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Presidential Documents

Title 3—

The President

Executive Order 13320 of December 9, 2003

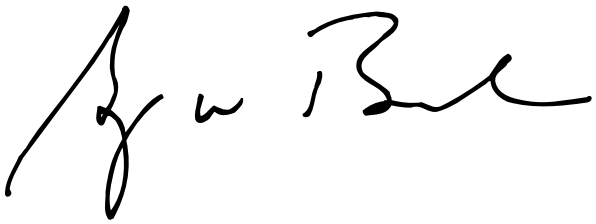
Closing of Executive Departments and Agencies of the Federal Government on Friday, December 26, 2003

By the authority vested in me as President by the Constitution and the laws of the United States of America, it is hereby ordered as follows:

Section 1. All executive branch departments and agencies of the Federal Government shall be closed and their employees excused from duty on Friday, December 26, 2003, the day after Christmas Day, except as provided in section 2 below.

Sec. 2. The heads of executive branch departments and agencies may determine that certain offices and installations of their organizations, or parts thereof, must remain open and that certain employees must report for duty on December 26, 2003, for reasons of national security or defense or other public need.

Sec. 3. Friday, December 26, 2003, shall be considered as falling within the scope of Executive Order 11582 of February 11, 1971, and of 5 U.S.C. 5546 and 6103(b) and other similar statutes insofar as they relate to the pay and leave of employees of the United States.



THE WHITE HOUSE,
December 9, 2003.

[FR Doc. 03–30913
Filed 12–11–03; 8:45 am]
Billing code 3195–01–P

Rules and Regulations

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

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

GENERAL ACCOUNTING OFFICE

4 CFR Parts 27, 28 and 29

Personnel Appeals Board; Procedural Rules

AGENCY: General Accounting Office, Personnel Appeals Board.

ACTION: Final rule.

SUMMARY: The General Accounting Office Personnel Appeals Board (PAB) has authority with respect to employment practices within the General Accounting Office (GAO or agency), pursuant to the General Accounting Office Personnel Act of 1980. The PAB revises its procedural regulations. The changes are intended to clarify the meaning of some sections, to correct a few provisions affected by changes in law or agency structure, and to refine certain procedures.

DATES: Effective date: January 1, 2004.

FOR FURTHER INFORMATION CONTACT: Beth Don, Executive Director, or Susan Inzeo, Solicitor, 202–512–6137.

SUPPLEMENTARY INFORMATION: The General Accounting Office Personnel Appeals Board is authorized by Congress, pursuant to 31 U.S.C. 751–755, to hear and decide cases brought by GAO employees concerning various personnel matters including adverse or performance-based actions, claims of discrimination, alleged prohibited personnel practices, and labor-management relations. The Board also exercises oversight authority over equal employment opportunity at the agency, and has authority to consider, decide, and order corrective action in labor-management representation matters. The Board's current procedural regulations applicable to GAO appear at 4 CFR parts 27 and 28. The Board is revising these regulations for the purpose of clarifying the meaning of some sections, correcting a few provisions affected by changes in law or agency structure, and streamlining certain procedures. The proposed changes were published for comment in the **Federal Register** at 68 FR 41742, July 15, 2003. The significant changes were summarized and explained in the supplementary information section of the published proposed rules. The Board will not repeat all that explanatory material here.

Comments on Proposed Revisions

The only comments received during the sixty-day comment period were submitted by the Personnel Appeals Board General Counsel. The Board has fully considered these comments and responds as follows.

The General Counsel raised concern regarding the changes to § 27.3 (The General Counsel). The Board's revision deletes the phrase ''unless to do so would create a conflict of interest for the General Counsel'' following the summary statement of the General Counsel's statutory responsibility, at Board request, to ''investigate matters under the jurisdiction of the Board, and otherwise assist the Board in carrying out its functions.'' The revision more closely tracks the language of the statute and the deleted language is superfluous.

The General Counsel also raised concern about § 28.98(c) (Individual charges in EEO cases; Special rules for adverse and performance-based actions). Specifically, the comment raised the possibility of confusion concerning the provision's applicability to performance-related actions that do not rise to the level of removal. The Board considers that the provision is clear in reference to performance-based removals and actions that rise to the level of adverse actions. Moreover, paragraph (c) of § 28.98 was not proposed for revision at this time.

The General Counsel objected to the reference in the revised § 28.133 (Stay proceedings) that a stay may be requested by the Office of General Counsel rather than the General Counsel. The final version of this provision reflects the Board's acceptance of this comment.

List of Subjects in 4 CFR Parts 27, 28, and 29

Administrative practice and procedures, Equal employment opportunity, Government employees, Labor management relations.

For the reasons stated in the preamble, the General Accounting Office Personnel Appeals Board amends 4 CFR chapter I, subchapter B, parts 27, 28, and 29 as follows:

PART 27—GENERAL ACCOUNTING OFFICE PERSONNEL APPEALS BOARD; ORGANIZATION

■ 1. The authority citation for part 27 continues to read as follows:

Authority: 31 U.S.C. 753.

§ 27.1 [Amended]

■ 2. Amend § 27.1 as follows:

■ a. Remove the words ''parts 28 and 29'' in the second sentence and add in their place ''part 28''.

■ b. In the third sentence, remove the word ''reconsideration'' and add in its place the word ''review''.

■ 3. Amend § 27.3 by revising the last sentence to read as follows:

§ 27.3 The General Counsel.

* * * The General Counsel, at the request of the Board, shall investigate matters under the jurisdiction of the Board, and otherwise assist the Board in carrying out its functions.

PART 28—GENERAL ACCOUNTING OFFICE PERSONNEL APPEALS BOARD; PROCEDURES APPLICABLE TO CLAIMS CONCERNING EMPLOYMENT PRACTICES AT THE GENERAL ACCOUNTING OFFICE

■ 4. The authority citation continues to read as follows:

Authority: 31 U.S.C. 753.

Subpart A—Purpose, General Definitions, and Jurisdiction

■ 5. Amend § 28.1 by revising paragraphs (a), (b), and the first sentence of paragraph (c) to read as follows:

§ 28.1 Purpose and scope.

(a) The regulations in this part implement the Board's authority with respect to employment practices within the General Accounting Office (GAO), pursuant to the General Accounting Office Personnel Act of 1980 (GAOPA), 31 U.S.C. 751–755.

(b) The purpose of the rules in this part is to establish the procedures to be followed by:

(1) The GAO, in its dealings with the Board;

(2) Employees of the GAO or applicants for employment with the GAO, or groups or organizations claiming to be affected adversely by the operations of the GAO personnel system;

(3) Employees or organizations petitioning for protection of rights or extension of benefits granted to them under subchapters III and IV of Chapter 7 of title 31, United States Code; and

(4) The Board, in carrying out its responsibilities under Subchapters III and IV of chapter 7 of title 31, United States Code.

(c) The scope of the Board's operations encompasses the investigation and adjudication of cases arising under 31 U.S.C. 753. * * *

* * * * *

■ 6. Amend § 28.2 by revising paragraph (a) introductory text, and paragraphs (b)(1) and (b)(3) to read as follows:

§ 28.2 Jurisdiction.

(a) The Board has jurisdiction to hear and decide the following:

* * * * *

(b) * * *

(1) An officer or employee petition involving a removal, suspension for more than 14 days, reduction in grade or pay, or furlough of not more than 30 days;

(2) * * *

(3) The appropriateness of a unit of employees for collective bargaining;

* * * * *

■ 7. Revise § 28.3 to read as follows:

§ 28.3 General definitions.

In this part—

Administrative judge means any individual designated by the Board to preside over a hearing conducted on matters within its jurisdiction. An administrative judge may be a member of the Board, an employee of the Board, or any individual qualified by experience or training to conduct a hearing who is appointed to do so by the Board. When a panel of members or the full Board is hearing a case, the Chair shall designate one of the members to exercise the responsibilities of the administrative judge in the proceedings.

Appeal means a request filed with the full Board for review of an initial decision.

Board means the General Accounting Office Personnel Appeals Board as established by 31 U.S.C. 751 and explained in 4 CFR 27.1.

Charge means any request filed with the PAB Office of General Counsel to investigate any matter within the jurisdiction of the Board, under the provisions of Subchapter IV of chapter 7 of Title 31, United States Code.

Charging Party means any person filing a charge with the PAB Office of General Counsel for investigation.

Clerk of the Board means the Clerk of the Personnel Appeals Board.

Comptroller General means the Comptroller General of the United States.

Days means calendar days.

Director of EEO Oversight means the Personnel Appeals Board Director of EEO Oversight.

Executive Director means the Executive Director of the Personnel Appeals Board.

GAO means the General Accounting Office.

General Counsel means the General Counsel of the Board, as provided for under 31 U.S.C. 752.

Initial Decision means the adjudicatory statement of a case that is issued by an administrative judge who is a member of or appointed by the Board.

Notice of Appeal means a pleading requesting that the full Board review an initial decision.

Person means an employee, an applicant for employment, a former employee, a labor organization or the GAO.

Petition means any request filed with the Board for action to be taken on matters within the jurisdiction of the Board, under the provisions of Subchapter IV of Chapter 7 of title 31, United States Code.

Petitioner means any person filing a petition for Board consideration.

Pleading means a document that initiates a cause of action before the Board, responds to a cause of action, amends a cause of action, responds to an amended cause of action, requests reconsideration of a decision, responds to such a request, requests appellate review by the full Board or responds to such a request.

Request for Reconsideration means a request, filed with the administrative judge who rendered the initial decision, to reconsider that decision in whole or part.

Solicitor means the attorney appointed by the Board to provide advice and assistance to the Board in carrying out its adjudicatory functions and to otherwise provide assistance as directed by the Board.

Workforce Restructuring Action (WRA) means the release of an employee from a job group by separation, demotion, reassignment requiring displacement, or furlough for more than 30 days when the cause of action is lack of work, shortage of funds, insufficient personnel ceiling, reorganization or realignment, an individual's exercise of reemployment or reinstatement rights, correction of skills imbalances, or reduction of high-grade supervisory, or managerial positions.

■ 8. Amend § 28.4 by adding paragraph (d) to read as follows:

§ 28.4 Computation of time.

* * * * *

(d) No written submission shall be accepted by the Clerk of the Board after 4 p.m., Monday through Friday.

Subpart B—Procedures

■ 9. Amend § 28.8 by revising paragraph (a) to read as follows:

§ 28.8 Informal procedural advice.

(a) Persons may seek informal advice on all aspects of the Board's procedures by contacting the Board's Executive Director, Director of EEO Oversight, Solicitor, General Counsel or the Clerk of the Board.

* * * * *

■ 10. Amend § 28.10 by revising the heading and the first sentence of paragraph (a) and paragraph (b)(1) to read as follows:

§ 28.10 Notice of petition rights.

(a) The GAO shall be responsible for ensuring that employees are routinely advised of their rights to petition the Board and that employees who are the object of an adverse or performance-based action are, at the time of the action, adequately advised of their rights to petition the Board. * * *

(b) * * *

(1) Time limits for filing a petition with the Board and the address of the Board;

* * * * *

■ 11. Amend § 28.11 by revising the heading and paragraphs (c), (d)(2) and the last sentence of paragraph (e) to read as follows:

§ 28.11 Filing a charge with the Office of General Counsel.

* * * * *

(c) *How to file.* Charges may be filed with the Office of General Counsel by personal delivery (including commercial carrier) or by mail. The address to be used differs for the two kinds of filing.

(1) A charge may be filed by personal delivery at the Office of General Counsel, Personnel Appeals Board, GAO, Suite 580, Union Center Plaza II, 820 First Street, NE., Washington, DC 20002.

(2) A charge may be filed by mail addressed to the Office of General

Counsel, Personnel Appeals Board, Suite 580, Union Center Plaza II, 441 G Street, NW., Washington, DC 20548 *or* Office of General Counsel, Personnel Appeals Board, GAO, Suite 580, Union Center Plaza II, 820 First Street, NE., Washington, DC 20002. When filed by mail, the postmark shall be the date of filing for all submissions to the Office of General Counsel.

(d) * * *

(2) The names and titles of persons, if any, responsible for actions the charging party wishes to have the Office of General Counsel investigate;

* * * * *

(e) * * * When attorney fees are the only issue raised in a charge to the Office of General Counsel, the General Counsel shall transmit the charge to the Board for processing under §§ 28.18 through 28.88 as a petition.

■ 12. Amend § 28.12 as follows:

■ a. Revise paragraphs (c), (d), and (g).

■ b. Add new paragraphs (h) and (i).

The additions and revisions read as follows:

§ 28.12 General Counsel procedures.

* * * * *

(c) Following the investigation, the Office of General Counsel shall provide the charging party with a Right to Petition Letter. Accompanying this letter will be a statement of the General Counsel advising the charging party of the results of the investigation. This statement of the General Counsel is not subject to discovery and may not be introduced into evidence before the Board.

(d)(1) If the General Counsel determines that there are reasonable grounds to believe that the charging party's rights under subchapters III and IV of chapter 7 of title 31, United States Code, have been violated, then the General Counsel shall represent the charging party unless the charging party elects not to be represented by the Office of General Counsel.

(2) If, following the investigation, the General Counsel determines that there are not reasonable grounds to believe that the charging party's rights under subchapters III and IV of chapter 7 of title 31, United States Code, have been violated, then the General Counsel shall not represent the charging party. The charging party may nonetheless file a petition with the Board in accordance with § 28.18.

(3) Any charging party may represent him- or herself or obtain other representation.

* * * * *

(g) If 180 days have elapsed since the filing of the charge, and the Office of General Counsel has not completed the investigation and issued a Right to Petition Letter, the charging party may bring his or her case directly to the Board by filing a petition in accordance with § 28.18. If a charging party exercises this option to file a petition with the Board without waiting for the completion of the investigation, the Office of General Counsel shall not represent the charging party in proceedings before the Board. The charging party may represent him- or herself or obtain other representation. The Office of General Counsel shall close the investigation of the charge upon being notified by the Clerk of the Board that the charging party has filed a petition with the Board under this paragraph (g).

(h) Office of General Counsel settlement: Where the General Counsel under paragraph (a) of this section transmits a settlement which has been agreed to by the parties, the settlement agreement shall be the final disposition of the case.

(i) Confidentiality: (1) It is the Office of General Counsel's policy to protect against the disclosure of documents obtained during the investigation, as a means of ensuring that Office's continuing ability to obtain all relevant information. However, if the Office of General Counsel files a petition with the Personnel Appeals Board on behalf of a charging party pursuant to this section, that Office may disclose the identity of witnesses and a synopsis of their expected testimony. Documents to be offered into evidence at the hearing may be disclosed as required by the prehearing disclosure requirements of § 28.56.

(2) Unless so ordered by a court of competent jurisdiction, no employee of the Personnel Appeals Board Office of General Counsel shall produce or disclose any information or records acquired as part of the performance of his/her official duties or because of his/her official status. Before producing or disclosing such information or records pursuant to court order, an employee shall notify the General Counsel.

■ 13. Revise § 28.13 to read as follows:

§ 28.13 Special procedure for Workforce Restructuring Action.

In the event of a Workforce Restructuring Action (WRA) resulting in an individual's separation from employment, an aggrieved employee may choose to file a petition directly with the Personnel Appeals Board, without first filing the charge with the PAB's Office of General Counsel pursuant to § 28.11. Pursuant to § 28.98, individuals raising discrimination issues in connection with a WRA action need not file a complaint with GAO's Office of Opportunity and Inclusiveness before pursuing a WRA challenge alleging discrimination, either by filing directly with the PAB or by filing a charge with the Board's Office of General Counsel.

Hearing Procedures for Cases Before the Board—General

§ 28.15 [Amended]

■ 14. Amend § 28.15 by removing the word ''appeals'' and adding in its place the word ''petitions'' in the first sentence.

■ 15. Amend § 28.17 by revising the heading, paragraphs (a)(2) and (a)(3), paragraphs (b)(1) and (b)(2) and paragraphs (c)(1), (c)(2), and (c)(3) to read as follows:

§ 28.17 Internal petitions of Board employees.

(a) * * *

(2) When an employee of the Board believes that he or she has been denied his or her right to equal employment opportunity, the employee shall bring this matter to the attention of the Board's Executive Director or General Counsel. If the matter cannot be resolved within 10 days, the Executive Director shall notify the employee of his or her right to file an EEO complaint. The employee may consult with either the Board's Solicitor or General Counsel and seek advice with regard to procedural matters concerning the filing of an EEO charge. The employee shall have 20 days from service of this notice to file an EEO charge with the PAB Office of General Counsel. Upon receipt of an EEO charge, the General Counsel shall arrange with the Executive Director for processing in accordance with paragraph (b) of this section. If the EEO allegations involve challenge to a WRA-based separation, the employee may choose to expedite the procedures by filing a petition directly with the Board.

(3) When an employee of the Board wishes to raise any other issue that would be subject to the Board's jurisdiction, the employee shall file a charge with the General Counsel and the General Counsel shall arrange with the Executive Director for processing in accordance with paragraph (b) of this section. If the challenged action is a WRA-based separation from employment, the employee may choose to expedite the procedures by filing a petition directly with the Board.

(b) * * *

(1) If agreed to by the Office of Special Counsel or the EEOC, as appropriate,

that body will appoint and detail a person from among its attorneys to perform the functions of the General Counsel.

(2) If the Special Counsel or the EEOC does not agree to such a procedure, an appointment of an attorney will be sought from the Federal Mediation and Conciliation Service (FMCS).

(3) * * *

(c) * * *

(1) If agreed to by the MSPB or the EEOC, as appropriate, that body will appoint and detail one of its administrative law judges (ALJ) or administrative judges (AJ) to perform the Board's adjudicative functions.

(2) If neither the MSPB nor the EEOC agrees to such a procedure, an appointment of an arbitrator will be sought from the FMCS.

(3) In any event, whoever is so appointed shall possess all of the powers and authority possessed by the Board in employee cases. The decision of the administrative law judge, administrative judge or arbitrator shall be a final decision of the Board. The procedure for judicial review of the decision shall be the same as that described in § 28.90.

* * * * *

■ 16. Amend § 28.18 by revising the heading and paragraphs (a), (b), (c), (d) introductory text, (e) and (f) to read as follows:

§ 28.18 Filing a petition with the Board.

(a) *Who may file.* Any person who is claiming to be affected adversely by GAO action or inaction that is within the Board's jurisdiction under subchapter IV of chapter 7 of title 31, United States Code, or who is alleging that GAO or a labor organization engaged or is engaging in an unfair labor practice, may file a petition if one of the following is met:

(1) The person has received a Right to Petition Letter from the Board's Office of General Counsel; or

(2) At least 180 days have elapsed from the filing of the charge with the Board's Office of General Counsel and that Office has not issued a Right to Petition Letter; or

(3) The person was separated due to a Workforce Restructuring Action and chooses to file a petition directly with the Board, without first filing with the Board's Office of General Counsel, as provided in § 28.13.

(b) *When to file.* (1) Petitions filed pursuant to paragraph (a)(1) of this section must be filed within 30 days after receipt by the charging party of the Right to Petition Letter from the Board's Office of General Counsel.

(2) Petitions filed pursuant to paragraph (a)(2) of this section may be filed at any time after 180 days have elapsed from the filing of the charge with the Board's Office of General Counsel, provided that that Office has not issued a Right to Petition Letter concerning the charge.

(3) Petitions filed pursuant to paragraph (a)(3) of this section must be filed within 30 days after the effective date of the separation due to a Workforce Restructuring Action.

(c) *How to file.* (1) A petition may be filed by hand delivery at the office of the Board, Suite 560, Union Center Plaza II, 820 First Street NE., Washington, DC 20002. It must be received by 4 p.m., Monday through Friday, on the date that it is filed.

(2) A petition may be filed by mail addressed to the Personnel Appeals Board, GAO, Suite 560, Union Center Plaza II, 441 G Street NW., Washington, DC 20548 or Personnel Appeals Board, GAO, Suite 560, Union Center Plaza II, 820 First Street NE., Washington, DC 20002. When filed by mail, the postmark shall be the date of filing for all submissions to the Board.

(d) *What to file.* The petition shall include the following information:

* * * * *

(e) *Failure to raise a claim or defense.* Failure to raise a claim or defense in the petition shall not bar its submission later unless to do so would prejudice the rights of the other parties or unduly delay the proceedings.

(f) *Non-EEO class actions.* One or more persons may file a petition as representatives of a class in any matter within the Board's jurisdiction. For the purpose of determining whether it is appropriate to treat a petition as a class action, the administrative judge will be guided, but not controlled, by the applicable provisions of the Federal Rules of Civil Procedure. See § 28.97 for EEO class actions.

■ 17. Revise § 28.19(a) to read as follows:

§ 28.19 Content of response by charged party.

(a) Within 20 days after service of a copy of a petition, the GAO or other charged party shall file a response containing at least the following:

(1) A statement of the position of the charged party on each allegation set forth therein, including admissions, denials or explanations. If the petition contains numbered paragraphs, the responses should reference the paragraph numbers. If the petition does not contain numbered paragraphs, the responses should quote or otherwise clearly identify the specific allegations of the petition.

(2) Any other defenses to the petition.

(3) Designation of, and signature by, the representative authorized to act for the charged party in the matter.

* * * * *

■ 18. Amend § 28.20 by revising the first and last sentences of paragraph (b)(1) and the first two sentences of paragraph (b)(2) to read as follows:

§ 28.20 Number of pleadings, service and response.

* * * * *

(b) *Service.* (1) The Board will serve copies of a petition upon the parties to the proceeding by mail and/or by facsimile. * * * The Board will not serve copies of any pleadings, motions, or other submissions by the parties after the initial petition.

(2) The parties shall serve on each other one copy of all pleadings other than the initial petition. Service shall be made by mailing, by facsimile or by delivering personally a copy of the pleading to each party on the service list previously provided by the Board.

* * *

* * * * *

■ 19. Revise § 28.21 to read as follows:

§ 28.21 Amendments to petitions and motions practice.

(a) *Amendments to petitions.* The Board, at its discretion, may allow amendments to a petition as long as all persons who are parties to the proceeding have adequate notice to prepare for the new allegations and if to do so would not prejudice the rights of the other parties or unduly delay the proceedings.

(b) *Motions practice.* (1) When an action is before an administrative judge, motions of the parties shall be filed with the Clerk of the Board and shall be in writing except for oral motions made during the hearing. An original and 3 copies of written motions shall be filed with the Clerk of the Board. An original and 3 copies of responses in opposition to written motions must be filed with the Clerk of the Board within 20 days of service of the motion unless the administrative judge requires a shorter time.

(2) When an action is before the full Board, an original and 7 copies of any motion shall be filed with the Clerk of the Board. An original and 7 copies of any responses in opposition to motions must be filed with the Clerk of the Board within 20 days of service of the motion unless the Board requires a shorter time.

(3) A party filing a motion for extension of time, a motion for postponement of a hearing, or any other procedural motion must first contact the

other party to determine whether there is any objection to the motion and must state in the motion whether the other party has any objection.

(4) No motions, responses or other submissions will be accepted for filing by the Clerk of the Board after 4 p.m., Monday through Friday. All written submissions shall be served simultaneously upon the other parties to the proceeding. A certificate of service must be attached showing service by mail, facsimile or personal delivery of the submission to the other parties. Further submissions by either party may be filed only with the approval of the administrative judge or full Board.

(5) All written motions and responses thereto shall include a proposed order, where applicable.

(6) Motions for extension of time will be granted only upon a showing of good cause.

(7) *Oral argument.* The administrative judge may allow oral argument on the motion at his or her discretion.

(c) *Motions for summary judgment.* (1) Either party may move for summary judgment by filing a written motion no later than 14 days prior to the commencement of the hearing or as otherwise ordered by the administrative judge.

(2) Motions for summary judgment must be accompanied by a statement of material facts for which there is no genuine dispute and a statement of reasons in support of the motion. The motion may be supported by documents, affidavits, or other evidence.

(3) Summary judgment will be granted if the pleadings, depositions, answers to interrogatories, admissions, affidavits, if any, and other documents show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

(4) A party moving for summary judgment must make a showing sufficient to establish the existence of each element essential to that party's cause of action and for which that party bears the burden of proof.

(5) When a party moves for summary judgment, the Board will evaluate the motion on its own merits, resolving all reasonable inferences against the moving party.

§ 28.22 [Amended]

■ 20. Amend § 28.22 by removing the words ''File recommended or'' and adding the word ''Issue'' in their place in paragraph (b)(12).

■ 21. Amend § 28.24 as follows:

■ a. Revise paragraph (a) introductory text and paragraph (a)(2).

■ b. In paragraph (b), remove the words ''an appeal'' and add the words ''a petition'' in their place.

The revision reads as follows:

§ 28.24 Sanctions.

* * * * *

(a) *Failure to comply with an order or subpoena.* When a party fails to comply with an order or subpoena (including an order for the taking of a deposition, for the production of evidence within the party's control, for an admission, or for production of witnesses), the administrative judge may:

(1) * * *

(2) Prohibit the party failing to comply with such order or subpoena from introducing, or otherwise relying upon, evidence relating to the information sought.

* * * * *

Parties, Practitioners and Witnesses

■ 22. Revise the first two sentences of paragraph (a) of § 28.25 to read as follows:

§ 28.25 Representation.

(a) All parties to a petition may be represented in any matter relating to the petition. The parties shall designate their representatives, if any, in the petition or responsive pleading. * * *

* * * * *

■ 23. Amend § 28.27 by revising the first two sentences of paragraph (c) to read as follows:

§ 28.27 Intervenors.

* * * * *

(c) A motion for permission to intervene will be granted where a determination is made by the administrative judge or the Board, where the case is being heard en banc, that the requestor will be affected directly by the outcome of the proceeding. Denial of a motion for intervention may be appealed to the full Board. * * *

* * * * *

§ 28.28 [Amended]

■ 24. Amend § 28.28 by removing the word ''appeal'' and adding the word ''petition'' in its place in paragraph (a).

■ 25. Amend § 28.29 by revising paragraph (a)(2) to read as follows:

§ 28.29 Consolidation or joinder.

(a) * * *

(2) Joinder may occur where one person has two or more petitions pending and they are united for consideration. For example, a single petitioner who has one petition pending challenging a 30-day suspension and another petition pending challenging a subsequent dismissal might have the cases joined.

* * * * *

Discovery

§ 28.41 [Amended]

■ 26. Amend § 28.41(b) by removing the word ''appeal'' in the first sentence and add in its place the word ''review''.

■ 27. Amend § 28.42 by revising the first sentence of paragraph (d)(5) to read as follows:

§ 28.42 Discovery procedures and protective orders.

* * * * *

(d) * * *

(5) Discovery shall be completed by the time designated by the administrative judge, but no later than 65 days after the service of the notice of filing of a petition. * * *

Subpoenas

■ 28. Amend § 28.46 as follows:

■ a. Revise paragraph (b).

■ b. Remove paragraph (d).

The revision read as follows:

§ 28.46 Motion for subpoena.

* * * * *

(b) *Motion.* (1) A motion for the issuance of a subpoena requiring the attendance and testimony of witnesses or the production of documents or other evidence under § 28.46(a) shall be submitted to the administrative judge at least 15 days in advance of the date scheduled for the commencement of the hearing.

(2) If the subpoena is sought as part of the discovery process, the motion shall be submitted to the administrative judge at least 15 days in advance of the date set for the attendance of the witness at a deposition or the production of documents.

* * * * *

Hearings

■ 29. Amend § 28.56 by adding a second sentence in paragraph (f) to read as follows:

§ 28.56 Hearing procedures, conduct and copies of exhibits.

