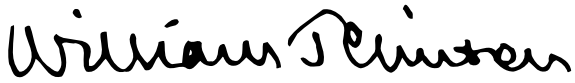
Families across our country have quickly responded to this need, but often at great financial, physical, and emotional sacrifice. Family members, working without pay, are the major providers of long-term care in the United States, and half of all caregivers today are over the age of 65 and are often themselves in declining health. Women, who tend to be the primary family caregivers in our society, often must juggle full-time work and family schedules with their caregiving responsibilities.

The contributions that family caregivers make to our society are best gauged by the impact they have in improving the quality of life of the family members for whom they care. Thanks to family caregivers, those they serve retain a measure of independence, remain with friends and relatives, and continue making contributions to our Nation.

This week, as we celebrate Thanksgiving and reflect with gratitude on our many blessings, let us remember to give thanks for the family caregivers among us whose love and care make life brighter for so many and whose dedication and generosity contribute so much to the strength and well-being of our Nation.

NOW, THEREFORE, I, WILLIAM J. CLINTON, President of the United States of America, by virtue of the authority vested in me by the Constitution and laws of the United States, do hereby proclaim November 22 through November 28, 1998, as National Family Caregivers Week. I call upon Government officials, businesses, communities, educators, volunteers, and the people of the United States to pay tribute to and acknowledge the heroic efforts of caregivers this special week and throughout the year.

IN WITNESS WHEREOF, I have hereunto set my hand this twentieth day of November, in the year of our Lord nineteen hundred and ninety-eight, and of the Independence of the United States of America the two hundred and twenty-third.



[FR Doc. 98–31751
Filed 11–24–98; 8:45 am]
Billing code 3195–01–P

Presidential Documents

Proclamation 7152 of November 20, 1998

National Family Week, 1998

By the President of the United States of America

A Proclamation

Of all the blessings that Americans enjoy, our families are perhaps the most precious. It is within the family that we first gain an understanding of who we are and learn to respect the individuality of others. It is to our families that we turn for the unconditional love, acceptance, comfort, and support we need. And it is our families who teach us how to give that love and support to others, helping us to grow into strong, caring adults who can contribute to the well-being of our communities and our world.

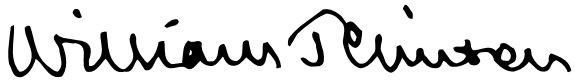
In the broad and diverse America of today, families take many different forms, but they all share a need for security and stability. If we are to maintain strong families as the cornerstone of our society and our hope for the future, it is our responsibility as individuals to strengthen and protect our own families—and it is our responsibility as Americans to reach out with compassion to help other families in need.

My Administration has worked hard to help provide America's families with the tools they need to thrive. Our economic policies have brought dignity, security, and opportunity to millions of families by creating new jobs and reducing unemployment.

The most important work, however, is always done in the hearts and homes of individuals. During this week, I encourage all Americans to reflect upon the many blessings of family life and to join in our national effort to promote strong, loving families across our country. By strengthening and supporting the American family, we are ensuring that the future will be bright for our children, our Nation, and the world.

NOW, THEREFORE, I, WILLIAM J. CLINTON, President of the United States of America, by virtue of the authority vested in me by the Constitution and the laws of the United States, do hereby proclaim November 22 through November 28, 1998, as National Family Week. I call upon Federal, State, and local officials to honor American families with appropriate programs and activities. I encourage educators, community organizations, and religious leaders to celebrate the strength and values we draw from family relationships, and I urge all the people of the United States to reaffirm their own family ties and to reach out to other families in friendship and goodwill.

IN WITNESS WHEREOF, I have hereunto set my hand this twentieth day of November, in the year of our Lord nineteen hundred and ninety-eight, and of the Independence of the United States of America the two hundred and twenty-third.



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Reader Aids

Federal Register

Vol. 63, No. 227

Wednesday, November 25, 1998

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FEDERAL REGISTER PAGES AND DATES, NOVEMBER

CFR PARTS AFFECTED DURING NOVEMBER

At the end of each month, the Office of the Federal Register publishes separately a List of CFR Sections Affected (LSA), which lists parts and sections affected by documents published since the revision date of each title.

REMINDERS

The items in this list were editorially compiled as an aid to Federal Register users. Inclusion or exclusion from this list has no legal significance.

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LIST OF PUBLIC LAWS

Note: The list of Public Laws for the second session of the 105th Congress has been completed and will resume when bills are enacted into law during the first session of the 106th Congress, which convenes on January 6, 1999.

A cumulative list of Public Laws for the second session of the 105th Congress will be published in the **Federal Register** on November 30, 1998.

Last List November 19, 1998.