* * * * *

(f) * * * Multiple exhibits shall be indexed and tabbed.

* * * * *

■ 30. Amend § 28.57 by revising paragraph (b) to read as follows:

§ 28.57 Public hearings.

* * * * *

(b) At the hearing, the petitioner, the petitioner's representative, GAO's legal representative, and a GAO management

representative, who is not expected to testify, each have a right to be present. The Agency management representative shall be designated prior to the hearing.

■ 31. Amend § 28.61 as follows:

■ a. In paragraph (b) introductory text, remove the word ''may'' and add in its place the word ''shall''.

■ b. Revise the definition of *harmful error* in paragraph (d).

The revision reads as follows:

§ 28.61 Burden and degree of proof.

* * * * *

(d) * * *

Harmful error means error by the agency in the application of its procedures which, in the absence or cure of the error, might have caused the agency to reach a conclusion different from the one reached.

* * * * *

■ 32. Redesignate § 28.62 as § 28.63, and add a new § 28.62 to read as follows:

§ 28.62 Decision on the record.

(a) The parties may agree to forego a hearing and request that the matter be decided by the presiding administrative judge based upon the record submitted.

(b) If the parties agree to forego a hearing under this subpart, the record will close on the date that the administrative judge sets as the final date for the receipt or filing of submissions of the parties. Once the record closes, no additional evidence or argument will be accepted unless the party seeking to submit it demonstrates that the evidence was not available before the record closed.

(c) In matters submitted for decision on the record under this section, the parties bear the same burdens of proof set forth in § 28.61.

(d) A decision obtained under this section is a decision on the merits of the case and is appealable as if the matter had been adjudicated in an evidentiary hearing.

Evidence

■ 33. Revise § 28.66 to read as follows:

§ 28.66 Admissibility.

Evidence or testimony may be excluded from consideration by the administrative judge if it is irrelevant, immaterial, unduly repetitious or protected by privilege. The administrative judge is not bound by formal evidentiary rules but may rely on the Federal Rules of Evidence for guidance.

■ 34. Revise § 28.69 to read as follows:

§ 28.69 Judicial notice.

The administrative judge on his or her own motion or on motion of a party, may take judicial notice of a fact which is not subject to reasonable dispute because it is either: a matter of common knowledge; or a matter capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. Judicial notice taken of any fact satisfies a party's burden of proving the fact noticed.

Board Decisions, Attorney's Fees and Judicial Review

§ 28.86 [Removed and reserved]

■ 35. Remove and reserve § 28.86.

■ 36. Amend § 28.87 by revising paragraphs (a) and (b) and paragraph (g) introductory text, to read as follows:

§ 28.87 Board procedures; initial decisions.

(a) When a case is heard in the first instance by a single Board member, a panel of members, or a non-member appointed by the Board, an initial decision shall be issued by that member, panel or individual and served upon the parties.

(b) An aggrieved party may seek reconsideration of or may appeal the initial decision in the following manner:

(1) Within 10 days of the service of the initial decision, such a party may file and serve a request for reconsideration with the administrative judge or panel rendering that decision. Filing of the request for reconsideration shall toll the commencement of the 15 day period for filing a notice of appeal with the full Board, pending disposition of the request for reconsideration by the administrative judge or panel. The administrative judge or panel shall determine if a response is required, and if so, will fix by order the time for the filing of the response. A motion for reconsideration will not be granted without providing an opportunity for response.

(2) Within 15 days of the service of the initial decision, such a party may appeal to the full Board by filing and serving a notice of appeal to the Board.

* * * * *

(g) In conducting its examination of the initial decision, the Board may substitute its own findings of fact and conclusions of law, but the Board generally will defer to demeanor-based credibility determinations made in the initial decision. In determining whether some action other than affirmance of the initial decision is required, the Board will also consider whether:

* * * * *

■ 37. Amend § 28.88 as follows:

■ a. Revise paragraphs (a), (b), and (d).

■ b. Add paragraphs (e) and (f).

The revisions and additions read as follows:

§ 28.88 Board procedures; enforcement.

(a) All decisions and orders of the Board shall be complied with promptly. Whenever a Board decision or order requires a person or party to take any action, the Board may require such person or party to provide the Board and all parties with a compliance report.

(b) When the Board does not receive a report of compliance in accordance with paragraph (a) of this section, the Solicitor shall make inquiries to determine the status of the compliance report and shall report upon the results of the inquiry to the Board.

* * * * *

(d) Upon receipt of a non-compliance report from its Solicitor or of a petition for enforcement of a final decision, the Board may issue a notice to any person to show cause why there was non-compliance. Apart from remedies available to the parties, the Board may seek judicial enforcement of a decision or order issued pursuant to a show cause proceeding.

(e) If the parties enter into a settlement agreement that has been reviewed and approved by the administrative judge, the Board retains jurisdiction to enforce the terms of such settlement agreement.

(f) Any party to a settlement agreement over which the Board retains jurisdiction may petition the Board for enforcement of the terms of such settlement agreement.

■ 38. Revise § 28.89 to read as follows:

§ 28.89 Attorney's fees and costs.

Within 20 days after service of a final decision by the Board, or within 20 days after the date on which an initial decision becomes final pursuant to § 28.87(d), the petitioner, if he or she is the prevailing party, may submit a request for the award of reasonable attorney's fees and costs. GAO may file a response within 20 days after service of the request. Motions for attorney's fees shall be filed in accordance with § 28.21 of these regulations. Rulings on attorney's fees and costs shall be consistent with the standards set forth at 5 U.S.C. 7701(g). The decision of the administrative judge concerning attorney's fees and costs shall be subject to review and shall become final according to the provisions of § 28.87.

Subpart D—Special Procedures; Equal Employment Opportunity (EEO) Cases

■ 39. Amend § 28.95 by revising paragraphs (a) and (d) to read as follows:

§ 28.95 Purpose and scope.

* * * * *

(a) Section 717 of the Civil Rights Act of 1964, as amended (42 U.S.C. 2000e-16), prohibiting discrimination based on race, color, religion, sex or national origin;

* * * * *

(d) Title I of the Americans with Disabilities Act of 1990 (42 U.S.C. 12101 *et seq.*) and sections 501 and 505 of the Rehabilitation Act of 1973 (29 U.S.C. 791, 794a) prohibiting discrimination on the basis of disability; or

* * * * *

■ 40. Amend § 28.97 by revising paragraph (b) introductory text, the first sentence of paragraph (c), paragraphs (d), and (e) to read as follows:

§ 28.97 Class actions in EEO cases.

* * * * *

(b) An appeal from GAO's disposition of any EEO class complaint may be submitted to the Board at the following times:

* * * * *

(c) In EEO class actions, employees shall not file charges with the Board's Office of General Counsel and that Office shall not undertake an independent investigation of a class complaint that has been filed with GAO. * * *

(d) An appeal of a GAO disposition of an EEO class complaint shall be decided by the Board based upon a review of the administrative record, including any recommended findings and conclusions, developed in the GAO class complaint process. In such cases, the Board will employ the same standards of review set forth in § 28.87.

(e) The parties to an EEO class complaint do not have a right to a de novo evidentiary hearing before the Board. However, either the class representative or GAO may file a motion requesting an evidentiary hearing, rather than having the Board decide the case upon review of the administrative record already developed by GAO. The Board, in its discretion, may grant such motion or, upon its own review of the administrative record, may direct that a new hearing be conducted. If the Board orders a new evidentiary hearing, the class representative shall file a petition on behalf of the class and the case shall be adjudicated before an administrative judge of this Board pursuant to the procedures applicable to an individual EEO complaint processed under § 28.98 of these regulations. For the purpose of determining whether it is appropriate to treat a petition as a class action, the administrative judge will be guided, but not controlled, by the applicable provisions of the Federal Rules of Civil Procedure.

■ 41. Amend § 28.98 by revising paragraphs (d) and (e)(1) to read as follows:

§ 28.98 Individual charges in EEO cases.

* * * * *

(d) *Special rules for WRA based actions.* An individual alleging discrimination issues in connection with a WRA-based separation may follow the procedures outlined above in paragraph (c) of this section for adverse and performance based actions, or may choose instead a third option. In accordance with the provisions of § 28.13, such an individual may challenge that action by filing directly with the PAB, thus bypassing both the Office of Opportunity and Inclusiveness and the Board's Office of General Counsel.

(e)(1) The charging party shall file the charge with the Board's Office of General Counsel in accordance with § 28.11. That Office shall investigate the charge in accordance with § 28.12.

* * * * *

§ 28.99 [Amended]

■ 42. Amend § 28.99 as follows:

■ a. Remove ''for review'' in the heading.

■ b. In paragraph (b)(1), add ''Agency'' after ''Provision for.''

■ 43. Revise § 28.101 to read as follows:

§ 28.101 Termination of Board proceedings when suit is filed in Federal District Court.

Any proceeding before the Board shall be terminated when an employee or applicant who is alleging violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e–16, Title I of the Americans with Disabilities Act of 1990, 42 U.S.C. 12101 *et seq.*, the Age Discrimination in Employment Act, 29 U.S.C. 633a, or the Rehabilitation Act, 29 U.S.C. 791, files suit in Federal District Court on the same cause of action pending before the Personnel Appeals Board.

■ 44. Amend § 28.112 by revising paragraph (a)(3) to read as follows:

§ 28.112 Who may file petitions.

(a) * * *

(3) The GAO if it has a good faith reason to doubt that a majority of employees in the bargaining unit wish to be represented by the labor organization which is currently the exclusive representative of those employees;

* * * * *

■ 45. Amend § 28.113 by revising paragraph (a)(7), the second sentence of paragraph (b), and the first sentence of paragraph (c) to read as follows:

§ 28.113 Contents of representation petitions.

(a) * * *

(7) Membership cards, dues records, or signed statements by employees indicating their desire to support the petition of the labor organization, or similar evidence acceptable to the Board, showing that at least 30 percent of the employees in the proposed unit support the representation petition.

(b) * * * Additionally, a petition under § 28.112(a)(2) shall include evidence satisfactory to the Board that at least 30 percent of the employees in the unit support the petition to determine whether the employees wish to continue to be represented by the labor organization currently having bargaining rights.

(c) The contents of petitions filed under § 28.112(a)(3) shall conform to those provided in petitions under paragraph (a) of this section except that the information required by paragraphs (a)(4) and (a)(7) of this section need not be supplied. * * *

* * * * *

Subpart F—Special Procedures; Unfair Labor Practices

§ 28.121 [Amended]

■ 46. Amend § 28.121(c) as follows:

■ a. Remove ''for review'' after the word ''petition''.

■ b. Remove the term ''14b'' and add in its place the term ''15e''.

■ c. Add the words ''Office of'' before the phrase ''General Counsel''.

§ 28.122 [Amended]

■ 47. Amend § 28.122 as follows:

■ a. Remove '';compelling need'' from the heading.

■ b. In paragraph (e) remove ''§§ 28.86–28.87'' and in its place add ''§ 28.87''.

■ 48. Amend § 28.123 as follows:

■ a. Revise paragraph (a)(4).

■ b. In paragraph (c), remove the words ''Labor/Management Relations'' and add the words ''Employment Standards'' in their place.

The revision reads as follows:

§ 28.123 Standards of conduct for labor organizations.

(a) * * *

(4) Fiscal integrity.

* * * * *

Subpart G—Corrective Action, Disciplinary and Stay Proceedings

§ 28.131 [Amended]

■ 49. Amend paragraph (d) of § 28.131 by removing the words ''for review'' after

''petition'' in both sentences, and adding the words ''Board's Office of'' before the phrase ''General Counsel''.

§ 28.132 [Amended]

■ 50. Amend § 28.132 by removing the first sentence in paragraph (e).

■ 51. Amend § 28.133 by revising paragraphs (a), (b), (c), (d), and (e) to read as follows:

§ 28.133 Stay proceedings.

(a) Prior to the effective date of any proposed personnel action, the Board's General Counsel may request, ex parte, the issuance of an initial stay of the proposed personnel action for a period not to exceed 30 days if the General Counsel believes that the proposed personnel action arises out of a prohibited personnel practice. The request shall be in writing and shall specify the nature of the action to be stayed and the basis for the General Counsel's belief. The Board's Office of General Counsel shall serve a copy of the request on the GAO. Within three business days of its filing, the request shall be granted by the Board member designated by the Board Chair to entertain the request unless that Board member determines that the request either:

(1) Fails to satisfy the requirements of this paragraph or

(2) On its face, conclusively establishes that the proposed personnel action did not arise out of an alleged prohibited personnel practice as specified by the General Counsel.

(b) The Board's General Counsel may request the issuance of either:

(1) Further temporary stays for the purpose of allowing additional time to pursue its investigation or

(2) A permanent stay for the purpose of staying the proposed personnel action until a final decision is rendered.

(c) Requests for stays under paragraph (b) of this section shall be received by both the Board and the GAO no less than 10 days before the expiration of any stay then in effect. Any response from GAO to the request shall be received by both the Board and the Board's Office of General Counsel no less than three days before the expiration of any stay then in effect. Any request for stay under this paragraph shall be decided by the Board member who issued the prior stay under paragraph (a) of this section, unless the Board Chair determines that it should be decided by the Board en banc. The Board member, or Board en banc, may require further briefing, oral argument, submission of affidavits or other documentary evidence, or may conduct an evidentiary hearing before rendering a decision. Any stay then in effect may be extended, sua sponte, for a period not to exceed 30 days to enable the Board member, or Board en banc, a reasonable opportunity to render a decision.

(d) A temporary stay under paragraph (b)(1) of this section may be issued if the Board member, or Board en banc, determines that under all of the circumstances the interests of justice would be served by providing more time for the Board's Office of General Counsel to pursue the investigation. However, the duration of any single temporary stay shall not exceed the amount of time reasonably necessary to acquire sufficient information to support a request for a permanent stay in the exercise of a high degree of diligence and, in no event, shall any single temporary stay exceed 60 days except as provided under paragraph (c) of this section for the purpose of allowing time to render a decision.

(e) In determining whether a permanent stay under paragraph (b)(2) of this section should be issued, the Board member, or Board en banc, shall:

(1) Assess the evidence adduced by each side as to whether the proposed personnel action arises out of an alleged prohibited personnel practice as specified by the Board's General Counsel;

(2) Assess the nature and gravity of any harm that could inure to each side if the request for permanent stay is either granted or denied; and

(3) Balance the assessments conducted under paragraphs (e)(1) and (2) of this section.

* * * * *

Subpart I—Ex Parte Communications

■ 52. Amend § 28.146 by revising the second sentence of paragraph (a) to read as follows:

§ 28.146 Explanation and definitions.

(a) * * * The only ex parte communications that are prohibited are those that involve the merits of the case or those that violate other rules requiring submissions to be in writing. * * *

* * * * *

■ 53. Add subpart K, consisting of §§ 28.160 and 28.161 to read as follows:

Subpart K—Access to Records

Sec.

28.160 Request for records.
28.161 Denial of access to information—Appeals.

Subpart K—Access to Records

§ 28.160 Request for records.

(a) Individuals may request access to records pertaining to them that are maintained as described in 4 CFR part 83, by addressing an inquiry to the PAB General Counsel either by mail or by appearing in person at the Personnel Appeals Board Office of General Counsel, 820 First Street, NE., Suite 580, Washington, DC 20002, during business hours on a regular business day. Requests in writing should be clearly and prominently marked ''Privacy Act Request.'' Requests for copies of records shall be subject to duplication fees set forth in 4 CFR 83.17.

(b) Individuals making a request in person shall be required to present satisfactory proof of identity, preferably a document bearing the individual's photograph. Requests by mail or submitted other than in person should contain sufficient information to enable the General Counsel to determine with reasonable certainty that the requester and the subject of the record are one and the same. To assist in this process, individuals should submit their names and addresses, dates and places of birth, social security number, and any other known identifying information such as an agency file number or identification number and a description of the circumstances under which the records were compiled.

(c) *Exemptions from disclosure.* The Personnel Appeals Board General Counsel and the Personnel Appeals Board, in deciding what records are exempt from disclosure, will follow the policies set forth in 4 CFR part 83.

§ 28.161 Denial of access to information—Appeals.

(a) If a request for access to information under § 28.160 is denied, the General Counsel shall give the requester the following information:

(1) The General Counsel's name and business mailing address;

(2) The date of the denial;

(3) The reasons for the denial, including citation of appropriate authorities; and

(4) The individual's right to appeal the denial as set forth in paragraphs (b) and (c) of this section.

(b) Any individual whose request for access to records of the PAB General Counsel has been denied in whole or part by the General Counsel may, within 30 days of receipt of the denial, challenge that decision by filing a written request for review of the decision with the Personnel Appeals Board, 820 First Street, NE., Suite 560, Washington, DC 20002.

(c) The appeal shall describe:

(1) The initial request made by the individual for access to records;

(2) The General Counsel's decision denying the request; and

(3) The reasons why that decision should be modified by the Board.

(d) The Board, en banc, may in its discretion render a decision based on the record, may request oral argument, or may conduct an evidentiary hearing.

PART 29—[REMOVED AND RESERVED]

■ 54. Remove and reserve part 29.

Anne M. Wagner,

Chair, Personnel Appeals Board, U.S. General Accounting Office.

[FR Doc. 03–30698 Filed 12–11–03; 8:45 am]

BILLING CODE 1610–02–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2003–16505; Airspace Docket No. 03–ACE–89]

Modification of Class E Airspace; Cherokee, IA

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Direct final rule; request for comments.

SUMMARY: This action modifies the Class E airspace areas at Cherokee, IA. A review of controlled airspace for Cherokee Municipal Airport indicates it does not comply with the criteria for 700 feet Above Ground Level (AGL) airspace required for diverse departures as specified in FAA Order 7400.2E, Procedures for Handling Airspace Matters. The review also revealed a discrepancy in the airport reference point (ARP) for Cherokee Municipal Airport. The ARP is used in the legal description for the Cherokee, IA Class E airspace area. This action enlarges the Class E airspace at Cherokee, IA to conform to the criteria in FAA Order 7400.2E. It also modifies the airspace area by adapting it to the revised Cherokee Municipal Airport APR and incorporates the revised ARP into the Class E airspace legal description.

DATES: This direct final rule is effective on 0901 UTC, April 15, 2004. Comments for inclusion in the Rules Docket must be received on or before January 23, 2004.

ADDRESSES: Send comments on this proposal to the Docket Management System, U.S. Department of Transportation, Room Plaza 401, 400 Seventh Street, SW., Washington, DC 20590–0001. You must identify the docket number FAA–2003–16505/Airspace Docket No. 03–ACE–89, at the beginning of your comments. You may also submit comments on the Internet at *http://dms.dot.gov.* You may review the public docket containing the proposal, any comments received, and any final disposition in person in the Docket Office between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The Docket Office (telephone 1–800–647–5527) is on the plaza level of the Department of Transportation NASSIF Building at the above address.

FOR FURTHER INFORMATION CONTACT: Kathy Randolph, Air Traffic Division, Airspace Branch, ACE–520C, DOT Municipal Headquarters Building, Federal Aviation Administration, 901 Locust, Kansas City, MO 64106; telephone: (816) 329–2525.

SUPPLEMENTARY INFORMATION: This amendment to 14 CFR 71 modifies the Class E airspace area extending upward from 700 feet above the surface of the earth at Cherokee, IA. An examination of controlled airspace for Cherokee Municipal Airport reveals it does not meet the criteria for 700 AGL airspace required for diverse departures as specified in FAA Order 7400.2E. The criteria in FAA Order 7400.2E for an aircraft to reach 1200 feet AGL is based on a standard climb gradient of 200 feet per mile plus the distance from the ARP to the end of the outermost runway. Any fractional part of a mile is converted to the next higher tenth of a mile. The examination also revealed a discrepancy in the Cherokee Municipal Airport ARP. This amendment enlarges the radius of the controlled airspace area around Cherokee Municipal Airport, corrects the discrepancy in the Cherokee Municipal Airport ARP and beings the legal description into compliance with FAA Order 7400.2E. This area will be depicted on appropriate aeronautical charts. Class E airspace areas extending upward from 700 feet or more above the surface of the earth are published in paragraph 6005 of FAA Order 7400.9L, dated September 2, 2003, and effective September 16, 2003, which is incorporated by reference in 14 CFR 71.1. The Class E airspace designation listed in this document will be published subsequently in the Order.

The Direct Final Rule Procedure

The FAA anticipates that this regulation will not result in adverse or negative comment and, therefore, is issuing it as a direct final rule. Previous actions of this nature have not been controversial and have not resulted in adverse comments or objection. Unless a written adverse or negative comment, or a written notice of intent to submit an adverse or negative comment is received within the comment period, the regulation will become effective on the date specified above. After the close of the comment period, the FAA will published a document in the **Federal Register** indicating that no adverse or negative comments were received and confirming the date on which the final rule will become effective. If the FAA does receive, within the comment period, an adverse or negative comment, or written notice of intent to submit such a comment, a document withdrawing the direct final rule will be published in the **Federal Register**, and a notice of proposed rulemaking may be published with a new comment period.

Comments Invited

Interested parties are invited to participate in this rulemaking by submitting such written data, views, or arguments, as they may desire. Comments that provide the factual basis supporting the views and suggestions presented are particularly helpful in developing reasoned regulatory decisions on the proposal. Comments are specifically invited on the overall regulatory aeronautical, economic, environmental, and energy-related aspects of the proposal. Communications should identify both docket numbers and be submitted in triplicate to the address listed above. Commenters wishing the FAA to acknowledge receipt of their comments on this notice must submit with those comments a self-addressed stamped postcard on which the following statement is made: ''Comments to Docket No. FAA–2003–16505/Airspace Docket No. 03–ACE–89.'' The postcard will be date/time stamped and returned to the commenter.

Agency Findings

The regulations adopted herein will not have a substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, it is determined that this final rule does not have federalism implications under Executive Order 13132.

The FAA has determined that this regulation is noncontroversial and unlikely to result in adverse or negative comments. For the reasons discussed in the preamble, I certify that this regulation (1) is not a ''significant

regulatory action'' under Executive Order 12866; (2) is not a ''significant rule'' under Department of Transportation (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.

List of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (air)

Adoption of the Amendment

■ Accordingly, the Federal Aviation Administration amends 14 CFR part 71 as follows:

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

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

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

§ 71.1 [Amended]

■ 2. The incorporation by reference in 14 CFR 71.1 of Federal Aviation Administration Order 7400.9L, dated September 2, 2003, and effective September 16, 2003, is amended as follows:

* * * * *

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

* * * * *

ACE IA E5 Cherokee, IA

Cherokee Municipal Airport, IA
(Lat. 42°43′54″ N., long. 95°33′21″ W.)
Pilot Rock NDB
(Lat. 42°43′56″ N., long. 95°33′11″ W.)

That airspace extending upward from 700 feet above the surface within a 6.4-mile radius of Cherokee Municipal Airport and within 2.6 miles each side of the 185° bearing from the Pilot Rock NDB extending from the 6.4-mile radius to 7.4 miles south of the airport.

* * * * *

Issued in Kansas City, MO, on November 28, 2003.

Paul J. Sheridan,

Acting Manager, Air Traffic Division, Central Region.

[FR Doc. 03–30740 Filed 12–11–03; 8:45 am]

BILLING CODE 4910–13–M

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 97

[Docket No. 30399; Amdt. No. 3085]

Standard Instrument Approach Procedures; Miscellaneous Amendments

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This amendment establishes, amends, suspends, or revokes Standard Instrument Approach Procedures (SIAPs) for operations at certain airports. These regulatory actions are needed because of the adoption of new or revised criteria, or because of changes occurring in the National Airspace System, such as the commissioning of new navigational facilities, addition of new obstacles, or changes in air traffic requirements. These changes are designed to provide safe and efficient use of the navigable airspace and to promote safe flight operations under instrument flight rules at the affected airports.

DATES: This rule is effective December 12, 2003. The compliance date for each SIAP is specified in the amendatory provisions.

The incorporation by reference of certain publications listed in the regulations is approved by the Director of the Federal Register as of December 12, 2003.

ADDRESSES: Availability of matters incorporated by reference in the amendment is as follows:

For Examination—

1. FAA Rules Docket, FAA Headquarters Building, 800 Independence Avenue, SW., Washington, DC 20591;

2. The FAA Regional Office of the region in which the affected airport is located;

3. The Flight Inspection Area Office which originated the SIAP; or

4. The Office of Federal Register, 800 North Capitol Street, NW., Suite 700, Washington, DC.

For Purchase—Individual SIAP copies may be obtained from:

1. FAA Public Inquiry Center (APA–200), FAA Headquarters Building, 800 Independence Avenue, SW., Washington, DC 20591; or

2. The FAA Regional Office of the region in which the affected airport is located.

By Subscription—Copies of all SIAPs, mailed once every 2 weeks, are for sale by the Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402.

FOR FURTHER INFORMATION CONTACT: Donald P. Pate, Flight Procedure Standards Branch (AMCAFS–420), Flight Technologies and Programs Division, Flight Standards Service, Federal Aviation Administration, Mike Monroney Aeronautical Center, 6500 South MacArthur Blvd. Oklahoma City, OK 73169 (Mail Address: P.O. Box 25082 Oklahoma City, OK 73125) telephone: (405) 954–4164.

SUPPLEMENTARY INFORMATION: This amendment to part 97 of the Federal Aviation Regulations (14 CFR part 97) establishes, amends, suspends, or revokes Standard Instrument Approach Procedures (SIAPs). The complete regulatory description of each SIAP is contained in official FAA form documents which are incorporated by reference in this amendment under 5 U.S.C. 552(a), 1 CFR part 51, and § 97.20 of the Federal Aviation Regulations (FAR). The applicable FAA Forms are identified as FAA Forms 8260–3, 8260–4, and 8260–5. Materials incorporated by reference are available for examination or purchase as stated above.

The large number of SIAPs, their complex nature, and the need for a special format make their verbatim publication in the **Federal Register** expensive and impractical. Further, airmen do not use the regulatory text of the SIAPs, but refer to their graphic depiction on charts printed by publishers of aeronautical materials. Thus, the advantages of incorporation by reference are realized and publication of the complete description of each SIAP contained in FAA form documents is unnecessary. The provisions of this amendment state the affected CFR (and FAR) sections, with the types and effective dates of the SIAPs. This amendment also identifies the airport, its location, the procedure identification and the amendment number.

The Rule

This amendment to part 97 is effective upon publication of each separate SIAP as contained in the transmittal. Some SIAP amendments may have been previously issued by the FAA in a National Flight Data Center (NFDC) Notice to Airmen (NOTAM) as an emergency action of immediate flight safety relating directly to published aeronautical charts. The circumstances which created the need for some SIAP amendments may require making them effective in less than 30 days. For the

remaining SIAPs, an effective date at least 30 days after publication is provided.

Further, the SIAPs contained in this amendment are based on the criteria contained in the U.S. Standard for Terminal Instrument Procedures (TERPS). In developing these SIAPs, the TERPS criteria were applied to the conditions existing or anticipated at the affected airports. Because of the close and immediate relationship between these SIAPs and safety in air commerce, I find that notice and public procedure before adopting these SIAPs are impracticable and contrary to the public interest and, where applicable, that good cause exists for making some SIAPs effective in less than 30 days.

Conclusion

The FAA has determined that this regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. It, therefore—(1) is not a ''significant regulatory action'' under Executive Order 12866; (2) is not a ''significant rule'' under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a regulatory evaluation as the anticipated impact is so minimal. For the same reason, the FAA certifies that this amendment will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

List of Subjects in 14 CFR Part 97

Air Traffic Control, Airports, Incorporation by reference, and Navigation (Air).

Issued in Washington, DC, on December 5, 2003.

James J. Ballough,

Director, Flight Standards Service.

Adoption of the Amendment

Accordingly, pursuant to the authority delegated to me, part 97 of the Federal Aviation Regulations (14 CFR part 97) is amended by establishing, amending, suspending, or revoking Standard Instrument Approach Procedures, effective at 0901 UTC on the dates specified, as follows:

PART 97—STANDARD INSTRUMENT APPROACH PROCEDURES

■ 1. The authority citation for part 97 continues to read as follows:

Authority: 49 U.S.C. 106(g), 40103, 40106, 40113, 40114, 40120, 44502, 44514, 44701, 44719, 44721–44722.

■ 2. Part 97 is amended to read as follows:

** * * Effective December 25, 2003*

Orlando, FL, Orlando Intl, ILS OR LOC Rwy 35L, Amdt 5, ILS RWY 35L (Cat II/III), Amdt 5
Orlando, FL, Orlando Intl, ILS OR LOC Rwy 17R, Amdt 4, ILS Rwy 17R (Cat II), Amdt 4
Orlando, FL, Orlando Intl, ILS OR LOC Rwy 35R, Orig, ILS Rwy 35R (Cat II), Orig
Orlando, FL, Orlando Intl, ILS OR LOC Rwy 17L, Orig, ILS Rwy 17L (Cat II), Orig
Orlando, FL, Orlando Intl, ILS OR LOC Rwy 36R, Amdt 7A, ILS Rwy 36R (Cat II, III), Amdt 7A
Orlando, FL, Orlando Intl, ILS OR LOC Rwy 18R, Amdt 6A
Orlando, FL, Orlando Intl, RNAV (GPS) Rwy 17L, Orig
Orlando, FL, Orlando Intl, RNAV (GPS) Rwy 35L, Orig-A
Orlando, FL, Orlando Intl, RNAV (GPS) Rwy 17R, Orig-A
Orlando, FL, Orlando Intl, RNAV (GPS) Rwy 35R, Orig
Minneapolis, MN, Minneapolis-St Paul Intl/ Wold-Chamberlain, ILS OR LOC Rwy 12L, Amdt 6, ILS Rwy 12L (Cat II, III), Amdt 6
Baker City, OR, Baker City Muni, VOR–A, Amdt 1

** * Effective February 19, 2004*

Paragould, AR, Kirk Field, VOR Rwy 4, Amdt 4
Paragould, AR, Kirk Field, NDB Rwy 4, Amdt 1
Paragould, AR, Kirk Field, RNAV (GPS) Rwy 4, Orig
Paragould, AR, Kirk Field, GPS Rwy 4, Orig, Cancelled
Paragould, AR, Kirk Field, NDB Rwy 22, Amdt 1
Paragould, AR, Kirk Field, RNAV (GPS) Rwy 22, Orig
Paragould, AR, Kirk Field, GPS Rwy 22, Orig, Cancelled
Beaufort, NC, Michael J. Smith Field, LOC Rwy 26, Amdt 1

[FR Doc. 03–30739 Filed 12–11–03; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 135

[Docket No.1999–5401; Amendment No. 135–92]

RIN 2120–AE42

Aging Airplane Safety

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule; technical amendment.

SUMMARY: The Federal Aviation Administration is making minor technical changes to its aging aircraft regulations as a result of an interim final rule with a request for comments published in the **Federal Register** on December 6, 2002. This final rule requires airplanes covered by the aging aircraft regulations to undergo inspections and records reviews by the Administrator after their 14th year in service and at specified internals thereafter. As part of this final rule, the FAA inadvertently did not make conforming amendments to an applicability section to reflect the existence of two new sections and the redesignation of an existing section. In addition to these changes, an error exists in the heading of a new section. These technical changes are necessary to keep our regulations clear, accurate and current. The intended effect is to make our regulations easier for the public and regulated industry to use. None of these amendments will impose any extra burden or restrictions on persons or organizations affected by these regulations.

EFFECTIVE DATE: This amendment is effective on December 8, 2003.

FOR FURTHER INFORMATION CONTACT: Frederick Sobeck, Airplane Maintenance Division, AFS–304, Flight Standards Service, Federal Aviation Administration, 800 Independence Avenue SW., Washington, DC 20591; telephone (202) 267–7355; facsimile (202) 267–5115.

SUPPLEMENTARY INFORMATION:

Background

The FAA is making some technical or administrative changes to its aging aircraft regulations. These changes do not affect the substance of the existing regulations or impose any new requirements and have no impact on activities carried out under the regulations.

The FAA published in the **Federal Register** of December 6, 2002 (67 FR 72726) a document that created a rule requiring (1) airplanes operated under 14 CFR part 121, (2) U.S.-registered multiengine airplanes operated under 14 CFR part 129, and (3) multiengine airplanes used in scheduled operations under 14 CFR part 135 to undergo inspections and records reviews by the Administrator after their 14th year in service and at specified internals thereafter. The FAA inadvertently did not include revisions to § 135.411 to reflect the existence of the new §§ 135.422 and 135.423 and the redesignation of current § 135.423 to § 135.424, effective December 8, 2003. This amendment to § 135.411 will (a) add a reference to new § 135.422 to existing § 135.411(a)(2), (b) add a

reference to new § 135.423 to existing § 135.411(a)(1), and (c) add a reference to the redisignated § 135.424 to existing § 135.411(a)(2). This document makes these appropriate amendatory changes to clearly reflect that new §§ 135.422 and 135.423, as well as redesignated § 135.424, apply to operations under part 135 as specified in § 135.411. This amendment will not impose any added restrictions on operators affected by these regulations.

In addition to the revisions to § 135.411, this amendment also corrects an error in the heading of § 135.423(b)(2). This amendment will not impose any additional restrictions on operators affected by these regulations.

Procedural Matters

Under the Administrative Procedure Act (APA), 5 U.S.C. 553, agencies must generally publish regulations for public comment and give the public at least 30 days notice before adopting regulations. There is an exception to these requirements if the agency for good cause finds that notice and public procedure are impracticable, unnecessary, or contrary to the public interest. In this case, the FAA finds that notice and comment requirements are unnecessary because of the administrative nature of the changes. The changes do not affect the rights or obligations of any regulated entity. It is in the public interest that the changes take effect promptly.

List of Subjects in 14 CFR Part 135

Air taxis, Aircraft, Aviation safety, Reporting and recordkeeping requirements.

The Amendment

■ In consideration of the foregoing, the Federal Aviation Administration amends Title 14 of the Code of Federal Regulations (CFR) part 135 as follows:

PART 135—OPERATING REQUIREMENTS: COMMUTER AND ON-DEMAND OPERATIONS AND RULES GOVERNING PERSONS ON BOARD SUCH AIRCRAFT

■ 1. The authority citation for part 135 continues to read as follows:

Authority: 49 U.S.C. 106(g), 40113, 44701–44702, 44705, 44709, 44711–44713, 44715–44717, 44722.

■ 2. Amend § 135.411 by revising the first sentence of paragraph (a)(1) and paragraph (a)(2) to read as follows:

§ 135.411 Applicability.

(a) * * *

(1) Aircraft that are type certificated for a passenger seating configuration, excluding any pilot seat, of nine seats or less, shall be maintained under parts 91 and 43 of this chapter and §§ 135.415, 135.416, 135.417, 135.421 and 135.423. * * *

(2) Aircraft that are type certificated for a passenger seating configuration, excluding any pilot seat, of ten seats or more, shall be maintained under a maintenance program in §§ 135.415, 135.416, 135.417, 135.422, and 135.424 through 135.443.

* * * * *

■ 3. Amend § 135.423 by revising the heading of paragraph (b)(2) to read as follows:

§ 135.423 Aging airplane inspections and records reviews for multiengine airplanes certificated with nine or fewer passenger seats.

* * * * *

(b) * * *

(2) Airplanes exceeding 14 years in service but not 24 years in service on December 8, 2003; initial and repetitive inspections and records review. * * *

Issued in Washington, DC, on December 3, 2003.

Donald P. Byrne,

Assistant Chief Counsel, Regulations Division.

[FR Doc. 03–30645 Filed 12–11–03; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF THE INTERIOR

Minerals Management Service

30 CFR Part 250

RIN 1010–AC91

Oil and Gas and Sulphur Operations in the Outer Continental Shelf—Revision of Requirements Governing Outer Continental Shelf Rights-of-Use and Easement and Pipeline Rights-of-Way

AGENCY: Minerals Management Service (MMS), Interior.

ACTION: Final rule.

SUMMARY: MMS is modifying requirements governing rights-of-use and easements and pipeline rights-of-way on the Outer Continental Shelf (OCS). These changes will increase rental rates for pipeline rights-of-way and establish rentals for rights-of-use and easements. This change is needed because of requests made by lessees and pipeline right-of-way holders to use large areas outside of the area covered by their lease and pipeline right-of-way for accessory structures. This rule will require holders of rights-of-use and easements and holders granted use of large areas as part of a pipeline right-of-way to pay rentals on a per acre basis.

EFFECTIVE DATE: This rule is effective January 12, 2004.

FOR FURTHER INFORMATION CONTACT: John Mirabella, Chief, Office of Offshore Regulations, (703) 787–1600.

SUPPLEMENTARY INFORMATION: Areas of the Gulf of Mexico (GOM) once thought beyond reach, located in water depths greater than 5,000 feet, are now being explored for development. A new generation of drillships and the development of new techniques allow drilling in waters as deep as 10,000 feet. Operators and pipeline right-of-way holders on the OCS are developing more sophisticated and cost-efficient technology that will lower the cost of safely finding, extracting, and delivering deepwater oil and natural gas.

In the next decade, as industry moves further offshore into ultra-deepwater frontiers, the number of floating production vessels will increase substantially. Structures such as tension-leg platforms and floating production and offloading systems will become widely used to produce oil and gas in the GOM. These systems must be stabilized above the seafloor in water depths of 1,000 to 10,000 feet and, therefore, require a mooring system that may have a ''footprint'' radius greater than 8,500 feet. In some cases, the mooring system may cover the majority of the OCS block on which the facility is positioned.

Additionally, where the cost of producing directly from a production platform in deep water will allow operators to produce only large hydrocarbon discoveries from platforms, operators will produce smaller hydrocarbon discoveries in deep water by means of wells with production trees (the assemblage of valves) that are located on the ocean floor. These subsea systems must be tied back to a host facility by means of pipelines that deliver the production for processing and/or measurement, and cable-like control umbilicals that contain electrical conductors and small diameter steel tubing. Umbilicals allow control of the valves in the production tree and the measurement of pressure and temperature within the well to be accomplished remotely from the host facility (a platform that may not be on or near the lease).

A right-of-use and easement or pipeline right-of-way grant allows lessees and pipeline right-of-way holders the freedom to optimize the placement of their facilities on unleased

OCS areas or areas under lease to other companies. Since the rights-of-use and easements are of value to the recipient of the rights, MMS believes that it is equitable to charge for the rights at a per acre rate that is generally consistent with the rate paid by lessees. This rule establishes that charge for the rights conveyed.

On April 24, 2003, MMS published a proposed rule to modify 30 CFR 250.160, in subpart A, and 30 CFR 250.1009, in Subpart J, to allow MMS to charge an annual rental to compensate the United States for the use of areas outside of the company's lease and to change the rental amount charged to a pipeline right-of-way holder for accessories for the pipeline right-of-way. This rule applies to applicants for pipeline rights-of-way who request a site for accessories for the pipeline right-of-way, and to applicants who request use of an area that is not part of their lease (*i.e.*, a right-of-use and easement). The rule covers new rights-of-use and easements and rights-of-way granted after the effective date of this rule and modifications to existing rights-of-use and easements and rights-of-way when the modification is granted after the effective date of this rule. The rule includes a rental of $5 per acre affected in water depths less than 200 meters and $7.50 per acre affected in water depths of 200 meters or greater. These rental rates correspond to the rental rates charged for leases in those water depths. The total annual rental depends on the size of the area requested, except that a minimum annual rental will be charged based on 90 acres. Therefore, the minimum rental is $450 per year in water depths of less than 200 meters and $675 per year in water depths of 200 meters or greater. Establishing the minimum charge based on 90 acres will ensure that the Federal Government receives sufficient payment to cover administrative costs.

Existing regulations for pipeline right-of-way rentals allow for payment on an annual basis, for a 5-year period, or for multiples of 5 years. This regulation retains these payment options for pipeline rights-of-way and establishes the same payment options for rights-of-use and easements.

Section 160 of Title 30 CFR is rewritten to add a table. Section 1009 is separated and redesignated as Sections 1009 through 1014. Current Sections 1010 through 1014 are redesignated as Sections 1015 through 1019. Redesignated Section 1012 is rewritten to add a table. The use of tables and the use of shorter sections with titles are intended to improve the clarity and readability of the regulation.

The comment period following publication of the proposed rule ended on May 27, 2003. Five comment letters were received during the comment period. One letter from an oil and gas company protested the rule as being in conflict with other rules that provide a royalty suspension under certain circumstances. The company argued that this rule will reduce the effect of the royalty reduction. Of the other four letters, two were received from oil and gas companies, one from seven different associations representing the natural gas and oil industry, and one from a law student. These four letters all supported the proposed rule. The commentors supporting the rule cited the increasing need for large rights-of-use and easement in deep water and considered the proposed rentals reasonable.

As mentioned above, one commentor argued that the fees established in the rule will reduce the effect of the royalty reduction. MMS believes that the increase in rental fees is appropriate because the purposes of these rentals and the purposes of royalty and royalty relief are very different and are unrelated. Royalty reduction provides major financial incentives to encourage specific actions such as deep water exploration that would not be undertaken under normal royalty obligations. This rule does not change that incentive. This rule simply establishes reasonable charges for companies choosing to use large areas of the OCS. Based on the majority of comments received, the rental fees being established are reasonable and will not discourage deep water exploration. In addition, lessees who receive deep-water royalty relief receive a financial benefit and incentive that is of a much greater magnitude than the amount of rentals owed under this rule.

One comment letter supported the change in the regulation but expressed the opinion that the estimate of two requests per year for new or modified rights-of-use and easements is low. The opinion was based on an expectation that production of methane hydrates will require larger rights-of-use and easements. MMS recognizes the potential for production of methane hydrates and the possible need for rights-of-use and easements associated with that production. However, MMS does not agree that such activity will occur soon. The economic effects estimated for the proposed rule were based on projections for the next 5 years. MMS believes that the estimates used are a good estimate of the requests that will be received over the next 5 years.

Commentors made no suggestions for revisions to the proposed regulation.

In revised Section 250.1012(b), the proposed rule used the phrase ''including fixed and floating platforms, subsea manifolds, and other similar structures'' to describe an accessory to a pipeline right-of-way. The proposed phrase is different from the existing text of the regulation, which used the phrase ''including but not limited to a platform.'' No substantive change was intended. The final rule uses the original phrase to clarify that the rule changes the amount of the rental but does not change the criteria used to determine when a site will be considered an accessory to a pipeline right-of-way.

Procedural Matters

Regulatory Planning and Review (Executive Order 12866)

This rule was determined by the Office of Management and Budget (OMB) to be significant and has been reviewed by OMB under Executive Order 12866.

Over the next 5 years, in water depths 200 meters or greater, MMS anticipates that it will receive an average of two requests per year for a new or modified right-of-use and easement and an average of two requests per year for a new or modified pipeline right-of-way that includes an area for an accessory. These requests will be affected by this rule. Based on historical data, the estimated affected area per request in water depths 200 meters or greater will average 5,760 acres, which is the typical size of one OCS lease block. In these water depths, the new rule imposes a rental of $7.50 per acre affected. This equates to a total cost of $86,400 (5,760 x $7.50 x 2) for pipeline right-of-way applicants and $86,400 (5,760 x $7.50 x 2) for right-of-use and easement applicants.

Over the next 5 years, in water depths less than 200 meters, MMS anticipates, based on requests in recent years, that applicants will submit an average of 10 requests per year for a new right-of-use and easement and an average of two requests per year for a new or modified pipeline right-of-way that includes an area for an accessory. These requests will be affected by this rule. The estimated affected area per request in water depths less than 200 meters will average 90 acres. In these water depths, the new rule imposes a rental of $5 per acre affected. This equates to a total annual cost of $4,500 (90 x $5 x 10) for right-of-use and easement applicants and $900 (90 x $5 x 2) for pipeline right-of-way applicants.

Under this scenario, the annual cost to industry for rentals will be $178,200 ($86,400 + $86,400 + $4,500 + $900).

Since the current regulations provide for an annual rental of $75 per site included in an application for pipeline rights-of-way accessories and no cost for right-of-use and easement applications, the total cost under current rules for these same activities is $300 per year for pipeline right-of-way applicants ($75 x 2 + $75 x 2) and no cost for right-of-use and easement applicants.

(1) This rule will not have an effect of $100 million or more on the economy. It will not adversely affect in a material way the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities.

(2) This rule will not create a serious inconsistency or otherwise interfere with an action taken or planned by another agency. Issuance of a pipeline right-of-way or right-of-use and easement does not interfere with the ability of other agencies to exercise their authority.

(3) This rule will not alter the budgetary effects of entitlements, grants, user fees, or loan programs or the rights or obligations of their recipients. This rule will have no effect on the rights of the recipients of entitlements, grants, user fees, or loan programs.

(4) This rule may raise novel legal or policy issues.

Regulatory Flexibility (RF) Act

The Department certifies that this rule will not have a significant economic effect on a substantial number of small entities under the RF Act (5 U.S.C. 601 *et seq.*).

This rule will affect lessees and holders of pipeline rights-of-way in the OCS. This includes about 130 different companies. These companies are generally classified under the North American Industry Classification System (NAICS) code 211111, which includes companies that extract crude petroleum and natural gas. For this NAICS code classification, a small company is one with fewer than 500 employees. Based on these criteria, an estimated 70 percent of these companies are considered small. This rule, therefore, affects a substantial number of small entities.

The companies that are considered small have an average of about 15 offshore facilities. The small companies have estimated annual sales between $10 million and $40 million. As discussed earlier, the total annual cost to industry is estimated to be $178,800. No large or small company will bear a significant cost.

Comments are important. The Small Business and Agriculture Regulatory Enforcement Ombudsman and 10 Regional Fairness Boards were established to receive comments from small business about Federal agency enforcement actions. The Ombudsman will annually evaluate the enforcement activities and rate each agency's responsiveness to small business. If you wish to comment on the actions of MMS, call 1–888–734–3247. You may comment to the Small Business Administration without fear of retaliation. Disciplinary action for retaliation by an MMS employee may include suspension or termination from employment with the Department of the Interior.

Small Business Regulatory Enforcement Fairness Act (SBREFA)

This rule is not a major rule under the SBREFA (5 U.S.C. 804(2)). This rule:

(a) Will not have an annual effect on the economy of $100 million or more.

(b) Will not cause a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions.

(c) Will not have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises.

This rule is not expected to have a significant effect because, as discussed under procedural matters, Regulatory Planning and Review (Executive Order 12866), this rule is estimated to have a total industry effect of $178,200 annually. This amount is not a significant effect for companies that do business on the OCS.

Paperwork Reduction Act (PRA) of 1995

The PRA provides that an agency may not conduct or sponsor a collection of information unless it displays a currently valid OMB control number. Until OMB approves a collection of information and assigns a control number, you are not required to respond. The revisions to 30 CFR Part 250, Subparts A and J, refer to, but do not change, information collection requirements in current regulations. OMB has approved the referenced information collection requirements under OMB control numbers 1010–0114 for Subpart A, current expiration date of July 31, 2005; and 1010–0050 for Subpart J, current expiration date of January 31, 2006. The rule imposes no new paperwork requirements, and an OMB form 83–I submission to OMB under the PRA is not required.

Federalism (Executive Order 13132)

With respect to Executive Order 13132, the rule will not have Federalism implications. This rule will not substantially and directly affect the relationship between the Federal and State governments. To the extent that State and local governments have a role in OCS activities, this rule will not affect that role.

Takings (Executive Order 12630)

With respect to Executive Order 12630, the rule will not have significant Takings implications. A Takings Implication Assessment is not required. The rulemaking is not a governmental action capable of interfering with constitutionally protected property rights.

Energy Supply, Distribution, or Use (Executive Order 13211)

This rule is not a significant rule and is not subject to review by the Office of Management and Budget under Executive Order 13211. The rule will not have a significant effect on energy supply, distribution, or use because payments to compensate the Federal Government for making resources unavailable for leasing will occur on the average less than one time a year. The costs due to increases in the rental rate will be very small compared with the costs of operating in the OCS. Thus, a Statement of Energy Effects is not required.

Civil Justice Reform (Executive Order 12988)

With respect to Executive Order 12988, the Office of the Solicitor has determined that this rule will not unduly burden the judicial system and that it meets the requirements of Sections 3(a) and 3(b)(2) of the Executive Order.

National Environmental Policy Act (NEPA) of 1969

This rule will not constitute a major Federal action significantly affecting the quality of the human environment. This rule will not affect the environmental regulations that a right-of-use and easement holder or a pipeline right-of-way holder will need to follow. A detailed statement under the NEPA is not required.

Unfunded Mandate Reform Act (UMRA) of 1995 (Executive Order 12866)

This rule will not impose an unfunded mandate on State, local, or tribal governments or the private sector of more than $100 million per year. The rule will not have a significant or unique effect on State, local, or tribal

governments or the private sector. A statement containing the information required by the UMRA (2 U.S.C. 1531 *et seq.*) is not required. This is because the rule will not affect State, local, or tribal governments, and the effect on the private sector is small.

List of Subjects in 30 CFR Part 250

Continental shelf, Environmental impact statements, Environmental protection, Government contracts, Investigations, Mineral royalties, Oil and gas development and production, Oil and gas exploration, Oil and gas reserves, Penalties, Pipelines, Public Lands—mineral resources, Public lands—right-of-way, Reporting and recordkeeping requirements, Sulphur development and production, Sulphur exploration, Surety bonds.

Dated: November 28, 2003.

Patricia E. Morrison,

Acting Assistant Secretary—Land and Minerals Management.

■ For the reasons stated in the preamble, the Minerals Management Service (MMS) amends 30 CFR Part 250 as follows:

■ 1. The authority citation for part 250 continues to read as follows:

Authority: 43 U.S.C. 1331, *et seq.*

■ 2. In § 250.160, new paragraphs (f) through (i) are added to read as follows:

§ 250.160 When will MMS grant me a right-of-use and easement, and what requirements must I meet?

* * * * *

(f) You must pay a fee as required by paragraph (g) of this section if:

(1) You obtain a right-of-use and easement after January 12, 2004; or

(2) You ask MMS to modify your right-of-use and easement to change the footprint of the associated platform, artificial island, or installation or device.

(g) If you meet either of the conditions in paragraph (f) of this section, you must pay a fee to MMS as shown in the following table:

If...	Then...
(1) Your right-of-use and easement site is located in water depths of less than 200 meters;	You must pay a rental of $5 per acre per year with a minimum of $450 per year. The area subject to annual rental includes the areal extent of anchor chains, pipeline risers, and other equipment associated with the platform, artificial island, installation or device.
(2) Your right-of-use and easement site is located in water depths of 200 meters or greater;	You must pay a rental of $7.50 per acre per year with a minimum of $675 per year. The area subject to annual rental includes the areal extent of anchor chains, pipeline risers, and other equipment associated with the platform, artificial island, or installation or device.

(h) You may make the rental payments required by paragraph (g)(1) and (g)(2) of this section on an annual basis, for a 5-year period, or for multiples of 5 years. You must make the first payment at the time you submit the right-of-use and easement application. You must make all subsequent payments before the respective time periods begin.

(i) Late payments. An interest charge shall be assessed on unpaid and underpaid amounts from the date the amounts are due, in accordance with the provisions found in 30 CFR 218.54. If you fail to make a payment that is late after written notice from MMS, MMS may initiate cancellation of the right-of-use grant and easement under 30 CFR 250.1009(d).

■ 3. In Subpart J, §§ 250.1009 through 250.1014 are redesignated as shown in the following table:

Current section and paragraph	Redesignated section and paragraph
250.1009(a)(1)	250.1009(a).
250.1009(a)(2)	250.1009(b).
250.1009(b)(1)	250.1011(a).
250.1009(b)(1)(i)	250.1011(a)(1).
250.1009(b)(1)(ii)	250.1011(a)(2).
250.1009(b)(2)	250.1011(b).
250.1009(b)(2)(i)	250.1011(b)(1).
250.1009(b)(2)(ii)	250.1011(b)(2).
250.1009(b)(2)(iii)	250.1011(b)(3).
250.1009(b)(3)	250.1011(c).
250.1009(b)(4)	250.1011(d).
250.1009(c) introductory text	250.1010 introductory text.
250.1009(c)(1)	250.1010(a).
250.1009(c)(2)	250.1012.
250.1009(c)(3)	250.1010(b).
250.1009(c)(4)	250.1010(c).
250.1009(c)(5)	250.1010(d).
250.1009(c)(6)	250.1010(e).
250.1009(c)(7)(i)	250.1010(f)(1).
250.1009(c)(7)(ii)	250.1010(f)(2).
250.1009(c)(7)(ii)(A)	250.1010(f)(2)(i).
250.1009(c)(7)(ii)(B)	250.1010(f)(2)(ii).
250.1009(c)(8)	250.1010(g).
250.1009(c)(9)	250.1010(h).
250.1009(d)	250.1013.
250.1009(e)	250.1014.
250.1010	250.1015.
250.1011	250.1016.
250.1012	250.1017.
250.1013	250.1018.

Current section and paragraph	Redesignated section and paragraph
250.1014	250.1019.

■ 4. The headings for newly redesignated §§ 250.1010 through 250.1014 are revised, and headings for newly redesignated §§ 250.1015 through 250.1019 are added to read as follows:

§ 250.1009 Requirements to obtain pipeline right-of-way grants.

* * * * *

§ 250.1010 General requirements for pipeline right-of-way holders.

* * * * *

§ 250.1011 Bond requirements for pipeline right-of-way holders.

* * * * *

§ 250.1012 Required payments for pipeline right-of-way holders.

* * * * *

§ 250.1013 Grounds for forfeiture of pipeline right-of-way grants.

* * * * *

§ 250.1014 When pipeline right-of-way grants expire.

* * * * *

§ 250.1015 Applications for pipeline right-of-way grants.

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§ 250.1016 Granting pipeline rights-of-way.

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§ 250.1017 Requirements for construction under pipeline right-of-way grants.

* * * * *

§ 250.1018 Assignment of pipeline right-of-way grants.

* * * * *

§ 250.1019 Relinquishment of pipeline right-of-way grants.

* * * * *

■ 5. Redesignated § 250.1012 is revised to read as follows:

§ 250.1012 Required payments for pipeline right-of-way holders.

(a) You must pay MMS an annual rental of $15 for each statute mile, or part of a statute mile, of the OCS that your pipeline right-of-way crosses.

(b) This paragraph applies to you if you obtain a pipeline right-of-way that includes a site for an accessory to the pipeline, including but not limited to a platform. This paragraph also applies if you apply to modify a right-of-way to change the site footprint. In either case, you must pay the amounts shown in the following table.

If...	Then...
(1) Your accessory site is located in water depths of less than 200 meters;	You must pay a rental of $5 per acre per year with a minimum of $450 per year. The area subject to annual rental includes the areal extent of anchor chains, pipeline risers, and other facilities and devices associated with the accessory.
(2) Your accessory site is located in water depths of 200 meters or greater;	You must pay a rental of $7.50 per acre per year with a minimum of $675 per year. The area subject to annual rental includes the areal extent of anchor chains, pipeline risers, and other facilities and devices associated with the accessory.

(c) If you hold a pipeline right-of-way that includes a site for an accessory to your pipeline and you are not covered by paragraph (b) of this section, then you must pay MMS an annual rental of $75 for use of the affected area.

(d) You may make the rental payments required by paragraphs (a), (b)(1), (b)(2), and (c) of this section on an annual basis, for a 5-year period, or for multiples of 5 years. You must make the first payment at the time you submit the pipeline right-of-way application. You must make all subsequent payments before the respective time periods begin.

(e) Late payments. An interest charge shall be assessed on unpaid and underpaid amounts from the date the amounts are due, in accordance with the provisions found in 30 CFR 218.54. If you fail to make a payment that is late after written notice from MMS, MMS may initiate cancellation of the right-of-use grant and easement under 30 CFR 250.1009(d).

[FR Doc. 03–30768 Filed 12–11–03; 8:45 am]

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DEPARTMENT OF EDUCATION

34 CFR Parts 668, 674, 682, and 685

Federal Student Aid Programs (Student Assistance General Provisions, Federal Perkins Loan Program, Federal Direct Loan Program, Federal Family Education Loan Program and the Federal Pell Grant Program)

AGENCY: Department of Education.

ACTION: Notice of waivers and modifications of statutory and regulatory provisions pursuant to the Higher Education Relief Opportunities for Students Act of 2003, Pub. L. 108–76.

SUMMARY: The Secretary of Education announces waivers and modifications of statutory and regulatory provisions that are appropriate to assist individuals (referred to in this notice as ''affected individuals'') who are applicants and recipients of student financial assistance under title IV of the Higher Education Act of 1965, as amended (HEA), and who—

- Are serving on active duty during a war or other military operation or national emergency;
- Are performing qualifying National Guard duty during a war or other military operation or national emergency;
- Reside or are employed in an area that is declared a disaster area by any Federal, State, or local official in connection with a national emergency; or
- Suffered direct economic hardship as a direct result of a war or other military operation or national emergency, as determined by the Secretary.

The Secretary is issuing these waivers and modifications under the authority of section 2(a) of the Higher Education Relief Opportunities for Students (HEROES) Act of 2003, Pub. L. 108–76. Section 2(b) of the HEROES Act requires the Secretary to publish, in a notice in the **Federal Register**, the waivers or modifications of statutory or regulatory provisions applicable to the student financial assistance programs under title IV of the HEA that the Secretary believes are appropriate to ensure that:

• Individuals who are recipients of student financial assistance under title IV are not placed in a worse position financially in relation to that student financial assistance because they are affected individuals;

• Affected individuals who are recipients of student financial assistance are not unduly subject to administrative burden or inadvertent, technical violations or defaults;

• Affected individuals are not penalized when a determination of need for student financial assistance is calculated;

• Affected individuals are not required to return or repay an overpayment of grant funds based on the HEA's Return of Title IV Funds provision; and

• Entities that participate in the student financial assistance programs under title IV of the HEA and that are located in areas that are declared disaster areas by any Federal, State, or local official in connection with a national emergency, or whose operations are significantly affected by such a disaster, receive temporary relief from administrative requirements.

Section 2(b)(1) of the HEROES Act further provides that section 437 of the General Education Provisions Act (20 U.S.C. 1232) and Section 553 of the Administrative Procedure Act (5 U.S.C. 553) do not apply to the contents of this notice.

Section 5 of the HEROES Act defines the following terms used in this notice:

Active duty—The term ''active duty'' has the meaning given that term in 10 U.S.C. section 101(d)(1), but does not include active duty for training or attendance at a service school (*e.g.*, the U.S. Military Academy or U.S. Naval Academy).

Military operation—The term ''military operation'' means a contingency operation as that term is defined in 10 U.S.C. section 101(a)(13).

National emergency—The term ''national emergency'' means a national emergency declared by the President of the United States.

Serving on active duty—The term ''serving on active duty during a war or other military operation or national emergency'' includes service by an individual who is—

(A) a Reserve member of an Armed Force ordered to active duty under 10 U.S.C. 12301(a), 12301(g), 12302, 12304, or 12306, or any retired member of an Armed Force ordered to active duty under 10 U.S.C. 688, for service in connection with a war or other military operation or national emergency, regardless of the location at which that active duty service is performed; and

(B) any other member of an Armed Force on active duty in connection with any war, operation, or emergency or subsequent actions or conditions who has been assigned to a duty station at a location other than the location at which the individual is normally assigned.

Qualifying National Guard duty—The term ''qualifying National Guard duty during a war or other military operation or national emergency'' means service as a member of the National Guard on full-time National Guard duty (as defined in 10 U.S.C. 101(d)(5)) under a call to active service authorized by the President or the Secretary of Defense for a period of more than 30 consecutive days under 32 U.S.C. 502(f), in connection with a war, another military operation, or a national emergency declared by the President and supported by Federal funds.

Section 2(c) of the HEROES Act requires the Secretary to provide an impact report to the Committee on Education and the Workforce of the U.S. House of Representatives and the Committee on Health, Education, Labor, and Pensions of the U.S. Senate not later than 15 months after first exercising the authority to issue a waiver or modification under section 2(a) of the HEROES Act. The report will describe the impact of any waivers or modifications on affected individuals and the programs under title IV of the HEA, and the basis for that determination, and will include the Secretary's recommendations for changes to the statutory or regulatory provisions that were the subject of the waivers or modifications. Therefore, a guaranty agency, lender, or institution must document its application of a waiver or modification made in accordance with this notice in such a manner that the institution can, upon request, report to the Secretary on the effect of the waivers and modifications.

EFFECTIVE DATE: December 12, 2003. The provisions of Pub. L. 108–76, and the waivers and modifications in this document, expire on September 30, 2005.

FOR FURTHER INFORMATION CONTACT: For provisions related to the title IV loan programs (Federal Perkins Loan Program, Federal Family Education Loan (FFEL) Program, and Federal Direct Loan (Direct Loan) Program): Ms. Gail McLarnon or Mr. George Harris, Office of Postsecondary Education, U.S. Department of Education, 1990 K Street, NW., (8th Floor), Washington, DC 20006. Internet and Telephone: *Gail.McLarnon@ed.gov* and (202) 219–7048 or *GeorgeOPE.Harris@ed.gov* and (202) 502–7521.

For other provisions: Ms. Wendy Macias, U.S. Department of Education, 1990 K Street, NW. (8th Floor), Washington, DC 20006. Internet and Telephone: *Wendy.Macias@ed.gov* and (202) 502–7526.

If you use a telecommunications device for the deaf (TDD), you may call the Federal Information Relay Service (FIRS) at 1–800–877–8339.

Individuals with disabilities may obtain this document in an alternative format (*e.g.*, Braille, large print, audiotape, or computer diskette) on request to the program contact persons listed under **FOR FURTHER INFORMATION CONTACT**.

SUPPLEMENTARY INFORMATION:

Category 1: The Secretary is waiving or modifying the following provisions of title IV of the HEA and the Department's regulations for ALL affected individuals specified in the **SUMMARY** section of this notice:

Need Analysis

Section 480 of the HEA provides that, in the calculation of an applicant's expected family contribution (EFC), the term ''total income,'' which is used in the determination of ''annual adjusted family income'' and ''available income,'' is equal to adjusted gross income plus untaxed income and benefits for the preceding tax year minus excludable income. The HEROES Act allows an institution to substitute adjusted gross income plus untaxed income and benefits received in the first calendar year of the award year for which such determination is made for any affected individual, and for his or her spouse and dependents, if applicable, in order to reflect more accurately the financial condition of an affected individual and his or her family. The Secretary has determined that an institution has the option of using the applicant's original EFC or the EFC based on the data from the first calendar year of the award year.

If an institution chooses to use the alternate EFC, it should use the administrative Professional Judgment procedures established by the Secretary as discussed in the following section on ''Professional Judgement.''

Professional Judgment

Section 479A of the HEA specifically gives the financial aid administrator (FAA) the authority to use professional judgment to make adjustments on a case-by-case basis to the cost of attendance or to the values of the items used in calculating the EFC to reflect a student's special circumstances. The

Secretary is modifying this provision by removing the requirement that adjustments be made on a case-by-case basis for affected individuals. The use of professional judgment in Federal need analysis is discussed in the Student Financial Aid Handbook.

The Secretary encourages FAAs to use professional judgment in order to reflect more accurately the financial need of affected individuals. To that end, the Secretary encourages institutions to determine need for any affected individual by determining the most beneficial of:

- The individual's need as determined using the adjusted gross income plus untaxed income and benefits received in the first calendar year of the award year;
- The individual's need as determined using professional judgment; or
- The individual's need as determined making no modifications. (For example, in some cases, an individual's income will increase as a result of serving on active duty or performing qualifying National Guard duty.)

The FAA must clearly document the reasons for any adjustment. As usual, any professional judgment decisions made by an FAA that affect a student's eligibility for a Federal Pell Grant must be reported to the Central Processing System (CPS).

Return of Title IV Funds—Grant Overpayments Owed by the Student

Section 484B(b)(2) of the HEA and 34 CFR 668.22(h)(3)(ii) require a student to return or repay, as appropriate, 50 percent of any unearned grant funds for which the student is responsible under the Return of Title IV Funds calculation. For a student who withdraws from an institution because of his or her status as an affected individual, the Secretary is waiving these statutory and regulatory requirements so that a student is not required to return or repay an overpayment of grant funds based on the Return of Title IV Funds provisions. For these students, the Secretary also waives 34 CFR 668.22(h)(4), which:

- Requires an institution to notify a student of a grant overpayment and the actions the student must take to resolve the overpayment;
- Denies eligibility to a student who owes an overpayment and does not take an action to resolve the overpayment; and
- Requires an institution to refer an overpayment to the Secretary under certain conditions.

Therefore, an institution is not required to contact the student, notify NSLDS, or refer the overpayment to the Department. Note that this is a change from previous guidance that instructed institutions to refer these overpayments to the Department. However, the institution must document in the student's file the amount of any overpayment as part of the documentation of the application of this waiver. The student is not required to return or repay an overpayment of grant funds based on the Return of Title IV Funds provision; therefore, an institution must not apply any title IV credit balance to the grant overpayment before paying any amount of the title IV credit balance to the student or parent, in the case of a PLUS loan.

Return of Title IV Funds—Amount of Unearned Funds Owed by the Institution

If the Return of Title IV Funds calculation results in the institution being required to return funds to one or more of the title IV programs, the institution must do so as it must for any student who withdraws. In many cases a return of funds by the institution will reduce the student's loan debt.

Section 484B(b)(1) of the HEA and 34 CFR 668.22(g) provide that an institution must return the lesser of (1) the total amount of unearned aid to be returned; or (2) an amount equal to the student's total institutional charges for the payment period or period of enrollment multiplied by the percentage of unearned aid. The total (initial) amount of institutional charges is used even if the institution fully refunds or otherwise adjusts the amount of institutional charges after the student withdraws. For a student who withdraws because of his or her status as an affected individual, the Secretary is modifying this provision to exclude from the amount of a student's total institutional charges any institutional charges that the institution is required to cover, and has covered, with non-title IV sources of aid. For example, assume a student receives a state grant of $800 that must be used only for tuition charges. The institution applies the state grant toward the total institutional charges of $1,000. The student withdraws. The institution uses $200, the difference between the full institutional charges and the amount of the state grant the institution was required to apply to the institutional charges, as the student's total institutional charges for the payment period or period of enrollment when determining the amount of unearned title IV funds that the institution must return.

Verification of AGI and U.S. Income Tax Paid

34 CFR 668.57(a)(3) provides that when an individual whose income was used in the calculation of the EFC of an applicant for title IV assistance has not filed an income tax return because he or she has been granted a filing extension by the IRS, an institution must accept, in lieu of an income tax return for verification of AGI or income tax paid:

- A copy of IRS Form 4868, ''Application for Automatic Extension of Time to File U.S. Individual Income Tax Return,'' that the individual filed with the IRS for the base year, or a copy of the IRS's approval of an extension beyond the automatic four-month extension if the individual requested an additional extension of the filing time; and
- A copy of each W–2 received for the base year, or for a self-employed individual, a statement signed by the individual certifying the amount of AGI for the base year.

The Secretary is modifying this provision so that the submission of a copy of IRS Form 4868 or a copy of the IRS extension approval is not required if an individual whose income was used in the calculation of the EFC:

- Has not filed and was not required to file an income tax return by the filing deadline because he or she was called up for active duty or for qualifying National Guard duty during a war or other military operation or national emergency; and
- Was not required to file for an extension.

For these individuals, an institution must accept, in lieu of an income tax return for verification of AGI or income tax paid:

- A statement from the individual certifying that he or she has not filed and was not required to file an income tax return or a request for a filing extension because he or she was called up for active duty or for qualifying National Guard duty during a war or other military operation or national emergency; and
- A copy of each W–2 received for the base year, or for a self-employed individual, a statement signed by the individual certifying the amount of AGI for the base year.

The student must submit the tax return to the institution once it is filed with the IRS for the institution to re-verify the AGI and taxes paid.

Category 2: The Secretary is waiving or modifying the following provisions of title IV of the HEA and the Department's regulations for affected individuals who are serving on active duty, performing

qualifying National Guard duty during a war or other military operation or national emergency, or who reside or are employed in a disaster area as described in the SUMMARY section of this notice:

Return of Title IV Funds—Postwithdrawal Disbursements

Under 34 CFR 668.22(a)(4)(ii)(A)(*3*) and (B), a student (or parent for a PLUS loan) must be provided a postwithdrawal disbursement if the student (or parent) responds to an institution's notification of the postwithdrawal disbursement within 14 days of the date that the institution sent the notice. If a student or parent submits a late response, an institution may, but is not required to, make the postwithdrawal disbursement. The Secretary is modifying this requirement so that, for a student who withdraws because of his or her status as an affected individual in this category and is eligible for a postwithdrawal disbursement, the 14-day time period in which the student (or parent) must normally respond to the offer of the post-withdrawal disbursement is extended to 45 days. If the student or parent submits a response after the 45-day period, the institution may, but is not required to, make the postwithdrawal disbursement. As required under the current regulations, if the student or parent submits the timely response instructing the institution to make all or a portion of the postwithdrawal disbursement, or the institution chooses to make a postwithdrawal disbursement based on receipt of a late response, the institution must disburse the funds within 120 days of the date of the institution's determination that the student withdrew.

Leaves of Absence

34 CFR 668.22(d)(4)(iii)(B) requires a student to provide a written, signed, and dated request, which includes the reason for that request, for an approved leave of absence prior to the leave of absence, or at a later date if the student is prevented from providing a prior written request by unforeseen circumstances. It may be appropriate in certain limited cases for an institution to provide an approved leave of absence to a student who must interrupt his or her enrollment because he or she is an affected individual. Therefore, the Secretary is waiving the requirement that the student provide a written request for affected individuals who would have difficulty providing a written request as a result of being an affected individual. The institution's documentation of its decision to grant the leave of absence must include, in addition to the reason for the leave of absence, the reason for waiving the requirement that the waiver be requested in writing.

Treatment of Title IV Credit Balances When a Student Withdraws

Under 34 CFR 668.164(e), an institution must pay any credit balance to the student, or parent in the case of a PLUS loan, within 14 days after the balance occurred. However, if a student (or parent) has provided permission, an institution may use a title IV credit balance to reduce the borrower's loan debt.

Therefore, for students who withdraw because they are affected individuals, the Secretary is modifying 34 CFR 668.164(e) to consider an institution to have met the 14-day requirement if, within that timeframe, the institution attempts to contact the student to suggest that permission be given to the institution allowing it to return the credit balance to the loan program(s). Based upon the instructions of the student (or parent), the institution must promptly return the funds to the title IV loan programs or pay the credit balance to the student (or parent).

If an institution chooses to attempt to contact the student (or parent), it must allow the student (or parent) 45 days to respond. If there is no response within 45 days, the institution must promptly return the funds to the title IV programs. The institution may also choose to pay the credit balance to the student (or parent) without first requesting permission to return the funds to the loan program in order to reduce the borrower's debt.

Cash Management—Borrower Request for Loan Cancellation

Under 34 CFR 668.165(a)(4)(ii), an institution must return loan proceeds or cancel the loan, or both, if the institution receives a loan cancellation request from a borrower within 14 days after the date of the institution's notice to the borrower, or by the first day of the payment period if the institution sends the notice more than 14 days before the first day of the payment period. If an institution receives a late loan cancellation request from a borrower, the institution may, but is not required to, comply with the request. For a borrower who is an affected individual in this category, the Secretary is modifying this provision to require an institution to allow at least 60 days, rather than at least 14 days, for the borrower to request the cancellation of all or a portion of loan proceeds that have been credited to the account at the institution. If an institution receives a loan cancellation request from a borrower after the 60-day period, the institution may, but is not required to, comply with the request.

Cash Management—Student and Parent Authorizations

34 CFR 668.165(b)(1) provides that an institution must obtain a written authorization from a student or parent, as applicable, to:

- Disburse title IV funds to a bank account designated by the student or parent;
- Use title IV funds to pay for current charges other than tuition, fees, room, and board, if the student contracts with the school for room and board; and
- Hold on behalf of the student or parent any title IV funds that would otherwise be paid directly to the student or parent.

The Secretary is modifying these provisions to permit an institution to accept an authorization provided by a student (or parent for a PLUS loan) orally, rather than in writing, if the student or parent is prevented from providing a written authorization because of his or her status as an affected individual in this category.

Satisfactory Academic Progress

Institutions may, in cases where a student failed to meet satisfactory academic progress standards as a direct result of being an affected individual in this category, apply the exception provision of ''other special circumstances'' contained in 34 CFR 668.34(c)(3) of the regulations.

Borrowers in a Grace Period

Sections 428(b)(7)(D) and 464(c)(7) of the HEA and 34 CFR 674.31(b)(2)(i)(C), 682.209(a)(6), and 685.207(b)(2)(ii) and (c)(2)(ii) exclude from a Federal Perkins Loan, FFEL, or Direct Loan borrower's (title IV borrower's) initial grace period, any period, not to exceed three years, during which a borrower who is a member of an Armed Forces reserve component is called or ordered to active duty for a period of more than 30 days. The statutory and regulatory provisions further require that any single excluded period may not exceed three years and must include the time necessary for the borrower to resume enrollment at the next available regular enrollment period. Lastly, borrowers are entitled to another full six- or nine-month grace period, as applicable, upon completion of the excluded period of service.

The Secretary is modifying these statutory and regulatory provisions to exclude from a title IV borrower's initial

grace period, any period, not to exceed three years, during which a borrower is an affected individual in this category. Any excluded period must include the time necessary for an affected individual in this category to resume enrollment at the next available enrollment period. Affected individuals in this category are also entitled to another full six- or nine-month grace period upon completion of the excluded period of service.

Borrowers in an ''In-School'' Period

A title IV borrower is considered to be in an ''in-school'' status and is not required to make payments on a title IV loan that has not entered repayment as long as the borrower is enrolled at an eligible school on at least a half-time basis. Under sections 428(b)(7) and 464(c)(1)(A) of the HEA and 34 CFR 674.31(b)(2), 682.209(a), and 685.207(b), (c), and (e)(2) and (3), when a title IV borrower ceases to be enrolled at an eligible institution on at least a half-time basis, the borrower is obligated to begin repayment of the loan after a six- or nine-month grace period, depending on the title IV loan program and the terms of the borrower's promissory note. The Secretary is modifying the statutory and regulatory provisions that obligate an ''in-school'' borrower who has dropped below half-time status to begin repayment if the borrower is an affected individual in this category by requiring the holder of the loan to maintain the loan in an ''in-school'' status for a period not to exceed three years, including the time necessary for the borrower to resume enrollment in the next regular enrollment period, if the borrower is planning to go back to school. The Secretary will pay interest that accrues on a subsidized Stafford Loan as a result of the extension of a borrower's in-school status under this modification.

Borrowers in an In-School or Graduate Fellowship Deferment

Under sections 427(a)(2)(C)(i), 428(b)(1)(M)(i), 428B(a)(2), 428C(b)(4)(C), 455(f)(2)(A), and 464(c)(2)(A)(i)(I) of the HEA and 34 CFR 674.34(b)(1), 682.210(b)(1)(i) and (ii), 682.210(s)(2), 682.210(s)(3), and 685.204(b)(1)(i), a title IV borrower is eligible for a deferment on the loan during periods after the commencement or resumption of the repayment period on the loan when the borrower is enrolled and in attendance as a regular student on at least a half-time basis (or full-time, if required by the terms of the borrower's promissory note) at an eligible institution; enrolled and in attendance as a regular student in a course of study that is part of a graduate fellowship program; or engaged in graduate or post-graduate fellowship-supported study outside the United States. The borrower's deferment period ends when the borrower no longer meets one of the above conditions. The Secretary is waiving the statutory and regulatory eligibility requirements for this deferment for title IV borrowers who were required to interrupt a graduate fellowship deferment or who were in an in-school deferment but who left school because of their status as an affected individual in this category. The holder of the loan is required to maintain the loan in a graduate fellowship deferment or in-school deferment status for a period not to exceed three years during which the borrower is an affected individual. This period includes the time necessary for the borrower to resume his or her graduate fellowship program or resume enrollment in the next regular enrollment period if the borrower returns to school. The Secretary will pay interest that accrues on a subsidized Stafford Loan as a result of extending a borrower's eligibility for deferment under this waiver.

Forbearance

Under section 464(e) of the HEA and 34 CFR 674.33(d)(2), there is a 3-year cumulative limit on the length of forbearances that a Federal Perkins Loan borrower can receive. To assist Perkins borrowers who are affected individuals in this category, the Secretary is waiving these statutory and regulatory requirements so that any forbearance based on a borrower's status as an affected individual is excluded from the 3-year cumulative limit.

Under section 464(e) of the HEA and 34 CFR 674.33(d)(2) and (3), a school must receive a written request and supporting documentation from a Federal Perkins Loan borrower before granting the borrower a forbearance, the terms of which must be in the form of a written agreement. The Secretary is waiving these statutory and regulatory provisions to require an institution to grant forbearance based on the borrower's status as an affected individual in this category for a one-year period, including a 3-month ''transition period'' that immediately follows that period, without supporting documentation or a written agreement, based on the written or oral request of the borrower, a member of the borrower's family, or another reliable source. The purpose of the 3-month ''transition period'' is to assist borrowers so that they will not be required to reenter repayment immediately after they are no longer affected individuals.

In order to grant the borrower forbearance beyond the initial period, supporting documentation from the borrower, a member of the borrower's family, or another reliable source is required.

34 CFR 682.211(i)(1) requires an FFEL borrower who requests forbearance because of a military mobilization to provide the loan holder with documentation showing that he or she is subject to a military mobilization. The Secretary is waiving this requirement to allow the borrower to receive forbearance at the request of the borrower, a member of the borrower's family, or another reliable source for a one-year period, including a three-month transition period that immediately follows that period, without providing the loan holder with documentation. In order to grant the borrower forbearance beyond this period, documentation supporting the borrower's military mobilization must be submitted to the holder of the loan.

The Secretary will apply the forbearance waivers and modifications in this section to loans held by the Department of Education.

Collection of Defaulted Loans

In accordance with 34 CFR Part 674, Subpart C-Due Diligence and 682.410, schools and guaranty agencies must attempt to recover amounts owed from defaulted Perkins and FFEL borrowers. The Secretary is waiving the regulatory provisions that require schools and guaranty agencies to attempt collection on defaulted loans for the time period during which the borrower is an affected individual. The school or guaranty agency may stop collection activities upon notification by the borrower, a member of the borrower's family, or another reliable source that the borrower is an affected individual in this category. Collection activities must resume after the borrower has notified the school or guaranty agency that he or she is no longer an affected individual and must include the 3-month transition period. The loan holder must document in the loan file why it has suspended collection activities on the loan, and the loan holder is not required to obtain evidence of the borrower's status while collection activities have been suspended. The Secretary will apply the waivers described in this paragraph to loans held by the Department of Education.

Loan Cancellation

Depending on the loan program, borrowers may qualify for loan

cancellation if they are employed full-time in specified occupations, such as teaching, childcare, or law enforcement, pursuant to sections 428J(b)(1), 428K(d)(1), 460(b)(1)(A), and 465(a)(2)(A)–(I) and (a)(3) of the HEA, and 34 CFR 674.53(d), 674.55(a)(2), 674.55(b)(5), 674.55(c)(2), 674.56(d)(1), 674.57(b)(1), 674.58(b), 674.60(b), 682.215, and 685.217. Generally, to qualify for loan cancellation, borrowers must perform uninterrupted, otherwise qualifying service for a specified length of time (for example, one year) or for consecutive periods of time, such as 5 consecutive years. For borrowers who are affected individuals in this category, the Secretary is waiving the requirements that apply to the various loan cancellations that such periods of service be uninterrupted and/or consecutive, if the reason for the interruption is related to the borrower's status as an affected individual. Therefore, the period during which the borrower is an affected individual in this category, including the 3-month transition period, will not be considered an interruption in the required service for the borrower to receive an otherwise eligible loan cancellation. The Secretary will apply the waivers described in this paragraph to loans held by the Department of Education.

Rehabilitation of Defaulted Loans

A borrower of an HEA, title IV loan must make 12 consecutive, monthly, on-time payments to rehabilitate a defaulted loan in accordance with sections 428F(a) and 464(h)(1) of the HEA and 34 CFR 674.39(a)(2), 682.405, and y685.211(f)(1). To assist title IV borrowers who are affected individuals in this category, the Secretary is waiving the statutory and regulatory requirements that payments made to rehabilitate a loan be consecutive. Loan holders should not treat any payment missed during the time that a borrower is an affected individual in this category, or the 3-month transition period, as an interruption in the number of consecutive, monthly, on-time payments required for loan rehabilitation. When the borrower is no longer considered to be an affected individual in this category, the required sequence of qualifying payments may resume at the point they were discontinued as a result of the borrower's status. The Secretary will apply the waivers described in this paragraph to loans held by the Department of Education.

Reinstatement of Title IV Eligibility

Under sections 428F(b) and 464(h)(2) of the HEA and under the definition of ''satisfactory repayment arrangement'' in 34 CFR 668.35(a)(2), 674.2(b), 682.200(b), and 685.102(b), a defaulted title IV borrower may make six consecutive, monthly, on-time payments to reestablish eligibility for title IV student financial assistance. To assist title IV borrowers who are affected individuals in this category, the Secretary is waiving statutory and regulatory provisions that require the borrower to make consecutive payments in order to reestablish eligibility for title IV student financial assistance. Loan holders should not treat any payment missed during the time that a borrower is an affected individual as an interruption in the six consecutive, monthly, on-time payments required for reestablishing title IV eligibility. When the borrower is no longer considered to be an affected individual or in the 3-month transition period for purposes of this notice, the required sequence of qualifying payments may resume at the point they were discontinued as a result of the borrower's status. The Secretary will apply the waivers described in this paragraph to loans held by the Department of Education.

Consolidation of Defaulted Loans

Under the definition of ''satisfactory repayment arrangement'' in 34 CFR 682.200(b) and 685.102(b), a defaulted FFEL or Direct Loan borrower may establish eligibility to consolidate a defaulted loan by making three consecutive, monthly, on-time payments on the loan. The Secretary is waiving the regulatory requirement that such payments be consecutive. FFEL loan holders should not treat any payment missed during the time that a borrower is an affected individual in this category as an interruption in the three consecutive, monthly, on-time payments required for establishing eligibility to consolidate a defaulted loan. When the borrower is no longer considered to be an affected individual in this category or in the 3-month transition period, the required sequence of qualifying payments may resume at the point they were discontinued as a result of the borrower's status as an affected individual. The Secretary will apply the waivers described in this paragraph to loans held by the Department of Education.

Category 3: The Secretary is waiving or modifying the following provisions of title IV of the HEA and the Department's regulations for affected individuals who are serving on active duty or performing qualifying National Guard duty during a war or other military operation or national emergency as described in the **SUMMARY** section of this notice:

Military Deferment

Under section 455(f)(4) of the HEA and 34 CFR 674.35(c)(1), 674.36(c)(1), 674.37(c)(1), 682.210(b)(2), and 685.204(d), certain borrowers are eligible for a deferment on their title IV loans for periods, not to exceed 3 years, during which the borrower is on active duty status in the United States Armed Forces. This provision includes a member of the National Guard or the Reserves serving a period of full-time active duty in the Armed Forces. The Secretary is modifying the statutory and regulatory requirements that limit military deferments to a 3-year cumulative period so that the time during which affected individuals in this category are serving on active duty is excluded from this time limit. The Secretary will pay interest that accrues on subsidized Stafford Loans during an extended period of deferment under this modification.

Under 34 CFR 674.38(a)(1) and 682.210(a)(4), a borrower must request the deferment and provide the institution or lender with supporting documentation to receive a deferment. The Secretary is modifying the regulations to allow a loan holder to grant an affected individual in this category a military deferment based on a request from a family member or another reliable source. The Secretary is also waiving documentation requirements to allow a loan holder to grant an affected individual in this category a military deferment for a one-year period without documentation. In order to grant a military deferment beyond the initial period, supporting documentation from the borrower, a member of the borrower's family, or another reliable source is required. The Secretary will apply the waivers described in this paragraph to loans held by the Department of Education.

Institutional Charges and Refunds

The HEROES Act encourages institutions to provide a full refund of tuition, fees, and other institutional charges for the portion of a period of instruction that a student was unable to complete, or for which the student did not receive academic credit, because he or she was called up for active duty or for qualifying National Guard duty during a war or other military operation or national emergency. Alternatively, the Secretary encourages institutions to provide a credit in a comparable amount against future charges.

The HEROES Act also recommends that institutions consider providing easy and flexible reenrollment options to such students who are affected

individuals in this category. Specifically, institutions are urged to minimize deferral of enrollment or reapplication requirements and to provide the greatest flexibility possible with administrative deadlines related to those applications.

Of course, an institution may provide such treatment to affected individuals other than those who are called up to active duty or for qualifying National Guard duty during a war or other military operation or national emergency.

However, before an institution makes a refund of institutional charges, it must perform the required Return of title IV Funds calculations based upon the originally assessed institutional charges. After determining the amount that the institution must return to the title IV Federal student aid programs, any reduction of institutional charges may take into account the funds that the institution is required to return. In other words, we do not expect that an institution would both return funds to the Federal programs and also provide a refund of those same funds to the student.

Category 4: The Secretary is waiving or modifying the following provisions of the HEA and regulations for dependents and spouses of affected individuals who are serving on active duty or performing qualifying National Guard duty during a war or other military operation or national emergency as described in the **SUMMARY** section of this notice:

Verification Signature Requirements

34 CFR 668.57(b) and (c) require signatures to verify the number of family members in the household and the number of family members enrolled in postsecondary institutions. The Secretary is waiving the requirement that a dependent student submit a statement signed by one of the applicant's parents when no responsible parent can provide the required signature because of the parent's status as an affected individual in this category.

Required Signatures on the Free Application for Federal Student Aid (FAFSA), Student Aid Report (SAR), and Institutional Student Information Record (ISIR)

Generally, when a dependent applicant for title IV aid submits an application (FAFSA) or submits corrections to a previously submitted application, at least one parental signature is required. The Secretary is waiving this requirement so that an applicant need not provide a parent's signature when there is no responsible parent who can provide the required signature because of the parent's status as an affected individual in this category. In these situations, a student's high school counselor or the FAA may sign on behalf of the parent as long as the applicant provides adequate documentation concerning the parent's inability to provide a signature due to the parent's status as an affected individual in this category.

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Catalog of Federal Domestic Assistance Numbers: 84.007 Federal Supplemental Educational Opportunity Grant Program; 84.032 Federal Family Education Loan Program; 84.032 Federal PLUS Program; 84.033 Federal Work Study Program; 84.038 Federal Perkins Loan Program; 84.063 Federal Pell Grant Program and 84.268 William D. Ford Federal Direct Loan Program.

Program Authority: 20 U.S.C. 1071, 1082, 1087a, 1087aa, Pub. L. 108–76.

Dated: December 8, 2003.

Sally L. Stroup,

Assistant Secretary, Office of Postsecondary Education.

[FR Doc. 03–30781 Filed 12–11–03; 8:45 am]

BILLING CODE 4000–01–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[CA 296–0427; FRL–7594–2]

Interim Final Determination To Stay and Defer Sanctions, South Coast Air Quality Management District

AGENCY: Environmental Protection Agency (EPA).

ACTION: Interim final rule.

SUMMARY: EPA is making an interim final determination to stay and defer imposition of sanctions based on a proposed approval of revisions to the South Coast Air Quality Management District (SCAQMD) portion of the California State Implementation Plan (SIP) published elsewhere in today's **Federal Register.** The revisions concern SCAQMD Rule 1168.

DATES: This interim final determination is effective on December 12, 2003. However, comments will be accepted until January 12, 2004.

ADDRESSES: Send comments to Andy Steckel, Rulemaking Office Chief (AIR–4), U.S. Environmental Protection Agency, Region IX, 75 Hawthorne Street, San Francisco, CA 94105 or e-mail to *steckel.andrew@epa.gov,* or submit comments at *http://www.regulations.gov.*

You can inspect copies of the submitted rule revisions, EPA's technical support document (TSD), and public comments at our Region IX office during normal business hours by appointment. You may also see copies of the submitted rule revisions by appointment at the following locations:

Rulemaking Office (AIR–4), Air Division, U.S. Environmental Protection Agency, Region IX, 75 Hawthorne Street, San Francisco, CA 94105.

California Air Resources Board, Stationary Source Division, Rule Evaluation Section, 1001 ''I'' Street, Sacramento, CA 95814.

South Coast Air Quality Management District, 21865 E. Copley Drive, Diamond Bar, CA 91765.

A copy of the rule may also be available via the Internet at *http://www.arb.ca.gov/drdb/drdbltxt.htm.* Please be advised that this is not an EPA website and may not contain the same version of the rule that was submitted to EPA.

FOR FURTHER INFORMATION CONTACT: Yvonne Fong, EPA Region IX, (415) 947–4117, *fong.yvonnew@epa.gov.*

SUPPLEMENTARY INFORMATION: Throughout this document, ''we,'' ''us'' and ''our'' refer to EPA.

I. Background

On April 26, 2002 (67 FR 20645), we published a limited approval and limited disapproval of SCAQMD Rule 1168. Table 1 lists the rule addressed by our prior limited approval and disapproval with the dates that it was adopted by the local air agency and submitted by the California Air Resources Board (CARB).

TABLE 1.—RULE PREVIOUSLY ACTED ON BY US

Local agency	Rule No.	Rule title	Adopted	Submitted
SCAQMD	1168	Adhesive and Sealant Applications	09/15/00	03/14/01

We based our limited disapproval action on a deficiency in the submittal. This disapproval action started a sanctions clock for imposition of offset sanctions 18 months after May 28, 2002 and highway sanctions 6 months later, pursuant to section 179 of the Clean Air Act (CAA) and our regulations at 40 CFR 52.31.

SCAQMD adopted revisions to Rule 1168 to correct the deficiency identified in our limited disapproval action. Table 2 lists the rule that was submitted to correct the deficiency noted in the previous version with the dates that it was adopted by the local air agency and submitted by the California Air Resources Board (CARB).

TABLE 2.—SUBMITTED RULE

Local agency	Rule No.	Rule title	Adopted	Submitted
SCAQMD	1168	Adhesive and Sealant Applications	10/03/03	11/14/03

In the Proposed Rules section of today's **Federal Register,** we have proposed approval of this submittal because we believe it corrects the deficiency identified in our April 26, 2002 disapproval action. Based on today's proposed approval, we are taking this final rulemaking action, effective on publication, to stay and defer imposition of sanctions that would be triggered by our April 26, 2002 limited disapproval.

EPA is providing the public with an opportunity to comment on this stay and deferral of sanctions. If comments are submitted that change our assessment described in this final determination and the proposed full approval of revised SCAQMD Rule 1168, we intend to take subsequent final action to reimpose sanctions pursuant to 40 CFR 51.31(d). If no comments are submitted that change our assessment, then all sanctions and sanction clocks will be permanently terminated on the effective date of a final rule approval.

II. EPA Action

We are making an interim final determination to stay and defer CAA section 179 sanctions associated with SCAQMD Rule 1168 based on our concurrent proposal to approve the State's SIP revision as correcting the deficiency that initiated sanctions.

Because EPA has preliminarily determined that the State has corrected the deficiency identified in EPA's limited disapproval action, relief from sanctions should be provided as quickly as possible. Therefore, EPA is invoking the good cause exception under the Administrative Procedure Act (APA) in not providing an opportunity for comment before this action takes effect (5 U.S.C. 553(b)(3)). However, by this action EPA is providing the public with a chance to comment on EPA's determination after the effective date, and EPA will consider any comments received in determining whether to reverse such action.

EPA believes that notice-and-comment rulemaking before the effective date of this action is impracticable and contrary to the public interest. EPA has reviewed the State's submittal and, through its proposed action, is indicating that it is more likely than not that the State has corrected the deficiency that started the sanctions clocks. Therefore, it is not in the public interest to initially impose sanctions or to keep applied sanctions in place when the State has most likely done all it can to correct the deficiency that triggered the sanctions clocks. Moreover, it would be impracticable to go through notice-and-comment rulemaking on a finding that the State has corrected the deficiency prior to the rulemaking approving the State's submittal. Therefore, EPA believes that it is necessary to use the interim final rulemaking process to stay and defer sanctions while EPA completes its rulemaking process on the approvability of the State's submittal. Moreover, with respect to the effective date of this action, EPA is invoking the good cause exception to the 30-day notice requirement of the APA because the purpose of this notice is to relieve a restriction (5 U.S.C. 553(d)(1)).

III. Statutory and Executive Order Reviews

This action stays and defers federal sanctions and imposes no additional requirements.

Under Executive Order 12866 (58 FR 51735, October 4, 1993), this action is not a ''significant regulatory action'' and therefore is not subject to review by the Office of Management and Budget.

This action is not subject to Executive Order 13211, ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use'' (66 FR 28355, May 22, 2001) because it is not a significant regulatory action.

The administrator certifies that this action 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.*).

This rule does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Public Law 104–4).

This rule does not have tribal implications because it will not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal government and Indian tribes, or on the distribution of power and responsibilities between the Federal government and Indian tribes, as specified by Executive Order 13175 (65 FR 67249, November 9, 2000).

This action does not have Federalism implications because it does not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132 (64 FR 43255, August 10, 1999).

This rule is not subject to Executive Order 13045, ''Protection of Children from Environmental Health Risks and Safety Risks'' (62 FR 19885, April 23, 1997), because it is not economically significant.

The requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272) do not apply to this rule because it imposes no standards.

This rule does not impose an information collection burden under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

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 to Congress and the Comptroller General. However, section 808 provides that any rule for which the issuing agency for good cause finds that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest, shall take effect at such time as the agency promulgating the rule determines. 5 U.S.C. 808(2). EPA has made such a good cause finding, including the reasons therefor, and established an effective date of December 12, 2003. 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.** A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This rule is not a ''major rule'' as defined by 5 U.S.C. 804(2).

Under section 307(b)(1) of the CAA, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by February 10, 2004. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this rule for the purpose of judicial review nor does it extend the time within which petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. (*See* section 307(b)(2)).

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Intergovernmental regulations, Ozone, Reporting and recordkeeping requirements, Volatile organic compounds.

Dated: November 20, 2003.

Laura Yoshii,

Deputy Regional Administrator, Region IX.

[FR Doc. 03–30773 Filed 12–11–03; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[CA 296–0427a; FRL–7593–9]

Revisions to the California State Implementation Plan, South Coast Air Quality Management District

AGENCY: Environmental Protection Agency (EPA).

ACTION: Direct final rule.

SUMMARY: EPA is taking direct final action to approve revisions to the South Coast Air Quality Management District (SCAQMD) portion of the California State Implementation Plan (SIP). These revisions concern volatile organic compound (VOC) emissions from adhesives and sealants. We are approving a local rule that regulates these emission sources under the Clean Air Act as amended in 1990 (CAA or the Act).

DATES: This rule is effective on February 10, 2004 without further notice, unless EPA receives adverse comments by January 12, 2004. If we receive such comment, we will publish a timely withdrawal in the **Federal Register** to notify the public that this rule will not take effect.

ADDRESSES: Send comments to Andy Steckel, Rulemaking Office Chief (AIR–4), U.S. Environmental Protection Agency, Region IX, 75 Hawthorne Street, San Francisco, CA 94105–3901, or e-mail to *steckel.andrew@epa.gov*, or submit comments at *http://www.regulations.gov.*

You can inspect copies of the submitted SIP revisions, EPA's technical support document (TSD), and public comments at our Region IX office during normal business hours by appointment. You may also see copies of the submitted SIP revisions by appointment at the following locations:

Air and Radiation Docket and Information Center, U.S. Environmental Protection Agency, Room B–102, 1301 Constitution Avenue, NW., (Mail Code 6102T), Washington, DC 20460.

California Air Resources Board, Stationary Source Division, Rule Evaluation Section, 1001 ''I'' Street, Sacramento, CA 95814.

South Coast Air Quality Management District, 21865 E. Copley Drive, Diamond Bar, CA 91765.

A copy of the rule may also be available via the Internet at *http://www.arb.ca.gov/drdb/drdbltxt.htm.* Please be advised that this is not an EPA website and may not contain the same version of the rule that was submitted to EPA.

FOR FURTHER INFORMATION CONTACT: Yvonne Fong, EPA Region IX, (415) 947–4117, *fong.yvonnew@epa.gov.*

SUPPLEMENTARY INFORMATION: Throughout this document, ''we,'' ''us'' and ''our'' refer to EPA.

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I. The State's Submittal

A. What Rule Did the State Submit?

Table 1 lists the rule we are approving with the dates that it was adopted by the local air agency and submitted by the California Air Resources Board (CARB).

TABLE 1.—SUBMITTED RULE

Local agency	Rule No.	Rule title	Adopted	Submitted
SCAQMD	1168	Adhesive and Sealant Applications	10/03/03	11/14/03

On November 19, 2003, a submittal of SCAQMD Rule 1168 was found to meet the completeness criteria in 40 CFR part 51, appendix V, which must be met before formal EPA review.

B. Are There Other Versions of This Rule?

We approved a version of SCAQMD 1168 into the SIP on April 26, 2002 (67 FR 20645). The SCAQMD adopted revisions to the SIP-approved version of Rule 1168 on June 7 and July 12, 2002 and on October 3, 2003. While we can act on only the most recently submitted version, we have reviewed the materials provided with the previous submittals of SCAQMD Rule 1168.

C. What Is the Purpose of the Rule Revisions?

VOCs help produce ground-level ozone and smog, which harm human health and the environment. Section 110(a) of the CAA requires states to submit regulations that control VOC emissions. This rule limits emissions of VOCs resulting from the application of adhesives and sealants.

This rule was also submitted to correct a deficiency we cited in an April 26, 2002 (67 FR 20645) final rulemaking for a previous version of this rule and to stay and defer the potential imposition of section 179 sanctions associated with that final rulemaking. The TSD has more information about this rule.

II. EPA's Evaluation and Action

A. How Is EPA Evaluating the Rule?

Generally, SIP rules must be enforceable (*see* section 110(a) of the Act), must require Reasonably Available Control Technology (RACT) for major sources in nonattainment areas (*see* section 182(a)(2)(A)), and must not relax existing requirements (*see* sections 110(l) and 193). SCAQMD regulates an ozone nonattainment area (*see* 40 CFR part 81), so SCAQMD Rule 1168 must fulfill RACT.

Guidance and policy documents that we used to help evaluate specific enforceability and RACT requirements consistently include the following:

1. Portions of the proposed post-1987 ozone and carbon monoxide policy that concern RACT, 52 FR 45044, November 24, 1987.

2. ''Issues Relating to VOC Regulation Cutpoints, Deficiencies, and Deviations,'' EPA, May 25, 1988 (the Bluebook).

3. ''Guidance Document for Correcting Common VOC & Other Rule Deficiencies,'' EPA Region 9, August 21, 2001 (the Little Bluebook).

4. ''Determination of Reasonably Available Control Technology and Best Available Retrofit Control Technology for Adhesives and Sealants,'' CARB, December 1998.

We also evaluated this rule to determine whether it corrects the deficiency cited in our April 26, 2002 (67 FR 20645) final rulemaking on a previous version of this rule. Our limited disapproval of this earlier version noted that the exemption of light curable products in SCAQMD Rule 1168 conflicted with section 110 and part D of the Act. The TSD has more information on our evaluation.

B. Does the Rule Meet the Evaluation Criteria?

We believe this rule is consistent with the relevant policy and guidance regarding enforceability, RACT, and SIP relaxations. We also conclude that the problematic provision which was found in an earlier version of this rule and which was the basis for our April 26, 2002 final limited disapproval has been corrected. The TSD has more information on our evaluation.

C. Public Comment and Final Action

As authorized in section 110(k)(3) of the Act, EPA is fully approving the submitted rule because we believe it fulfills all relevant requirements. We do not think anyone will object to this approval, so we are finalizing it without proposing it in advance. However, in the Proposed Rules section of this **Federal Register**, we are simultaneously proposing approval of the same submitted rule. If we receive adverse comments by January 12, 2004, we will publish a timely withdrawal in the **Federal Register** to notify the public that the direct final approval will not take effect and we will address the comments in a subsequent final action based on the proposal. If we do not receive timely adverse comments, the direct final approval will be effective without further notice on February 10, 2004. This will incorporate this rule into the federally enforceable SIP and will terminate all CAA section 179 and 110(c) sanction and FIP implications associated with our limited disapproval action on a previous version of this rule.

III. Statutory and Executive Order Reviews

Under Executive Order 12866 (58 FR 51735, October 4, 1993), this action is not a ''significant regulatory action'' and therefore is not subject to review by the Office of Management and Budget. For this reason, this action is also not subject to Executive Order 13211, ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use'' (66 FR 28355, May 22, 2001). This action merely approves state law as meeting Federal requirements and imposes no additional requirements beyond those imposed by state law. Accordingly, the Administrator certifies 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.*). Because this rule approves pre-existing requirements under state law and does not impose any additional enforceable duty beyond that required by state law, it does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Public Law 104–4).

This rule also does not have tribal implications because it will not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes, as specified by Executive Order 13175 (65 FR 67249, November 9, 2000). This action also does not have Federalism implications because it does not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132 (64 FR 43255, August 10, 1999). This action merely approves a state rule implementing a Federal standard, and does not alter the relationship or the distribution of power and responsibilities established in the Clean Air Act. This rule also is not subject to Executive Order 13045 ''Protection of Children from Environmental Health Risks and Safety Risks'' (62 FR 19885, April 23, 1997), because it is not economically significant.

In reviewing SIP submissions, EPA's role is to approve state choices, provided that they meet the criteria of the Clean Air Act. In this context, in the absence of a prior existing requirement for the State to use voluntary consensus standards (VCS), EPA has no authority to disapprove a SIP submission for failure to use VCS. It would thus be inconsistent with applicable law for EPA, when it reviews a SIP submission, to use VCS in place of a SIP submission that otherwise satisfies the provisions of the Clean Air Act. Thus, the requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) do not apply. This rule does not impose an information collection burden under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

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**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a ''major rule'' as defined by 5 U.S.C. 804(2).

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by February 10, 2004. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this rule for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. (*See* section 307(b)(2).)

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Intergovernmental relations, Ozone, Reporting and recordkeeping requirements, Volatile organic compounds.

Dated: November 20, 2003.

Laura Yoshii,

Deputy Regional Administrator, Region IX.

■ Part 52, Chapter I, Title 40 of the Code of Federal Regulations is amended as follows:

PART 52—[AMENDED]

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

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

Subpart F—California

■ 2. Section 52.220 is amended by adding paragraphs (c)(319) to read as follows:

§ 52.220 Identification of plan.

* * * * *

(c) * * *

(319) Amended regulation for the following APCD was submitted on November 14, 2003, by the Governor's designee.

(i) Incorporation by reference.

(A) South Coast Air Quality Management District.

(*1*) Rule 1168, amended on October 3, 2003.

* * * * *

[FR Doc. 03–30774 Filed 12–11–03; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 180

[OPP–2003–0311; FRL–7337–7]

Vinclozolin; Time-Limited Pesticide Tolerances Technical Correction

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule; technical correction.

SUMMARY: EPA issued a final rule in the **Federal Register** of September 30, 2003, concerning time-limited tolerances established for the fungicide, vinclozolin. This document is being issued to correct a typographical error in the regulatory text.

DATES: This technical correction is effective on December 12, 2003.

FOR FURTHER INFORMATION CONTACT: Mary L.Waller, Registration Division (7505C), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (703) 308–9354; e-mail address:*waller.mary@epa.gov*.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this Action Apply to Me?

The Agency included in the final rule a list of those who may be potentially affected by this action. If you have questions regarding the applicability of this action to a particular entity, consult the person listed under **FOR FURTHER INFORMATION CONTACT**.

B. How Can I Get Copies of this Document and Other Related Information?

1. *Docket.* EPA has established an official public docket for this action under docket identification (ID) number OPP–2003–0311. The official public docket consists of the documents specifically referenced in this action, any public comments received, and other information related to this action. Although a part of the official docket, the public docket does not include Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. The official public docket is the collection of materials that is available for public viewing at the Public Information and Records Integrity Branch (PIRIB), Rm. 119, Crystal Mall #2, 1921 Jefferson Davis Hwy., Arlington, VA. This docket facility is open from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The docket telephone number is (703) 305–5805.

2. *Electronic access.* You may access this **Federal Register** document electronically through the EPA Internet under the ''**Federal Register**'' listings at *http://www.epa.gov/fedrgstr/*. A frequently updated electronic version of 40 CFR part 180 is available at *http://www.access.gpo.gov/nara/cfr/cfrhtml_00/Title_ 40/40cfr180_00.html*, a beta site currently under development.

An electronic version of the public docket is available through EPA's electronic public docket and comment system, EPA Dockets. You may use EPA Dockets at *http://www.epa.gov/edocket/* to submit or view public comments, access the index listing of the contents of the official public docket, and to access those documents in the public docket that are available electronically. Once in the system, select ''search,'' then key in the appropriate docket ID number.

II. What Does this Correction Do?

In the **Federal Register** of September 30, 2003 (68 FR 56184) (FRL–7327–6) published a final rule extending time-limited tolerances established for the fungicide, vinclozolin. This document is being issued to correct a typographical error in the regulatory text.

III. Why is this Correction Issued as a Final Rule?

Section 553 of the Administrative Procedure Act (APA), 5 U.S.C. 553(b)(B), provides that, when an Agency for good cause finds that notice and public procedure are impracticable, unnecessary or contrary to the public interest, the agency may issue a final rule without providing notice and an opportunity for public comment. EPA has determined that there is good cause for making today's technical correction final without prior proposal and opportunity for comment, because EPA is merely inserting language that was inadvertently omitted from the previously published final rule. EPA finds that this constitutes good cause under 5 U.S.C. 553(b)(B).

IV. Do Any of the Statutory and Executive Order Reviews Apply to this Action?

This final rule implements a technical correction to the CFR, and it does not otherwise impose or amend any requirements. As such, the Office of Management and Budget (OMB) has determined that a technical correction is not a ''significant regulatory action'' subject to review by OMB under Executive Order 12866, entitled *Regulatory Planning and Review* (58 FR 51735, October 4, 1993). Nor does this final rule contain any information

collection requirements that require review and approval by OMB pursuant to the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501 *et seq.*). Since the Agency has made a ''good cause'' finding that this action is not subject to notice-and-comment requirements under the APA or any other statute (see Unit III.), this action is not subject to provisions of the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*), or to sections 202 and 205 of the Unfunded Mandates Reform Act of 1995 (UMRA) (Public Law 104–4). In addition, this action does not significantly or uniquely affect small governments or impose any enforceable duty or contain any unfunded mandate as described under Title II of the Unfunded Mandates Reform Act of 1995 (UMRA) (Public Law 104–4). This final rule will not have substantial direct effects on the States or on one or more Indian tribes, on the relationship between the national government and the States or one or more Indian tribes, or on the distribution of power and responsibilities among the various levels of government or between the Federal government and Indian tribes. As such, this action does not have any ''federalism implications'' as described in Executive Order 13132, entitled Federalism (64 FR 43255, August 10, 1999), or any ''tribal implications'' as described in Executive Order 13175, entitled *Consultation and Coordination with Indian Tribal Governments* (65 FR 67249, November 6, 2000). Since this direct final rule is not a ''significant regulatory action'' as defined by Executive Order 12866, it does not require OMB review or any Agency action under Executive Order 13045, entitled *Protection of Children from Environmental Health Risks and Safety Risks* (62 FR 19885, April 23, 1997), and is not subject to Executive Order 13211, *Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use* (66 FR 28355, May 22, 2001). This action does not involve any technical standards that require the Agency's consideration of voluntary consensus standards pursuant to section 12(d) of the National Technology Transfer and Advancement Act of 1995 (NTTAA), Public Law 104–113, section 12(d) (15 U.S.C. 272 note). This action will not result in environmental justice related issues and does not, therefore, require special consideration under Executive Order 12898, entitled *Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations* (59 FR 7629, February 16, 1994) or Executive Order 12630, entitled *Governmental Actions and Interference with Constitutionally Protected Property Rights* (53 FR 8859, March 15, 1988). In issuing this final rule, EPA has taken the necessary steps to eliminate drafting errors and ambiguity, minimize potential litigation, and provide a clear legal standard for affected conduct, as required by section 3 of Executive Order 12988, entitled *Civil Justice Reform* (61 FR 4729, February 7, 1996).

V. Congressional Review Act

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

List of Subjects in 40 CFR Part 180

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

■ Therefore, 40 CFR part 180 is corrected as follows:

PART 180—[AMENDED]

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

Authority: 21 U. S. C. 321 (q), 346 (a) and 371.

§ 180.380 [Corrected]

■ 2. In FR Doc. 03–24782, appearing on page 56189, in § 180.380, in the amendment to the table in paragraph (a), the commodity ''Poultry'' should have read ''Poultry, fat.''

Dated: November 26, 2003.

Peter Caulkins,

Acting Director, Registration Division, Office of Pesticide Programs.

[FR Doc. 03–30708 Filed 12–12–03; 8:45 am]

BILLING CODE 6560–50–S

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

44 CFR Part 65

Changes in Flood Elevation Determinations

AGENCY: Federal Emergency Management Agency (FEMA), Emergency Preparedness and Response Directorate, Department of Homeland Security.

ACTION: Final rule.

SUMMARY: Modified Base (1% annual-chance) Flood Elevations (BFEs) are finalized for the communities listed below. These modified elevations will be used to calculate flood insurance premium rates for new buildings and their contents.

EFFECTIVE DATES: The effective dates for these modified BFEs are indicated on the following table and revise the Flood Insurance Rate Maps (FIRMs) in effect for the listed communities prior to this date.

ADDRESSES: The modified BFEs for each community are available for inspection at the office of the Chief Executive Officer of each community. The respective addresses are listed in the table below.

FOR FURTHER INFORMATION CONTACT: Doug Bellomo, P.E., Hazard Identification Section, Mitigation Division, Emergency Preparedness and Response Directorate, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472, (202) 646–2903.

SUPPLEMENTARY INFORMATION: Federal Emergency Management Agency makes the final determinations listed below of the modified BFEs for each community listed. These modified elevations have been published in newspapers of local 2 circulation and ninety (90) days have elapsed since that publication. The Mitigation Division Director of the Emergency Preparedness and Response Directorate has resolved any appeals resulting from this notification.

The modified BFEs are not listed for each community in this notice. However, this rule includes the address of the Chief Executive Officer of the community where the modified BFEs determinations are available for inspection.

The modifications are made pursuant to Section 206 of the Flood Disaster Protection Act of 1973, 42 U.S.C. 4105, and are in accordance with the National

Flood Insurance Act of 1968, 42 U.S.C. 4001 *et seq.,* and with 44 CFR part 65.

For rating purposes, the currently effective community number is shown and must be used for all new policies and renewals.

The modified BFEs are the basis for the floodplain management measures that the community is required to either adopt or to show evidence of being already in effect in order to qualify or to remain qualified for participation in the National Flood Insurance Program (NFIP).

These modified elevations, together with the floodplain management criteria required by 44 CFR 60.3, are the minimum that are required. They should not be construed to mean that the community must change any existing ordinances that are more stringent in their floodplain management requirements. The community may at any time enact stricter requirements of its own, or pursuant to policies established by other Federal, State, or regional entities.

These modified elevations are used to meet the floodplain management requirements of the NFIP and are also used to calculate the appropriate flood insurance premium rates for new buildings built after these elevations are made final, and for the contents in these buildings.

The changes in BFEs are in accordance with 44 CFR 65.4.

National Environmental Policy Act

This rule is categorically excluded from the requirements of 44 CFR Part 10, Environmental Consideration. No environmental impact assessment has been prepared.

Regulatory Flexibility Act

The Mitigation Division Director of the Emergency Preparedness and Response Directorate certifies that this rule is exempt from the requirements of the Regulatory Flexibility Act because modified BFEs are required by the Flood Disaster Protection Act of 1973, 42 U.S.C. 4105, and are required to maintain community eligibility in the NFIP. No regulatory flexibility analysis has been prepared.

Regulatory Classification

This final rule is not a significant regulatory action under the criteria of Section 3(f) of Executive Order 12866 of September 30, 1993, Regulatory Planning and Review, 58 FR 51735.

Executive Order 12612, Federalism

This rule involves no policies that have federalism implication under Executive Order 12612, Federalism, dated October 26, 1987.

Executive Order 12778, Civil Justice Reform

This rule meets the applicable standards of Section 2(b)(2) of Executive Order 12778.

List of Subjects in 44 CFR Part 65

Flood insurance, Floodplains, Reporting and Recordkeeping requirements.

■ Accordingly, 44 CFR Part 65 is amended to read as follows:

PART 65—[AMENDED]

■ 1. The authority citation for Part 65 continues to read as follows:

Authority: 42 U.S.C. 4001 *et seq.*; Reorganization Plan No. 3 of 1978, 3 CFR, 1978 Comp., p. 329; E.O. 12127, 44 FR 19367, 3 CFR, 1979 Comp., p.376.

§ 65.4 [Amended]

■ 2. The tables published under the authority of § 65.4 are amended as follows:

State and county	Location and case No.	Date and name of newspaper where notice was published	Chief executive officer of community	Effective date of modification	Community number
Arizona:					
Gila (FEMA Docket No.: B–7438).	City of Globe (03–09–0187P).	June 18, 2003; June 25, 2003; *Arizona Silver Belt*.	The Honorable Stanley Gibson, Mayor, City of Globe, 150 North Pine Street, Globe, Arizona 85501.	September 24, 2003	040029
Gila (FEMA Docket No.: B–7438).	Unincorporated Areas (03–09–0187P).	June 18, 2003; June 25, 2003; *Arizona Silver Belt*.	The Honorable Cruz Salas, Chairman, Gila County Board of Supervisors, 1400 East Ash Street, Globe, Arizona 85501.	September 24, 2003 ..	040028
Maricopa (FEMA Docket No.: B–7438).	City of Avondale (02–09–190P).	May 29, 2003; June 5, 2003; *Arizona Republic*.	The Honorable Ronald J. Drake, Mayor, City of Avondale, 525 North Central Avenue, Avondale, Arizona 85323.	May 22, 2003	040038
Maricopa (FEMA Docket No.: B–7438).	Town of Buckeye (03–09–0245P).	June 19, 2003; June 26, 2003; *Buckeye Valley News*.	The Honorable Dusty Hull, Mayor, Town of Buckeye, 100 North Apache Road, Suite A, Buckeye, Arizona 85326.	May 20, 2003	040039
Maricopa (FEMA Docket No.: B–7438).	City of Chandler (03–09–0353P).	May 29, 2003; June 5, 2003; *Arizona Business Gazette*.	The Honorable Boyd Dunn, Mayor, City of Chandler, 55 North Arizona Place, Suite 301, Chandler, Arizona 85225.	May 7, 2003	040040
Maricopa (FEMA Docket No.: B–7438).	City of El Mirage (02–09–945P).	May 22, 2003; May 29, 2003; *Arizona Republic*.	The Honorable Robert Robles, Mayor, City of El Mirage, P.O. Box 26, El Mirage, Arizona 85335.	August 28, 2003	040041
Maricopa (FEMA Docket No.: B–7438).	Town of Gila Bend (02–09–858P).	July 3, 2003; July 10, 2003; *Arizona Business Gazette*.	The Honorable Chuck Turner, Mayor, Town of Gila Bend, P.O. Box A, Gila Bend, Arizona 85337.	October 9, 2003	040043
Maricopa (FEMA Docket No.: B–7438).	City of Phoenix (03–09–0290P).	June 12, 2003; June 19, 2003; *Arizona Business Gazette*.	The Honorable Skip Rimsza, Mayor, City of Phoenix, 200 West Washington Street, 11th Floor, Phoenix, Arizona 85003–1611.	May 29, 2003	040051

State and county	Location and case No.	Date and name of newspaper where notice was published	Chief executive officer of community	Effective date of modification	Community number
Maricopa (FEMA Docket No.: B–7438).	City of Surprise (02–09–945P).	May 22, 2003; May 29, 2003; *Arizona Republic*.	The Honorable Joan H. Shafer, Mayor, City of Surprise, 12425 West Bell Road, Suite D–100, Surprise, Arizona 85374.	August 28, 2003	040053
Maricopa (FEMA Docket No.: B–7438).	Unincorporated Areas (02–09–945P).	May 22, 2003; May 29, 2003; *Arizona Republic*.	The Honorable R. Fulton Brock, Chairman, Maricopa County Board of Supervisors, 301 West Jefferson, 10th Floor, Phoenix, Arizona 85003.	August 28, 2003	040037
Maricopa (FEMA Docket No.: B–7438).	Unincorporated Areas (02–09–858P).	July 3, 2003; July 10, 2003; *Arizona Business Gazette*.	The Honorable Don Stapley, Chairman, Maricopa County Board of Supervisors, 301 West Jefferson, 10th Floor, Phoenix, Arizona 85003.	October 9, 2003	040037
Maricopa (FEMA Docket No.: B–7438).	Town of Youngtown (03–09–1014X).	May 22, 2003; May 29, 2003; *Arizona Republic*.	The Honorable Bryan Hackbarth, Mayor, Town of Youngtown, 12030 Clubhouse Square, Youngtown, Arizona 85363.	August 28, 2003	040057
Pima (FEMA Docket No.: B–7438).	City of Tucson (02–09–873P).	July 17, 2003; July 24, 2003; *Daily Territorial*.	The Honorable Bob Walkup, Mayor, City of Tucson, City Hall, 255 West Alameda Street, Tucson, Arizona 85701.	October 23, 2003	040076
Pima (FEMA Docket No.: B–7438).	Unincorporated Areas (03–09–0541P).	June 19, 2003; June 26, 2003; *Arizona Daily Star*.	The Honorable Ray Carroll, Republican County Supervisor, Pima County District Four, 130 West Congress Street, 11th Floor, Tucson, Arizona 85701.	September 25, 2003 ..	040073
California:					
Contra Costa (FEMA Docket No.: B–7438).	City of Clayton (03–09–0387P).	May 29, 2003; June 5, 2003; *Contra Costa Times*.	The Honorable Gregory J. Manning, Mayor, City of Clayton, City Hall, 6000 Heritage Trail, Clayton, California 94517.	May 9, 2003	060027
Los Angeles (FEMA Docket No.: B–7438).	Unincorporated Areas (02–09–404P).	May 22, 2003; May 29, 2003; *Los Angeles Times*.	The Honorable Yvonne B. Burke, Chair, Los Angeles County Board of Supervisors, 500 West Temple Street, Los Angeles, California 90012.	April 21, 2003	065043
Placer (FEMA Docket No.: B–7438).	City of Rocklin (02–09–810P).	May 7, 2003; May 14, 2003; *The Rocklin*.	The Honorable Kathy Lund, Mayor, City of Rocklin, 3970 Rocklin Road, Rocklin, California 95677–2720.	August 13, 2003	060242
Placer (FEMA Docket No.: B–7438).	Unincorporated Areas (02–09–810P).	May 7, 2003; May 14, 2003; *The Rocklin*.	The Honorable Rex Bloomfield, Chairman, Placer County Board of Supervisors, 175 Fulweiler Avenue, Auburn, California 95603.	August 13, 2003	060239
Sacramento (FEMA Docket No.: B–7438).	Unincorporated Areas (03–09–0080P).	May 8, 2003; May 15, 2003; *Daily Recorder*.	The Honorable Illa Collin, Chair, Sacramento County Board of Supervisors, 700 H Street, Room 2450, Sacramento, California 95814.	August 14, 2003	060262
San Diego (FEMA Docket No.: B–7438).	City of San Diego (03–09–0578P).	June 26, 2003; July 3, 2003; *San Diego Union-Tribune*.	The Honorable Richard M. Murphy, Mayor, City of San Diego, 202 C Street, 11th Floor, San Diego, California 92101.	June 9, 2003	060295
San Diego (FEMA Docket No.: B–7438).	San City of San Marcos (03–09–0123P).	April 24, 2003; May 1, 2003; *The Paper*.	The Honorable F.H. ''Corky'' Smith, Mayor, City of San Marcos, One Civic Center Drive, San Marcos, California 92069–2949.	July 31, 2003	060296
Santa Barbara (FEMA Docket No.: B–7438).	City of Solvang (02–09–1302P).	May 29, 2003; June 5, 2003 *Santa Barbara News Press*.	The Honorable Beverly Russ, Mayor, City of Solvang, P.O. Box 107, Solvang, California 93464–0107.	May 7, 2003	060756
Santa Barbara (FEMA Docket No.: B–7438).	Unincorporated Areas (02–09–179P).	July 3, 2003; July 10, 2003; *Santa Barbara News Press*.	The Honorable Naomi Schwartz, Chair, Santa Barbara County Board of Supervisors, 105 East Anapamu Street, Santa Barbara, California 93101.	October 9, 2003	060331
Santa Cruz (FEMA Docket No.: B–7438).	Unincorporated Areas (03–09–0475P).	May 8, 2003; May 15, 2003; *Register-Pajaronian*.	The Honorable Ellen Pirie, Chair, Santa Cruz County Board of Supervisors, 701 Ocean Street, Room 500, Santa Cruz, California 95060.	August 14, 2003	060353

State and county	Location and case No.	Date and name of newspaper where notice was published	Chief executive officer of community	Effective date of modification	Community number
Santa Cruz (FEMA Docket No.: B–7438).	City of Watsonville (03–09–0475P).	May 8, 2003; May 15, 2003; *Register-Pajaronian*.	The Honorable Richard de la Paz, Jr., Mayor, City of Watsonville, Administration Building, Second Floor, 215 Union Street, Watsonville, California 95076.	August 14, 2003	060357
Colorado:					
Adams (FEMA Docket No.: B–7438).	Unincorporated Areas (03–08–0104P).	May 14, 2003; May 21, 2003; *Brighton Standard-Blade*.	The Honorable Elaine T. Valente, Chairman, Adams County Board of Commissioners, 450 South Fourth Avenue, Brighton, Colorado 80601.	August 20, 2003	080001
Arapahoe (FEMA Docket No.: B–7438).	City of Littleton (03–08–0030P).	May 22, 2003; May 29, 2003; *Littleton Independent*.	The Honorable Susan M. Thornton, Mayor, City of Littleton, 2255 West Berry Avenue, Littleton, Colorado 80165.	August 28, 2003	080017
Broomfield (FEMA Docket No.: B–7438).	City and County of Broomfield (03–08–0061P).	June 19, 2003; June 26, 2003; *Boulder Daily Camera*.	The Honorable Karen Stuart, Mayor, City and County of Broomfield, One DesCombes Drive, Broomfield, Colorado 80020.	September 25, 2003	085073
Broomfield (FEMA Docket No.: B–7438).	City and County of Broomfield (03–08–0270P).	July 16, 2003; July 23, 2003; *Broomfield Enterprise*.	The Honorable Karen Stuart, Mayor, City and County of Broomfield, One DesCombes Drive, Broomfield, Colorado 80020.	June 27, 2003	085073
Denver (FEMA Docket No.: B–7438).	City and County of Denver (03–08–0210P.	May 15, 2003; May 22, 2003; *Denver Post*.	The Honorable John W. Hickenlooper, Mayor, City and County of Denver, 1437 Bannock Street, Suite 350, Denver, Colorado 80202.	April 24, 2003	080046
Adams Arapahoe Denver (FEMA Docket No.: B–7438).	City of Aurora (03–08–0210P).	May 15, 2003; May 22, 2003; *Denver Post*.	The Honorable Paul E. Tauer, Mayor, City of Aurora, 15151 East Alameda Parkway, Fifth Floor, Aurora, Colorado 80012.	April 24, 2003	080002
Douglas (FEMA Docket No.: B–7438).	Town of Parker (02–08–186P).	April 23, 2003; April 30, 2003; *Douglas County News-Press*.	The Honorable Gary Lasater, Mayor, Town of Parker, 20120 East Main Street, Parker, Colorado 80138–7334.	July 30, 2003	080310
Douglas (FEMA Docket No.: B–7438).	Unincorporated Areas (02–08–186P).	April 23, 2003; April 30, 2003; *Douglas County News-Press*.	The Honorable James R. Sullivan, Chairman, Douglas County, Board of Commissioners, 100 Third Street, Castle Rock, Colorado 80104.	July 30, 2003	080049
Douglas (FEMA Docket No.: B–7438).	Unincorporated Areas (03–08–0096P).	April 23, 2003; April 30, 2003; *Douglas County News-Press*.	The Honorable James R. Sullivan, Chairman, Douglas County Board of Commissioners, 100 Third Street, Castle Rock, Colorado 80104.	July 30, 2003	080049
El Paso, (FEMA Docket No.: B–7438).	City of Colorado Springs (03–08–0223P).	June 5, 2003; June 12, 2003; *The Gazette*.	The Honorable Lionel Rivera, Mayor, City of Colorado Springs, P.O. Box 1575, Colorado Springs, Colorado 80901.	May 13, 2003	080060
Jefferson (FEMA Docket No.: B–7438).	Unincorporated Areas (03–08–0099P) (03–08–0456P).	March 19, 2003; March 26, 2003; *Canyon Courier*.	The Honorable Richard M. Sheehan, Chairman, Jefferson County Board of Commissioners, 100 Jefferson County Parkway, Golden, Colorado 80419.	June 26, 2003	080087
Hawaii:					
Hawaii (FEMA Docket No.: B–7438).	Hawaii County (02–09–368P).	July 10, 2003; July 17, 2003; *Hawaii Tribune Herald*.	The Honorable Harry Kim, Mayor, County of Hawaii, 25 Aupuni Street, Hilo, Hawaii 96720.	October 16, 2003	155166
Maui (FEMA Docket No.: B–7438).	Maui County (03–09–0116P).	May 29, 2003; June 5, 2003; *Maui News*.	The Honorable Alan M. Arakawa, Mayor, Maui County, 200 South High Street, Wailuku, Hawaii 96793.	May 6, 2003	150003
Maui (FEMA Docket No.: B–7438).	Maui County (03–09–0107P).	July 3, 2003; July 10, 2003; *Maui News*.	The Honorable Alan M. Arawaka, Mayor, Maui County, 200 South High Street, Wailuku, Hawaii 96793.	June 13, 2003	150003
Idaho:					

State and county	Location and case No.	Date and name of newspaper where notice was published	Chief executive officer of community	Effective date of modification	Community number
Bonneville (FEMA Docket No.: B–7438).	City of Ammon (03–10–0229P).	July 3, 2003; July 10, 2003; *Post Register*.	The Honorable Bruce Ard, Mayor, City of Ammon, 2135 South Ammon Road, Ammon, Idaho 83406.	June 13, 2003	160028
Bonneville (FEMA Docket No.: B–7438).	Unincorporated Areas (03–10–0229P).	July 3, 2003; July 10, 2003; *Post Register*.	The Honorable Lee Stake, Chairman, Bonneville County Board of Commissioners, 605 North Capital Avenue, Idaho Falls, Idaho 83402.	June 13, 2003	160027
Nevada:					
Independent City (FEMA Docket No.: B–7438).	City of Carson City (01–09–592P).	June 19, 2003; June 26, 2003; *Nevada Appeal*.	The Honorable Ray Masayko, Mayor, City of Carson City, 201 North Carson Street, Suite 2, Carson City, Nevada 89701.	May 29, 2003	320001
Clark (FEMA Docket No.: B–7438).	City of Henderson (03–09–0861X) (03–09–980X).	May 1, 2003; May 8, 2003; *Las Vegas Review-Journal*.	The Honorable James Gibson, Mayor, City of Henderson, 240 South Water Street, Henderson, Nevada 89015.	April 21, 2003	320005
Clark (FEMA Docket No.: B–7438).	Unincorporated Areas (02–09–1071P).	April 24, 2003; May 1, 2003; *Las Vegas Review-Journal*.	The Honorable Mary J. Kincaid-Chauncey, Chair, Clark County Board of Commissioners, 500 South Grand Central Parkway, Las Vegas, Nevada 89155.	July 31, 2003	320003
Clark (FEMA Docket No.: B–7438).	Unincorporated Areas (03–09–0861X) (03–09–980X).	May 1, 2003; May 8, 2003; *Las Vegas Review-Journal*.	The Honorable Mary J. Kincaid-Chauncey, Chair, Clark County Board of Commissioners, 500 South Grand Central Parkway, Las Vegas, Nevada 89155.	April 21, 2003	320003
Clark (FEMA Docket No.: B–7438).	Unincorporated Areas (02–09–718P).	July 10, 2003; July 17, 2003; *Las Vegas Review-Journal*.	The Honorable Mary J. Kincaid Chauncey, Chair, Clark County Board of Commissioners, 500 South Grand Central Parkway, Las Vegas, Nevada 89155.	June 19, 2003	320003
Texas:					
Dallas (FEMA Docket No.: B–7438).	City of Dallas (00–06–248P).	January 31, 2002; February 7, 2002; *Dallas Morning News*.	The Honorable Ron Kirk, Mayor, City of Dallas, 1500 Marilla Street, Dallas, Texas 75201.	November 8, 2000	480171

(Catalog of Federal Domestic Assistance No. 83.100, ''Flood Insurance.'')

Dated: December 5, 2003.

Anthony S. Lowe,

Mitigation Division Director, Emergency Preparedness and Response Directorate.

[FR Doc. 03–30769 Filed 12–11–03; 8:45 am]

BILLING CODE 6718–04–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[DA 03–3748, MM Docket No. 02–12; RM–10356, RM–10551, RM–10553, and RM–10554]

Radio Broadcasting Services; Ash Fork, AZ, Beaver, UT, Cedar City, UT, Dolan Springs, AZ, Fredonia, AZ, Moapa Valley, NV, Peach Springs, AZ and Tusayan, AZ

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: In response to a Notice of Proposed Rule Making, 67 FR 5961 (February 8, 2002), this Report and Order allots Channel 267A to Ash Fork, Arizona, and allots Channel 285C3 to Peach Springs, Arizona as first local aural transmission services for those communities; allots Channel 278C1 to Fredonia, Arizona, as a second local service to Fredonia; reallots Channel 224C, Station KRRN(FM), from Dolan Springs, Arizona, to Moapa Valley, Nevada, as a second local service to Moapa Valley; substitutes Channel 221C for Channel 223C at Station KXFF(FM), Cedar City, Utah; substitutes Channel 222A for Channel 221A at Station KSGC(FM), Tusayan, Arizona; and allots Channel 246A to Beaver, Utah, as that community's first local aural transmission service. The coordinates for Channel 267A at Ash Fork, Arizona, are 35–16–13 NL and 112–32–31 WL, with a site restriction of 7.4 kilometers (4.6 miles) northwest of Ash Fork. The coordinates for Channel 285C3 at Peach Springs, Arizona, are 35–31–39 NL and 113–19–49 WL, with a site restriction of 8.6 kilometers (5.3 miles) east of Peach Springs. The coordinates for Channel 278C1 at Fredonia, Arizona, are 36–53–00 NL and 112–11–40 WL, with a site restriction of 29.5 kilometers (18.3 miles) east of Fredonia. The coordinates for Channel 224C, at Station KRRN(FM), Moapa Valley, Nevada, are 36–35–06 NL and 114–36–01 WL, with a site restriction of 11.7 kilometers (7.3 miles) west of Moapa Valley. The coordinates for Channel 221C at Station KXFF(FM), Cedar City, Utah are 37–38–41 NL and 113–22–28 WL, with a site restriction of 27.8 kilometers (17.3 miles) west of Cedar City. The coordinates for Channel 222A at Station KSGC(FM), Tusayan, Arizona, are 35–58–14 NL and 112–07–53 WL, with a site restriction of 0.6 kilometers (0.4 miles) southwest of Tusayan. The coordinates for Channel 246A at Beaver, Utah, are 38–16–37 NL and 112–38–25 WL.

DATES: Effective January 12, 2004.

FOR FURTHER INFORMATION CONTACT: R. Barthen Gorman, Media Bureau, (202) 418–2180.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's Report

and Order, MM Docket No. 02–12 adopted November 21, 2003, and released November 26, 2003. The full text of this Commission decision is available for inspection and copying during normal business hours in the FCC's Reference Information Center at Portals II, 445 12th Street, SW, Room CY–A257, Washington, DC, 20554. The document may also be purchased from the Commission's duplicating contractor, Qualex International, Portals II, 445 12th Street, SW, Room CY–B402, Washington, DC, 20554, telephone 202 863–2893. facsimile 202 863–2898, or via e-mail *qualexint@aol.com.*

List of Subjects in 47 CFR Part 73

Radio, Radio broadcasting.

■ Part 73 of Title 47 of the Code of Federal Regulations is amended as follows:

PART 73—RADIO BROADCAST SERVICES

■ 1.The authority citation for Part 73 reads as follows:

Authority: 47 U.S.C. 154, 303, 334 and 336.

§ 73.202 [Amended]

■ 2. Section 73.202(b), the Table of FM Allotments under Arizona, is amended by adding Ash Fork, Channel 267A, by removing Channel 224C at Dolan Springs, by adding Fredonia, Channel 278C1, by adding Peach Springs, Channel 285C3, by removing Channel 221A and by adding Channel 222A at Tusayan.

■ 3. Section 73.202(b), the Table of FM Allotments under Nevada, is amended by adding Channel 224C, Moapa Valley.

■ 4. Section 73.202(b), the Table of FM Allotments under Utah, is amended by adding Beaver, Channel 246A, by removing Channel 223C, and by adding Channel 221C at Cedar City.

Federal Communications Commission.

John A. Karousos,

Assistant Chief, Audio Division, Media Bureau.

[FR Doc. 03–30767 Filed 12–11–03; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[DA 03–3747; MB Docket No.03–195; RM–10745]

Radio Broadcasting Services; Dripping Springs & Marble Falls, TX

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: This document substitutes Channel 285A for Channel 285C2 at Marble Falls, Texas, reallots Channel 285A to Dripping Springs, Texas, and modifies the license for Station KXXS to specify operation Channel 285A at Dripping Springs in response to a petition filed by Amigo Radio, Ltd. See 68 FR 54878, September 19, 2003. The coordinates for Channel 285A at Dripping Springs are 30–11–54 and 98–00–46. Although Mexican concurrence has been requested for the allotment of Channel 285A at Dripping Springs, notification has not been received. Therefore, operation with the facilities specified for channel 285A at Dripping Springs is subject to modification, suspension, or termination without right to hearing, if found by the Commission to be necessary in order to conform to the 1992 USA-Mexico FM Broadcast Agreement or if specifically objected to by Mexico. With this action, this proceeding is terminated.

DATES: Effective January 12, 2004.

FOR FURTHER INFORMATION CONTACT: Kathleen Scheuerle, Media Bureau, (202) 418–2180.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's Report and Order, MB Docket No. 03–195, adopted November 21, 2003, and released November 26, 2003. The full text of this Commission decision is available for inspection and copying during regular business hours in the FCC's Reference Information Center, Portals II, 445 12th Street, SW., Room CY–A257, Washington, DC 20554. The complete text of this decision may also be purchased from the Commission's duplicating contractor, Natek, Inc., Portals II, 445 12th Street, SW., Room CY–B402, Washington, DC 20554, telephone 202–863–2893.

List of Subjects in 47 CFR Part 73

Radio, Radio broadcasting.

■ Part 73 of title 47 of the Code of Federal Regulations is amended as follows:

PART 73—RADIO BROADCAST SERVICES

■ 1. The authority citation for Part 73 continues to read as follows:

Authority: 47 U.S.C. 154, 303, 334 and 336.

§ 73.202 [Amended]

■ 2. Section 73.202(b), the Table of FM Allotments under Texas, is amended by removing Marble Falls, Channel 285C2 and by adding Dripping Springs, Channel 285A.

Federal Communications Commission.

John A. Karousos,

Assistant Chief, Audio Division, Media Bureau.

[FR Doc. 03–30766 Filed 12–11–03; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 74

[ET Docket No. 01–75; FCC 03–246]

Revision of Broadcast Auxiliary Service

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: This document addresses petitions for reconsideration of the *Report and Order* in this proceeding, filed by Nassau County Police Department (NCPD) and the Society of Broadcast Engineers, Inc. (SBE). In the Report and Order, the Commission amended the rules in part 74, Broadcast Auxiliary Service (BAS), part 78, Cable Television Relay Service (CARS), and part 101, Fixed Microwave Service (FS) to permit stations in these services to use digital technology. It also made conforming amendments so that the stations in these services, which share frequency bands and use similar transmission technologies, will operate under consistent regulations.

DATES: Effective January 12, 2004.

FOR FURTHER INFORMATION CONTACT: Ted Ryder, Office of Engineering and Technology, (202) 418–2803.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's *Memorandum Opinion and Order,* ET Docket No. 01–75, FCC 03–246, adopted October 15, 2003, and released October 20, 2003. The full text of this document is available on the Commission's Internet site at *www.fcc.gov.* It is also available for inspection and copying during regular business hours in the FCC Reference Center (Room CY–A257), 445 12th St., SW, Washington, DC 20554. The full text of this document also may be purchased from the Commission's duplication contractor, Qualex International, Portals II, 445 12th St., SW., Room CY–B402, Washington, DC 20554; telephone (202) 863–2893; fax (202) 863–2898; e-mail *qualexint@aol.com.*

Summary of the Report and Order

1. In the *Memorandum Opinion and Order,* the Commission addressed petitions for reconsideration of the

Report and Order (*R&O*) in this proceeding, filed by Nassau County Police Department (NCPD) and the Society of Broadcast Engineers, Inc. (SBE). In the *R&O*, the Commission amended the rules in part 74, Broadcast Auxiliary Service (BAS), part 78, Cable Television Relay Service (CARS), and part 101, Fixed Microwave Service (FS) to permit stations in these services to use digital technology. It also made conforming amendments so that the stations in these services, which share frequency bands and use similar transmission technologies, will operate under consistent regulations. Specifically, the actions in the *R&O* permit BAS licensees to use digital modulation in all of the Aural and Television (TV) BAS bands; update and conform BAS and CARS rules with FS rules; simplify and streamline BAS processing via our licensing database, the Universal Licensing System (ULS); and allow the operation of Wireless Assist Video Devices (WAVDs) under part 74.

2. The Commission granted NCPD's petition to exclude WAVDs from the band 500–506 MHz (UHF–TV channel 19) in the New York/Northeast New Jersey (NY/NJ) area in order to protect incumbent public safety land mobile operations in that area. In addition we exclude, to a lesser extent, WAVD operation on adjacent bands 494–500 MHz (UHF–TV channel 18) and 506–512 MHz (UHF–TV channel 20) in that area. We also denied SBE's petition to treat composite, dual carrier analog/digital TV BAS emissions within a single channel as separate emissions.

3. On March 28, 2003, the NCPD filed a Petition for Reconsideration of the *R&O* asking that we exclude WAVDs from the band 500–506 MHz (UHF–TV channel 19) in the NY/NJ area. Additionally, on April 4, 2003, the SBE filed a Petition for Reconsideration asking that we: (1) Treat composite, dual carrier analog/digital TV BAS emissions within a single BAS channel as separate emissions; (2) accommodate elective registration of BAS Mobile TV Pick-up (TVPU) receive sites on the ULS; (3) confirm that multiple BAS emissions of reduced bandwidth are permissible on standard TV BAS channels; and (4) clarify that BAS RPUs may continue to operate with 20 and 25 kHz bandwidths in the 450/455 MHz RPU band.

A. Exclusion of WAVDs From UHF–TV Channel 19 in the NY/NJ Area

4. We agree with NCPD that WAVD operations should be excluded from the band 500–506 MHz (UHF–TV channel 19) in the NY/NJ area. First, we agree with NCPD that there is a need for public safety land mobile use of UHF–TV channel 19, as evidenced by numerous existing public safety operations authorized under waiver on this channel in the NY/NJ area. We find that deployment of WAVDs on this channel in accordance with the rules as adopted in the *R&O, i.e.,* absent an exclusion, could thus pose a risk of interference to those public safety land mobile operations. We therefore exclude WAVD operation UHF–TV channel 19 in the NY/NJ area. We also exclude WAVD operation on adjacent UHF–TV Channels 18 and 20 in the NY/NJ area, to a lesser extent, consistent with the approach in the WAVD rules adopted by the *R&O*. We note that, because WAVDs are authorized on all 42 assignable channels, they may use other channels in the NY/NJ area to satisfy their communications needs, and thus this exclusion will not overly constrain WAVD deployment in the NY/NJ area. We also note that no WAVDs have yet been applied for or licensed, and we thus find that no existing WAVD licensee would be affected by this new exclusion. Accordingly, we granted NCPD's Petition and amend § 74.870(c)(4) to exclude WAVD operation on the band 500–506 MHz (UHF–TV channel 19) for a radius of 200 km around the coordinates listed in section 90.303 for the NY/NJ area, and on the bands 494–500 MHz (lower adjacent UHF–TV channel 18) and 506–512 MHz (upper adjacent UHF–TV channel 20) for a radius of 128 km around those coordinates.

B. Treatment of Composite, Dual Carrier Analog/Digital Emissions

5. In the *R&O,* the Commission decided that hybrid TV BAS systems, where an analog signal and a digital signal are transmitted in a single channel, would be treated as a single, aggregate emission regarding emission mask, emission designator, and Equivalent Isotropically Radiated Power (EIRP) determinations in the equipment authorization and station licensing processes. This approach conforms with the treatment of similar equipment used by the FS under part 101 and best addresses how various emissions fit within a single BAS channel. The Commission also adopted a similar approach for TV BAS composite systems under part 74. The Commission observed that hybrid and composite systems will accommodate both existing analog and new digital TV signals simultaneously over a common TV BAS channel, which will ease the transition to DTV. These systems provide a migration mechanism from using an analog signal to a combination analog/digital signal, and eventually to only a digital signal. The Commission stated that conforming the treatment of these systems with existing rules for the FS under part 101 would simplify manufacturing processes, equipment authorization, and licensing.

6. We continue to believe that conforming the treatment of composite systems under part 74 with the aggregate treatment of hybrid systems under parts 74 and 101 would simplify equipment authorization and licensing for these systems without complicating or compromising frequency coordination. We note that, under the rules adopted in the *R&O,* manufacturers only need to ensure compliance with a single bandwidth, emission mask, and EIRP to obtain certification for their equipment, rather than conducting separate measurements for the analog and digital portions of their signal. Moreover, because TV BAS licenses in the 2 GHz band designate the upper and lower edges of the licensed channel, rather than the assigned center frequency, our approach provides licensees with flexibility to accommodate multiple signals within their assigned channel. Requiring separate emission designators, as requested by SBE, would reduce this flexibility because each emission must then be associated with a specific frequency. In addition, because such a change would entail a wholesale restructuring of the way TV BAS is licensed in the 2 GHz band, making the requested change would entail a restructuring of the ULS and a requirement for many licensees to modify their licenses to conform. With respect to frequency coordination, we reiterate that for specific composite systems, coordinators could determine individual technical and operational details and interference protection criteria via the manufacturer and model shown in the individual license record in the ULS or, when necessary, contact the licensee to obtain this information through the normal coordination process, as is appropriate wherever additional technical or operational details are needed. In response to SBE's concern regarding the determination of whether the analog or digital carrier is on the low or high side of the channel, we note that the licensee could similarly be contacted. Finally, because the need to accommodate analog emissions will likely decrease after transition to DTV, we believe that the utility of these transitional analog/digital systems, as well as any need to obtain additional technical details for frequency coordination, will be relatively short-

lived. Accordingly, we do not find that frequency coordination would be unnecessarily complicated by aggregate treatment of BAS emissions within a channel, and consequently deny SBE's Petition. We therefore find separate treatment of analog and digital emissions unnecessary.

C. Additional Requests

7. *Elective Registration of BAS TVPU Receive Sites:* In its Petition, SBE asks that we allow licensees to electively register fixed receive sites associated with BAS TVPU stations in the ULS. SBE states that this information would be used to protect TVPU receive sites, especially during frequency coordination along international borders. As noted by SBE, frequency coordination of BAS TVPU stations necessitates information on TVPU receive sites, and registration of such receive sites may offer some benefit to frequency coordination by facilitating their identification. However, we find that, because registration of BAS TVPU receive sites in the ULS was neither at issue nor addressed by the *R&O,* it is beyond the scope of the *Memorandum Opinion and Order.* At this time, we find that such elective registration is unnecessary. However if parties continue to believe that such a requirement would be beneficial they may file a petition for rulemaking seeking the imposition of TVPU receive site registration.

8. *Reduced Bandwidth on TV BAS Channels:* SBE seeks clarification of several issues related to the use of digital links in the TV BAS bands. First, SBE asks that the Commission clarify that the Commission will not routinely dismiss applications specifying narrowband digital emissions. SBE notes that only a wideband (25 MHz) channel plan currently exists for the 7 and 13 GHz bands, but some newer digital equipment operates with only 6.5 MHz bandwidths. Second, SBE asks that the Commission clarify that a narrowband channel may operate on a frequency offset from the channel center. Finally, SBE asks the Commission to clarify that licensees may stack multiple narrowband emissions within a channel.

9. As an initial matter, we note that the Commission does not routinely dismiss applications for underutilization of the spectrum. If no other deficiencies exist, an application for narrowband emissions within a wideband channel will not be routinely dismissed. In addition, we note that the Commission grants licenses for these bands by specifying a band of operation, not a specific operating frequency. Therefore, a licensee has flexibility to locate its emissions within a channel where it is most advantageous. Finally, to promote spectrum efficiency, we note that the rules allow licensees to multiplex multiple signals within a channel. Under this rule, licensees may provide information using multiple narrowband channels within the larger channel subject to the condition that the composite emissions meet the rules for out-of-band emissions. In these instances, we note that spectral efficiency will be further enhanced if the presence of systems operating on frequencies other than the channel center is accounted for in the frequency coordination process.

10. *RPU BAS with 20 kHz and 25 kHz Bandwidths:* Finally, in its Petition, SBE notes that the Commission, in the *R&O,* rechannelized the BAS RPU 450/455 MHz band into 6.25 kHz blocks, stackable to 50 kHz maximum channel bandwidth, and adopted certain Part 90 technical standards, including the § 90.210 emission mask requirements, for authorized bandwidths of 30 kHz or less. SBE, claiming that the part 90 technical standards only allow a maximum channel width of 12.5 kHz, requests that we clarify that licensees may continue to use channel widths up to 25 kHz. The rules adopted in the *R&O,* which permit narrowband channels to be stacked to form wider channels, have not changed and are not restricted by the part 90 limitations on channel bandwidth. Thus, licensees may continue to stack these channels as needed, up to a maximum channel bandwidth of 50 kHz. However, we encourage licensees to operate with spectrally efficient equipment and use the minimum bandwidth necessary for their operation.

Final Regulatory Flexibility Certification

11. The Regulatory Flexibility Act of 1980, as amended (RFA) [1] requires that a regulatory flexibility analysis be prepared for rulemaking proceedings, unless the agency certifies that ''the rule will not have a significant economic impact on a substantial number of small entities.'' [2] The RFA generally defines ''small entity'' as having the same meaning as the terms ''small business,'' ''small organization,'' and ''small governmental jurisdiction.'' [3] In addition, the term ''small business'' has the same meaning as the term ''small business concern'' under the Small Business Act.[4] A small business concern is one which: (1) Is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (SBA).[5]

12. In the *Report and Order* in this proceeding, the Commission established Wireless Assist Video Devices (WAVDs), allowing them to operate on certain unused TV channels on a secondary basis to other services. To provide flexibility, WAVDs are authorized on 42 TV channels, which include TV channels 8–12, 14–36, and 38–51, with operation subject to certain separation rules to protect other services. In this connection, WAVD operation is excluded on four channels, TV channels 14–17, in the New York/NE New Jersey (NY/NJ) area, to protect incumbent land mobile operations. In the *Memorandum Opinion and Order,* the Commission excludes WAVD operation on three additional channels, TV channels 18–20, in the NY/NJ area, to protect incumbent public safety land mobile operations authorized pursuant to waivers of the Commission's rules.

13. We believe that these additional exclusions are necessary to protect incumbent public safety land mobile licensees and will have only minimal impact on prospective WAVD licensees. We note that public safety operations are extensive in this area on these frequencies and it is unlikely that perspective WAVD licensees could find the frequencies usable. We find that increasing the number of channels from which WAVD operation is excluded in the NY/NJ area from four to seven is insignificant given the total number of TV channels generally available to WAVD licensees. We also note that no WAVDs have yet been applied for or licensed, and we thus find that no existing WAVD licensee is affected by these new exclusions. Finally, we note that wherever WAVDs cannot be used, whether due to these exclusions, to other channel separations, or to conflicting frequency usage, cabled video assist devices would remain a

[1] The RFA, *see* 5 U.S.C. 601–612, has been amended by the Contract With America Advancement Act of 1996, Public Law 104–121, 110 Stat. 847 (1996) (CWAAA). Title II of the CWAAA is the Small Business Regulatory Enforcement Fairness Act (SBREFA).

[2] 5 U.S.C. 605(b).

[3] 5 U.S.C. 601(6).

[4] 5 U.S.C. 601(3) (incorporating by reference the definition of ''small business concern'' in Small Business Act, 15 U.S.C. 632). Pursuant to 5 U.S.C. 601(3), the statutory definition of a small business applies ''unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the **Federal Register**.''

[5] Small Business Act, 15 U.S.C. 632.

viable option for WAVD licensees. We thus conclude that these additional exclusions will have only a minor effect on WAVD operations, and hence a minimal economic impact on WAVD licensees. Therefore, we certify that the requirements of the *Memorandum Opinion and Order* will not have a significant economic impact on a substantial number of small entities. The Commission will send a copy of the *Memorandum Opinion and Order,* including a copy of this final certification, in a report to Congress pursuant to the Congressional Review Act, *see* 5 U.S.C. 801(a)(1)(A). In addition, the *Memorandum Opinion and Order* and this certification will be sent to the Chief Counsel for Advocacy of the Small Business Administration.

Ordering Clauses

14. Pursuant to sections 1, 4(i), 302, 303(f), 303(r), and 332 of the Communications Act of 1934, as amended, 47 U.S.C. 151, 154(i), 302a, 303(f), 303(r), and 332, this Memorandum Opinion and Order *is adopted.*

15. Part 74 of the Commission's Rules is amended as specified in Rule Changes, effective January 12, 2004. This action is taken pursuant to sections 1, 4(i), 302, 303(f), 303(r), and 332 of the Communications Act of 1934, as amended, 47 U.S.C. 151, 154(i), 302a, 303(f), 303(r), and 332.

16. The petition for reconsideration of the *Report and Order* in this proceeding filed by Nassau County Police Department (NCPD) *is granted,* and the petition for reconsideration filed by the Society of Broadcast Engineers, Inc., *is granted in part and denied in part,* consistent with the terms of this Memorandum Opinion and Order.

17. The Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, *shall send* a copy of this Memorandum Opinion and Order, ET Docket No. 01–75, including the Final Regulatory Flexibility Certification, to the Chief Counsel for Advocacy of the Small Business Administration.

18. Finally, the proceeding in ET Docket No. 01–75 *is terminated.*

List of Subjects in 47 CFR Part 74

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

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

Rule Changes

■ For the reasons set forth in the preamble, the Federal Communications Commission proposes to amend 47 CFR part 74 as follows:

PART 74—EXPERIMENTAL RADIO, AUXILIARY, SPECIAL BROADCASTING, AND OTHER PROGRAM DISTRIBUTIONAL SERVICES

■ 1. The authority citation for part 74 continues to read as follows:

Authority: 47 U.S.C. 154, 303, 307, 336(f), 336(h) and 554.

■ 2. Section 74.870 is amended by revising the entry for New York/NE New Jersey in the table of paragraph (c)(4) to read as follows:

§ 74.870 Wireless video assist devices.

* * * * *

(c) * * *

(4) * * *

Area	North latitude	West longitude	Excluded frequencies (MHz)	Excluded channels		
				200	128	52 km
* * * *		*	*			*
New York/NE New Jersey	40°45′	73°59′37.5″	470–476	14	.	
			476–482	15	.	
			482–488	16	.	
			488–494	.....		17
			494–500	.....		18
			500–506	19	.....	
			506–512	.....		20
* * * *		*	*			*

* * * * *

[FR Doc. 03–30749 Filed 12–11–03; 8:45 am]

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 600

[Docket No. 020424095–3252–02, I.D. 032801B]

RIN 0648–AP25

Fishing Capacity Reduction Program for the Crab Species Covered by the Fishery Management Plan for the Bering Sea/Aleutian Islands King and Tanner Crabs

AGENCY: National Marine Fisheries Service, National Oceanic and Atmospheric Administration, Commerce.

ACTION: Final rule.

SUMMARY: This final rule establishes a fishing capacity reduction program in the fishery for the crab species managed under the Bering Sea/Aleutian Islands King and Tanner Crabs Fishery Management Plan (crab FMP). The program will reduce excess capacity and promote economic efficiency in the crab fishery. It is authorized under both special legislation and existing National Marine Fisheries Service (NMFS) regulations governing fishing capacity reduction programs. Its objectives include: increasing harvesting productivity for crab fishermen who remain after capacity reduction, helping conserve and manage fishery resources, and encouraging harvesting effort rationalization. Program participation is

voluntary. Under the program, NMFS will pay participants for withdrawing vessels from fishing, relinquishing fishing licenses, and surrendering fishing histories. NMFS will finance the program's $100 million cost with a 30–year loan to be repaid by post-reduction fishermen.

DATES: The final rule is effective January 12, 2004.

ADDRESSES: Copies of the Environmental Assessment, Regulatory Impact Review, and Final Regulatory Flexibility Analysis are available from Michael L. Grable, Chief, Financial Services Division, National Marine Fisheries Service, 1315 East-West Highway, Silver Spring, MD 20910–3282.

Written comments regarding the burden-hour estimates or other aspects of the collection of information requirements contained in this final rule may be submitted to Michael L. Grable at the above address and by e-mail to *David__Rostker@omb.eop.gov*, or fax to (202) 395–7285.

Anyone wishing to contact the NMFS Restricted Access Management Program (which issues crab species fishing licenses) may do so at this address: Restricted Access Management Program, National Marine Fisheries Service, P.O. Box 21668, Juneau, AK 99802–1668.

FOR FURTHER INFORMATION CONTACT: Michael L. Grable,(301)713–2390.

SUPPLEMENTARY INFORMATION:

Statutory and Regulatory Background

The Consolidated Appropriations Act of 2001 (Pub. L. 106–554, section 144) directed the Secretary of Commerce to establish a $100 million fishing capacity reduction program (crab program) in the Bering Sea/Aleutian Islands king and Tanner crab fishery (crab fishery). That law was subsequently amended twice (Pub. L. 107–20, section 2201; and Pub. L. 107–117, section 205) to clarify the vessels eligible to participate in the crab fishery and change the crab program's funding from a $50 million appropriation and a $50 million loan to a $100 million loan (reduction loan). The authority for making loans of this type is sections 1111 and 1112 of the Merchant Marine Act, 1936 (46 App. U.S.C. 1279f and 1279g)(MMA)(Title XI).

The North Pacific Fishery Management Council (Council) developed, and NMFS implemented, the crab FMP under the Magnuson-Stevens Fishery Conservation and Management Act (16 U.S.C. 1801 *et seq.*)(Magnuson-Stevens Act). The Council developed Amendment 5 to the crab FMP to establish a license limitation program (LLP) for the crab fishery (63 FR 52642). The Council also developed Amendment 10 to the crab FMP which further defined the eligibility criteria for crab LLP licenses (66 FR 48813). NMFS implemented Amendment 10 and later corrected the implementing regulation's eligibility criteria (68 FR 46117). Regulations implementing the crab FMP govern the fishery's management.

Subpart L to 50 CFR part 600, a framework rule promulgated pursuant to section 312 of the Magnuson-Stevens Act (16 U.S.C. 1861a(b)-(e)), governs fishing capacity reduction in general. NMFS publishes this rule as a new § 600.1018 appearing immediately after the framework rule's last existing section.

Primary Statutory Objective

Section 144 of Pub. L. 106–554 established the crab program's primary objective as reducing ''the fishing capacity in the BSAI crab fisheries by permanently reducing the number of license limitation program crab licenses . . . .''

Summary of Proposed Rule and Response to Comments

On December 12, 2002, NMFS published proposed regulations to establish this crab program (67 FR 76329). The preamble to the proposed rule provides additional information on the program as it was proposed. NMFS extended and later reopened the proposed rule's public comment period.

NMFS received comments from 28 entities. Comments were evenly distributed among individuals and organizations representing the views of many parties. The comments generally supported the crab program, but some disagreed with proposed rule aspects. The following is a summary of the comments and NMFS' responses.

Comment 1: Three comments involve the definition of the term ''reduction vessel''. Two of these suggest redefining the term ''reduction vessel'' to mean the vessel currently designated on a crab reduction permit. The other suggests expanding the definition to include vessels which replaced other vessels under the Amendment 10 exceptions.

Response: NMFS structured the proposed rule to make the majority of crab LLP license holders eligible to participate in the crab program. The comments suggest, however, that the proposed rule might exclude some holders who either qualified for their LLP crab licenses under the Amendment 10 exceptions or transferred these licenses, after their issuance, to vessels other than those whose catch histories gave rise to the licenses. Accordingly, NMFS has revised the proposed rule to better accommodate license holders in these circumstances.

The proposed rule defined the term ''reduction vessel'' as the vessel whose crab fishing history during the FMP's three qualification periods gave rise to an LLP crab license. This was the reduction vessel for all crab program purposes (e.g., loss of fishing privileges, loss of crab fishing history, bid scoring, and reduction loan apportionment). The final rule, however, replaces the term ''reduction vessel'' with two separate terms, ''reduction/privilege vessel'' and ''reduction/history vessel''.

In the final rule, a reduction/privilege vessel is the vessel designated on a crab LLP license on the date of the final rule's publication in the **Federal Register** and a reduction/history vessel is the vessel whose catch history gave rise to the crab LLP license. In many cases, the reduction/privilege vessel and the reduction/history vessel will be the same vessel, but the distinction between these two reduction vessel functions will better accommodate license holders in the circumstances these comments involve. The reduction/privilege vessel no longer has any significance for any crab program purpose other than the loss of fishing privileges, and the reduction/history vessel is determinative for all other crab program purposes which involve fishing history.

Comment 2: One comment suggests redefining the term ''crab reduction permit'' to mean a bidder's non-interim crab LLP license plus all of its predecessor history.

Response: NMFS has resolved this issue by adding the terms ''reduction/history vessel'' and ''reduction fishing history''.

Comment 3: One comment suggests redefining ''crab reduction history'' as all crab fishing history giving rise to or accruing under a crab reduction permit.

Response: NMFS has resolved this issue by adding the term ''reduction fishing history''.

Comment 4: One comment suggests modifying the term ''bid crab'' to recognize that documented harvests of crab for crab program purposes may have been made from several different vessels.

Response: NMFS agrees and has appropriately revised the final rule.

Comment 5: Five comments involve the confidentiality of Alaska's fish ticket data.

Two of these suggest adding a final rule provision requiring bidders to waive confidentiality for the crab fishing history associated with their bids, primarily as a way of providing

more accurate information to voters in the crab program referendum. Two others suggest a provision allowing the disclosure of crab fishing histories to potential bidders. The last suggests that NMFS and the State of Alaska resolve confidentiality issues affecting the crab program.

Response: Alaska law (AS 16.05.815) make the fish ticket data confidential. Neither NMFS nor State officials have authority to use the State's fish ticket data inconsistently with the State's law. Accordingly, NMFS cannot accommodate these comments.

Comment 6: One comment suggests that NMFS review Alaska's fish ticket data to ensure they reflect post-landing adjustments to landing data.

Response: The crab program must rely on the State's data, and NMFS cannot review them for this purpose.

Comment 7: Thirteen comments addressed the five-year period for determining ''bid crab''.

Ten of these agreed with the proposed rule's provision in this respect. Two disagreed with the proposed rule's provisions and suggested that a more appropriate period was the most recent five-years in which a bidder's reduction/history vessel actually harvested crab in each endorsement fishery (rather than the most recent five-year period during which each endorsement fishery was open for directed fishing). The last suggests the final rule provide for this period in some area/species endorsement fisheries to mirror certain years in the Council's proposed crab rationalization plan.

Response: The proposed rule defined the term ''bid crab'' as the documented harvest of crab during the most recent 5 years of a 10–year period, beginning on January 1, 1990, and ending on December 31, 1999, during which each of the reduction endorsement fisheries were open. NMFS believes this is the fairest approach most consistent with the crab program's authorizing legislation as well as the approach most closely resembling certain years in the Council's proposed crab rationalization plan. The crab program's authorizing statute specifies the beginning and ending date of the 10–year period, and NMFS has no authority to provide otherwise.

Comment 8: Ten comments discuss the stacking of more than one crab LLP license and associated crab fishing histories on a single reduction vessel. Nine of these suggest NMFS accommodate stacking for crab program bidding purposes. One asked how NMFS would provide for this if it were allowed.

Response: NMFS believes each crab program bid should include only one crab reduction permit and the crab fishing history which gave rise to it. Stacked crab LLP licenses and their future disposition is a matter for fisheries managers' resolution.

Comment 9: Three comments suggest the final rule provide the non-crab reduction permit component of a bid's reduction fishing interest be restricted to the reduction vessel's non-crab licenses and exclude any halibut/sablefish individual fishing quota (IFQ).

Response: NMFS believes the crab program's legislative authority requires bidders to relinquish all fishing licenses, permits, or other privileges they hold which were issued based on the fishing histories of the bids' reduction/history vessels. Consequently, each bidder holding halibut/sablefish IFQ on the date this final rule is published in the **Federal Register** must relinquish the IFQ if its issuance was based on the fishing history of the bidder's reduction/history vessel.

Comment 10: One comment suggests five specific technical clarifications. These include: inserting ''Bering Sea and Aleutian Islands (BSAI)'' before ''crab species'' in 50 CFR 600.1018(a); inserting ''BSAI'' before ''crab'' in 50 CFR 600.1018(b); striking paragraph ''(h)'' and inserting paragraph ''(i)'' in 50 CFR 600.1018(h)(2), (h)(4), and (h)(6); striking ''and'' at the end of 50 CFR 600.1018(h)(4); and striking paragraph ''(i)(1)'' and inserting paragraph ''(j)(1)'' in 50 CFR 600.1018(j)(2).

Response: NMFS agrees and has appropriately revised the final rule.

Comment 11: One comment suggests NMFS revise the final rule to clarify that co-bidders are not required for non-crab reduction permits.

Response: NMFS agrees and has appropriately revised the final rule. There are no co-bidders for non-crab reduction permits because non-crab reduction permits are restricted to those for which bidders were the holders of record on the date this final rule is published in the **Federal Register**.

Comment 12: One comment states that the proposed rule unfairly omits crab vessels under 32 feet (9.75 meters) as well as parties without crab LLP licenses.

Response: The authorizing statute established the crab program's eligibility criteria and does not allow NMFS to accommodate this comment.

Comment 13: One comment suggests the definition of ''bid crab'' does not include the crab fishing histories of vessels that were lost or destroyed and subsequently replaced by other vessels.

Response: NMFS intended the proposed rule's definition of ''bid crab'' to do so and has appropriately revised the proposed rule to remove any ambiguity about this.

Comment 14: Nine comments involve lost or destroyed vessels and their reduction fishing histories. Eight of these suggest bids involving lost or destroyed vessels require existing (i.e., neither lost nor destroyed) reduction vessels that lose their fishing privileges.

Response: NMFS agrees that each bid requires an existing reduction vessel that loses its fishing privileges. In the final rule, this is the reduction/privilege vessel. NMFS believes this is a matter of equity. Most bidders will have existing reduction/privilege vessels that will lose their fishing privileges. Allowing lost or destroyed vessels to be reduction/privilege vessels for this purpose would allow a minority of bidders to receive value for something which no longer has any value. Moreover, casualty insurance has in all likelihood already compensated most of those whose vessels were previously lost or destroyed.

Comment 15: Five comments suggest that the crab program make no exceptions beyond those provided in Amendment 10 for lost or destroyed vessels or crab LLP licenses acquired through fishing history transfers.

Response: NMFS agrees. Neither the proposed nor the final rule makes any such exceptions.

Comment 16: One comment requests that NMFS report crab program results by ''region''.

Response: NMFS will report crab program results only by reduction endorsement fishery and by the crab fishery as a whole.

Comment 17: One comment asks how the crab program accommodates the captain's share provisions of the Council's crab rationalization plan.

Response: The crab program does not accommodate this provision and makes no provision for captains' shares because NMFS has no statutory authority to do so.

Comment 18: One comment asks what constitutes the reduction loan borrower.

Response: After NMFS completes the crab program, all reduction fishery license holders under whose licenses vessels land crab and whose fees begin repaying the reduction loan are collectively the reduction loan borrower. Neither the reduction loan nor its collective borrower are conventional. The reduction loan and its repayment method are statutory. There are no promissory notes, mortgages, or other loan security documents. No individual is responsible

for repaying any specific loan portion. After the fees commence, the first ex-vessel purchasers of crab from the reduction fishery automatically deduct the fees from trip proceeds before paying the proceeds' balance to the parties otherwise entitled to them. No individual's assets secure the loan's repayment (although nonpayment, for whatever reason, of the fees could subject an individual's assets to enforced payment of any unpaid fees).

Comment 19: One comment suggests the final rule clarify whether Community Development Quota landings are subject to the reduction loan repayment fees.

Response: Community Development Quota landings are subject to the fees.

Comment 20: One comment objects both to the statutory method of collecting the reduction loan repayment fees and the capacity reduction framework regulation provisions to which collection of the fee is subject.

Response: NMFS has no alternative to using the statutory method and believes the framework provisions in this respect are reasonable and necessary.

Comment 21: One comment suggests the final rule provide that the crab program not result in crab catcher processors using a greater share of total allowable crab catches after reduction than they did before reduction due to the likelihood that most crab program bids will involve crab catcher vessel delivering ashore.

Response: This is a voluntary program, and NMFS makes no bidding distinction between crab catcher processors and crab vessels delivering their catches ashore. The Council is the proper forum for dealing with this issue.

Comment 22: One comment suggests that the final rule provide for crab catcher processors' relinquishing their processing histories.

Response: NMFS has no statutory authority to do this as part of the crab program.

Comment 23: One comment requests clarification of any second referendum's basis.

Response: A second referendum may occur, at NMFS' discretion, if the first referendum fails. The general basis would be the expectation that a second round of bids might result in lower bid amounts producing greater capacity reduction per dollar of reduction cost than the first round of bids and, consequently, might improve the likelihood of a second referendum success.

Comment 24: One comment suggests the final rule provide for paying creditors whose security includes vessels or licenses involved in the crab program.

Response: NMFS believes the proposed rule made adequate provision for public notice to secured creditors.

Comment 25: One comment suggests the final rule provide for including the holders of interim crab licenses in the crab program based on whatever portions of their fishing histories are undisputed.

Response: The authorizing statute restricts the crab program to non-interim crab LLP license holders, and NMFS has no authority to provide otherwise.

Comment 26: One comment suggests releasing, before conducting the fee referendum, aggregate data about bids involving affiliated fishing interests.

Response: NMFS does has no way of knowing which bidders may be affiliated with other bidders.

Comment 27: One comment suggests reduction vessels should not lose their fishing privileges in fisheries other than the reduction fishery.

Response: The authorizing statute requires that reduction/privilege vessels lose their worldwide fishing privileges, and NMFS has no discretion in this matter.

Comment 28: One comment suggests the reduction loan be prorated over the various crab area/species endorsement fisheries.

Response: The authorizing statute specifically provides for doing this, and the proposed rule provided for it in accordance with the statute.

Comment 29: One comment was concerned that the crab program might result in revoking crab fishing history other than the crab fishing history which may be used as the basis of any future crab rationalization plan.

Response: The crab program will result in revoking the complete crab fishing history of each crab reduction/history vessel.

Comment 30: One comment suggests the crab program involve relinquishment of the worldwide fishing privileges of what, under the final rule, are reduction/privilege vessels.

Response: Both the proposed rule and the final rule so provide.

Changes to Proposed Rule

Although public comment about the proposed rule did not address the issue of when NMFS notifies crab program bidders whether NMFS accepted or rejected their bids, the final rule differs in this respect from the proposed rule. The proposed rule provided for this notification occurring before the referendum about the reduction loan repayment fee. Based on interim public comment during the Pacific Coast groundfish fishing capacity reduction program (68 FR 42613), however, NMFS now believes that postponing this notice until after the referendum has already occurred may help neutralize any potential which the proposed rule aspect might have had for biasing referendum results. If referendum voters know before they vote whose bids NMFS accepted and whose bid NMFS rejected, they may vote differently than they otherwise would have if they did not know whose bids NMFS accepted and whose bids NMFS rejected.

The following reflects the minor or clarifying revisions of the proposed rule which the final rule incorporates:

(1) NMFS revised the term ''reduction vessel'' by replacing it with two separate terms, ''reduction/privilege vessel'' and ''reduction/history vessel''. Consequently, the term ''reduction vessel'' does not appear anywhere in the final rule. The effect of this revision is that the vessel, for loss of fishing privileges purposes, will be the vessel designated on a crab LLP license at the time the final rule is published in the **Federal Register**; and the vessel, for loss of fishing history, bid scoring, and loan apportionment purposes, will be the vessel (or in some cases, vessels) whose fishing history gave rise to a crab LLP license. In most cases, the vessels will be the same for both purposes; in other cases, the vessels for each purpose will be different.

(2) NMFS included a new term, ''reduction fishing history'', in order to clarify that the fishing history component of each bidder's reduction fishing interest includes the complete documented harvest, upon any part of which NMFS based issuance of the crab LLP licence included as a crab reduction permit in the bid, plus such fishing history, after the issuance of such crab LLP license, of any other vessel upon which the bidder used such crab reduction permit;

(3) NMFS clarified that co-bidders are not required for non-crab reduction permits;

(4) NMFS eliminated any ambiguity about whether replacement vessels are, under appropriate Amendment 10 exceptions, reduction/history vessels;

(5) NMFS added a definition for the term ''replacement vessel'' in order to clarify certain aspects of multiple reduction/history vessels under the exceptions to Amendment 10; and

(6) NMFS revised the bidder acceptance/rejection notice provisions to postpone this notice until after the crab program's referendum.

Finally, NMFS herein clarifies that it has no direct authority to revoke world-wide fishing privileges. The U.S.

Department of Transportation's Maritime Administration (MARAD) is responsible under section 9 of the Shipping Act of 1916, 46 App. U.S.C. 808, for approving transfers of vessels from the U.S. flag to a foreign flag. MARAD has the authority and already had a mechanism in the regulations to deny the approval to flag foreign fishing industry vessels over 1,000 gross tons. However, MARAD's regulations at 46 C.F.R. part 221.15 also included a general approval for transfers of fishing industry vessels under 1,000 gross tons. Upon learning of the crab program provision, MARAD amended the regulations to also address vessels under 1,000 gross tons that are subject to the crab program and to make it clear that any vessel that participates in the crab program will be ineligible for a section 9 approval to transfer the vessel to a foreign flag. Further, MARAD is planning to again amend its section 9 regulations to address the broader issue of fishing vessels that are subject to a capacity reduction program.

Key Steps

NMFS will, in the following chronological order, now implement the crab program by:

(1) Publishing the final regulations;

(2) Publishing in the **Federal Register** a notification listing all qualified bidders and all qualified voters;

(3) Publishing in the **Federal Register** an invitation to bid, along with a bidding form and terms of capacity reduction agreement;

(4) Issuing detailed bidding guidance to each qualifying bidder;

(5) Sending a crab program invitation to bid and a bidding form and terms of capacity reduction agreement to each qualifying bidder;

(6) Receiving bids during the period in which bidding remains open;

(7) Tallying the resulting bids;

(8) Accepting or rejective the bids (without notice to the bidders);

(9) Issuing detailed voting guidance to each qualifying voter;

(10) Sending a referendum ballot to each qualifying voter;

(11) Receiving referendum votes during the period in which voting remains open;

(l2) Tallying the resulting votes;

(13) Notifying referendum voters of the referendum's results; and

(14) In the instance of a successful referendum:

(a) Notifying accepted bidders that their bids were accepted and that the resulting reduction contracts are unconditional,

(b) Publishing in the **Federal Register** a reduction payment tender notification,

(c) Tendering reduction payments,

(d) Disbursing reduction payment in accordance with accepted bidders written payment instructions,

(e) Accomplishing the necessary crab program revocations and restrictions, and

(f) Administering the payment and collecting reduction loan repayment fees.

Reading the Rule in Conjunction with the Framework Rule

This final rule establishes which framework rule provisions (this subpart's § 600.1000 through § 600.6017) do not apply to the crab program. Consequently, a comprehensive understanding of the crab program requires reading this final rule in conjunction with the remaining framework rule provisions that continue to apply to the crab program. NMFS recommends that all interested persons carefully read the former in close conjunction with the latter.

Summary of Crab Program Notices and Mailings

This table summarizes, in chronological order, key crab program actions that will involve providing notice to affected persons:

Notice Actions	Method		
	FEDERAL REGISTER	Mailing	Website
Final rule	X		X
Bidder and voter list	X	X	X
Invitation to bid, along with bidding form and terms of capacity reduction agreement	X	X	X
Referendum ballots		X	X
Referendum results		X	X
Bidder acceptance/reduction contracts unconditional		X	
Reduction payment tender notice	X		
Reduction payment tender		X	
Fee payment and collection		X	X

NMFS will also mail each of the following:

Action	NMFS will mail:
Bidder and voter notice	A notice to each crab license holder who is prospectively a qualifying bidder, voter, or both.
Bidder guidance	Detailed guidance to all qualifying bidders about the crab program, how to bid, and other bidding matters.
Invitation to bid, bidding form, and terms of capacity reduction agreement	An invitation to bid and a bidding form and bidding terms and agreements to each crab license holder who is on our prospectively qualifying bidder list.
Voter guidance	Detailed guidance to all qualifying voters about how to vote and other referendum matters.
Referendum ballots	A referendum ballot and instructions to each crab license holder who is on NMFS prospectively qualifying voter list.
Referendum results	The results of the referendum to each crab license holder.
Bid Acceptance/ Reduction Contracts Unconditional	Notification, to each accepted bidder, that its bid was accepted and a successful referendum has fulfilled the one condition to performance of the reduction contracts.
Reduction payment tender	NMFS' tender of reduction payment to each accepted bidder (requesting the bidder's written reduction payment instructions).
Fee payment and collection notice	A notice to each fish seller and each fish buyer of the initial fee payment and collection requirement.

All website postings will be solely for the public's convenience and our failure or inability to post anything on a website does not affect the rights, privileges, duties, or obligations of any person involved.

Classification

The Assistant Administrator for Fisheries, National Marine Fisheries Service, determined that this final rule is consistent with the Consolidated Appropriations Act of 2001, as amended, the Magnuson-Stevens Fishery Conservation and Management Act, and other applicable laws.

In compliance with the National Environmental Policy Act, NMFS prepared an environmental assessment for this final rule. The assessment discusses the impact of this rule on the natural and human environment and integrates a Regulatory Impact Review and a Final Regulatory Flexibility Analysis. NMFS assessment has resulted in a finding of no significant impact. NMFS will send the assessment, the review and analysis to anyone who requests it (see **ADDRESSES**).

NMFS determined that this final rule is economically significant for purposes of Executive Order 12866. The rule may result in a reverse auction that could total up to $100 million worth of successful bids. These bids represent the compensation for the net present value of the total losses that the fishermen expect to bear from exiting the market. The expected costs of the rule would also include administrative costs that would be incurred by NMFS in facilitating this auction. The benefits of the rule would be the increase in producer and consumer surplus resulting from the lower costs of harvesting the same amount of crab. The benefits expected by the remaining fishermen should at least equal the cost of compensating the exiting fishermen since this auction is voluntarily undertaken.

In compliance with the Regulatory Flexibility Act, NMFS prepared an analysis that describes the economic impact this final rule may have on small entities. In this final rule's preamble, NMFS described the rule and its legal basis. NMFS intends the analysis to aid in considering all reasonable regulatory alternatives that can minimize the economic impact on affected small entities.

This final rule's effect on post-reduction crab harvesters will depend on the crab program's nature and size. Our assessment, review, and analysis considered:

(1) The effect of three alternatives:

(a) The status quo,

(b) Uniform reduction loan repayment fees, and

(c) Weighted reduction loan repayment fees; and

(2) Based on five potential magnitudes of revoked crab licenses and vessels:

(a) 30,

(b) 45,

(c) 60,

(d) 75, and

(e) 90.

The preferred alternative, weighted reduction loan repayment fees, provides the most equitable method for allocating reduction loan repayment, and this is the reduction loan repayment method section 144 of Pub. L. 106–554 requires.

The final rule's impact will be positive for both bidders whose bid offers NMFS accepts and post-reduction harvesters whose landing fees repay the reduction loan because the bidders and harvesters will assume the impact and fewer crab license holders after capacity reduction will be collectively able to catch more fish than if capacity had not been reduced:

(1) Bidders will volunteer to make bid offers at bid amounts of their own choice. Presumably, no bidder will volunteer to make a bid offer with a bid amount that is inconsistent with the bidder's interest; and

(2) Reduction loan repayment landing fees will be authorized, and NMFS can complete the crab program, only if at least two-thirds of crab license holders voting in a post-bidding fee referendum voted in favor of the fee. Presumably, crab license holders would not vote in favor of the fee unless they concluded that the crab program's prospective capacity reduction was sufficient to enable them to increase their post-reduction revenues enough to justify the fee.

Given the large levels of overcapacity existent in U.S. and other global fisheries, buyback vessels and permits should not be allowed to move into other fisheries. This cascade effect would only exacerbate the overcapacity problems that exist in those fisheries. For example, the sale of domestic vessels to overseas operators while reducing capacity in the U.S. would harm stocks of fish harvested globally. This would cause U.S. fishermen to compete with additional foreign fishermen; e.g. bluefin tuna, swordfish, sharks. This indirectly reduces net benefits to U.S. and global fishermen. Overall net benefit levels would be reduced in those fisheries in which capacity was transferred and indirectly in all related fisheries through continued or increased discarded bycatch levels, degradation of habitat, and other related problems.

NMFS believes that this action will affect neither authorized crab harvest levels nor crab harvesting practices.

NMFS has prepared a Regulatory Compliance Guide (RCG) for this final rule to comply with a requirement of the Small Business Administration. The RCG takes the form of questions and answers which explain the requirements for participation and other aspects of the program. It will be mailed by NMFS to all prospective bidders who may participate in the crab program.

This final rule contains information collection requirements subject to the

Paperwork Reduction Act (PRA). The Office of Management and Budget (OMB) approved this information collection under OMB control number 0648–0376. NMFS estimates that the public reporting burden for this information collection will average 4 hours for bidding and 4 hours for voting in a referendum. Persons affected by this final rule will also be subject to other collection-of-information requirements referred to in the rule and also approved under OMB control number 0648–0376. These requirements and their associated response times are: completing and filing a fish ticket (10 minutes), submitting monthly fish buyer reports (2 hours), submitting annual fish buyer reports (4 hours), and fish buyer/fish seller reports when a person fails either to pay or to collect the loan repayment fee (2 hours).

This final rule also contains a new collection-of-information requirement that OMB has approved under the same OMB control number. The provision allows the public 30 days to advise us of any license or permit holder or vessel owner claims that conflict with accepted bidders' representations about holding, owning, or retaining any of the crab or non-crab reduction permits, the reduction/privilege and reduction/history vessels, or the crab or non-crab reduction fishing histories. Responses are voluntary, but NMFS estimates the public reporting burden for this collection of information will be 1 hour per response.

These response estimates include the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the information collection. Interested persons may send comments regarding this burden estimate, or any other aspect of this data collection, including suggestions for reducing the burden, to both NMFS and OMB (see **ADDRESSES**).

Notwithstanding any other provision of law, no person is required to respond to, and no person is subject to a penalty for failure to comply with, an information collection subject to the PRA requirements unless that information collection displays a currently valid OMB control number.

This action will not result in any adverse effects on endangered species or marine mammals.

List of Subjects in 50 CFR Part 600

Fisheries, Fishing capacity reduction, Fishing permits, Fishing vessels, Intergovernmental relations, Loan programs -business, Reporting and recordkeeping requirements.

Dated: December 8, 2003.

Rebecca Lent,

Deputy Assistant Administrator for Regulatory Programs, National Marine Fisheries Service.

■ For the reasons in the preamble, the National Marine Fisheries Service amends 50 CFR part 600 as follows:

PART 600—MAGNUSON-STEVENS ACT PROVISIONS

■ 1. The authority citation for part 600 is revised to read as follows:

Authority: 5 U.S.C. 561, 16 U.S.C. 1801 *et seq.*, 16 U.S.C. 1861a(b) through (e), 46 App. U.S.C. 1279f and 1279g, section 144(d) of Division B of Pub. L. 106–554, section 2201 of Pub. L. 107–20, and section 205 of Pub. L. 107–117.

■ 2. Section 600.1018 is added to Subpart L to read as follows:

§ 600.1018 Bering Sea and Aleutian Islands (BSAI) Crab species program.

(a) *Purpose.* This section's purpose is to implement the program that Section 144(d) of Division B of Pub. L. 106–554, as amended by section 2201 of Pub. L. 107–20 and section 205 of Pub. L. 107–117, enacted for BSAI crab species.

(b) *Terms.* Unless otherwise defined in this section, the terms defined in § 600.1000 expressly apply to the program for BSAI crab. Likewise, the terms defined in § 679.2 of this chapter also apply to terms not otherwise defined in either § 600.1000 or this section. The following terms used in this section have the following meanings for the purpose of this section:

Acceptance means NMFS' acceptance, on behalf of the United States, of a bid.

Bid means a bidder's irrevocable offer, in response to an invitation to bid under this section, to surrender, to have revoked, to have restricted, to relinquish, to have withdrawn, or to have extinguished by other means, in the manner this section requires, the bidder's reduction fishing interest.

Bid amount means the dollar amount of each bid.

Bidder means either a qualifying bidder bidding alone or a qualifying bidder and a co-bidder bidding together who at the time of bidding holds the reduction fishing interests specified at § 600.1018(e).

Bid crab means the crab that NMFS determines each bidder's reduction/history vessel (see definition) harvested, according to the State of Alaska's records of the documented harvest of crab, from each reduction endorsement fishery and from the Norton Sound fishery during the most recent 5 calendar years in which each reduction endorsement fishery was for any length of time open for directed crab fishing during a 10–calendar-year period beginning on January 1, 1990, and ending on December 31, 1999.

Bid score means the criterion by which NMFS decides in what order to accept bids in the reverse auction this section specifies.

Co-bidder means a person who is not a qualifying bidder, but who at the time of bidding owns the reduction/privilege vessel this section requires to be included in a bid and is bidding together with a qualifying bidder.

Crab means the crab species covered by the Fishery Management Plan for the Bering Sea/Aleutian Islands King and Tanner Crabs pursuant to § 679.2 of this chapter.

Crab license means a License Limitation Program license for crab issued pursuant to § 679.4(k)(5) of this chapter.

Crab reduction permit means a non-interim crab license endorsed for one or more reduction endorsement fisheries, regardless of whether it is also endorsed for the Norton Sound fishery.

FSD means NMFS' Financial Services Division, located in NMFS' Silver Spring, MD, headquarters office.

Non-crab reduction permit means a fishing license, including all of its predecessor history, for which a bidder is the holder of record on December 12, 2003 and which was issued based on the fishing history of the bidder's -reduction/history vessel.

Norton Sound fishery means the non-reduction fishery defined in § 679.2 of this chapter as the area/species endorsement for Norton Sound red king and Norton Sound blue king crab.

NVDC means the U.S. Coast Guard's National Vessel Documentation Center located in Falling Waters, WV.

Qualifying bidder means a person who at the time of bidding is the license holder of record of a crab reduction permit.

Qualifying voter means a person who at the time of voting in a referendum is the license holder of record either of an interim or a non-interim crab license, except a crab license whose sole area/species endorsement is for the Norton Sound fishery.

RAM Program means NMFS' Restricted Access Management Program located in NMFS' Juneau, AK, regional office.

Reduction endorsement fishery means any of the seven fisheries that § 679.2 of this chapter defines as area/species endorsements except the area/species endorsement for the Norton Sound fishery.

Reduction fishery means the fishery for all crab covered by the Bering Sea/Aleutian Islands King and Tanner Crabs Fishery Management Plan under all area/species endorsements that section 679.2 of the chapter defines, except the area/species endorsement for the Norton Sound fishery.

Reduction fishing history means, for each bid, the complete documented harvest of the bidder's reduction/history vessel, upon any part of which such harvest NMFS based issuance of the crab license included in the bid as a crab reduction permit, plus such fishing history, after the issuance of such crab license, of any other vessel upon which the bidder used such crab license.

Reduction fishing interest means, for each bid, the bidder's:

(1) Reduction fishing privilege (see definition);

(2) Crab reduction permit;

(3) Non-crab reduction permit;

(4) Reduction fishing history (see definition); and

(5) Any other claim that could in any way qualify the owner, holder, or retainer of any of the reduction components, or any person claiming under such owner, holder, or retainer, for any present or future limited access system fishing license or permit in any United States fishery (including, but not limited to, any harvesting privilege or quota allocation under any present or future individual fishing quota system).

Reduction fishing privilege means the worldwide fishing privileges of a bid's reduction/privilege vessel (see definition).

Reduction/history vessel means the vessel or vessels which generated the reduction fishing history.

Reduction loan sub-amount means the portion of the original principal amount of reduction loan this section specifies each reduction endorsement fishery must repay with interest.

Reduction/privilege vessel means the vessel designated on a crab license on December 12, 2003.

Referendum means a referendum under this section to determine whether voters approve the fee required to repay this program's reduction loan.

Replacement vessel means a reduction/history vessel which replaced the lost or destroyed one whose reduction fishing history qualified during the general qualification period and the endorsement qualification period and, which under the exceptions in Amendment 10, qualified during the recent participation period.

(c) *Relationship to this subpart*—(1) *Provisions that apply.* The provisions of § 600.1000 through § 600.1017 of this subpart apply to this program except as paragraph (c)(2) of this section provides; and

(2) *Provisions that do not apply.* The following sections, or portions of them, of this subpart do not apply to this program:

(i) All of:

(A) Section 600.1001,

(B) Section 600.1002,

(C) Section 600.1003,

(D) Section 600.1004,

(E) Section 600.1005,

(F) Section 600.1006, and

(G) Section 600.1007,

(ii) The portions of § 600.1008:

(A) Pertaining to an implementation plan,

(B) Pertaining to a 60–day comment period for a proposed implementation regulation,

(C) Pertaining to public hearings in each State that the this program affects,

(D) Pertaining to basing the implementation regulation on a business plan,

(E) Within paragraphs (d)(1)(ii) through (viii),

(F) Within paragraph (d)(2)(ii),

(G) Within paragraph (e), and

(H) Within paragraph (f) and pertaining to fishing capacity reduction specifications and a subsidized program,

(iii) The portions of § 600.1009:

(A) Pertaining to fishing capacity reduction specifications,

(B) Within paragraph (a)(4),

(C) Pertaining to a reduction amendment,

(D) Within paragraph (a)(5)(ii), to the extent that the paragraph is inconsistent with the requirements of this section,

(E) Within paragraph (b)(i), and

(F) Pertaining to an implementation plan,

(iv) The portions of § 600.1010:

(A) Within paragraph (b),

(B) Pertaining to fishing capacity reduction specifications,

(C) Within paragraph (d)(1), and

(D) Within paragraphs (d)(4))(iv) through (vii),

(v) The portions of § 600.1011:

(A) That comprise the last sentence of paragraph (a),

(B) Within paragraph (d), and

(C) Within paragraph (e)(2),

(vi) The portions of § 600.1012:

(A) Within paragraph (b)(3) following the word ''subpart'', and

(B) Within paragraph (b)(3), and

(vii) The last sentence of § 600.1014(f).

(d) *Reduction cost financing.* NMFS will use the proceeds of a reduction loan, authorized for this purpose, to finance 100 percent of the reduction cost. The original principal amount of the reduction loan will be the total of all reduction payments that NMFS makes under reduction contracts. This amount shall not exceed $100 million.

(e) *Who constitutes a bidder.* A bidder is a person or persons who is the:

(1) Holder of record and person otherwise fully and legally entitled to offer, in the manner this section requires, the bid's crab reduction permit and the bid's non-crab reduction permit;

(2) Reduction/privilege vessel owner, title holder of record, and person otherwise fully and legally entitled to offer, in the manner this section requires, the bid's reduction fishing privilege; and

(3) Retainer and person otherwise fully and legally entitled to offer, in the manner this section requires, the bid's reduction fishing history.

(f) *How crab licenses determine qualifying bidders and qualifying voters*—(1) *Non-interim crab licenses.* Each person who is the record holder of a non-interim crab license endorsed for one or more reduction endorsement fisheries is both a qualifying bidder and a qualifying voter and can both bid and vote;

(2) *Interim crab licenses.* Each person who is the record holder of an interim crab license endorsed for one or more reduction endorsement fisheries is a qualifying voter but not a qualifying bidder and can vote but not bid;

(3) *Crab licenses endorsed solely for the Norton Sound Fishery.* Each person who is the record holder of any crab license endorsed solely for the Norton Sound fishery is neither a qualifying bidder nor a qualifying voter and can neither bid nor vote; and

(4) *Time at which qualifying bidders and voters must hold required crab licenses.* A qualifying bidder must be the record holder of the required crab license at the time the qualifying bidder submits its bid. A qualifying voter must be the record holder of the required crab license at the time the qualifying voter submits its referendum ballot.

(g) *Qualifying bidders and co-bidders*—(1) *Qualifying bidders bidding alone.* There is no co-bidder when a qualifying bidder owns, holds, or retains all the required components of the reduction fishing interest;

(2) *Qualifying bidders bidding together with co-bidders.* When a qualifying bidder does not own the reduction/privilege vessel, the person who does may be the qualifying bidder's co-bidder; and

(3) *Minimum reduction components that qualifying bidders must hold or retain when bidding with co-bidders.* At a minimum, a qualifying bidder must hold the crab reduction permit and the non-crab reduction permit and retain

the reduction fishing history. The reduction/privilege vessel may, however, be owned by another person who is a co-bidder.

(h) *Reduction fishing interest*—(1) *General requirements.* Each bidder must:

(i) In its bid, offer to surrender, to have revoked, to have restricted, to relinquish, to have withdrawn, or to have extinguished by other means, in the manner that this section requires, the reduction fishing interest,

(ii) At the time of bidding, hold, own, or retain the reduction fishing interest and be fully and legally entitled to offer, in the manner that this section requires, the reduction fishing interest, and

(iii) Continuously thereafter hold, own, or retain the reduction fishing interest and remain fully and legally entitled to offer, in the manner that this section requires, the reduction fishing interest until:

(A) The bid expires without NMFS first having accepted the bid,

(B) NMFS notifies the bidder that NMFS rejects the bid,

(C) NMFS notifies the bidder that a reduction contract between the bidder and the United States no longer exists, or

(D) NMFS tenders reduction payment to the bidder;

(2) *Reduction/privilege vessel requirements.* The reduction/privilege vessel in each bid must be:

(i) The vessel designated, at the time this final rule is published in the **Federal Register**, on a crab license which becomes a bid's crab reduction permit, and

(ii) Be neither lost nor destroyed at the time of bidding;

(3) *Reduction fishing privilege requirements.* The reduction fishing privilege in each bid must be the reduction/privilege vessel's:

(i) Fisheries trade endorsement under the Merchant Marine Act, 1936 (46 U.S.C.A. 12108),

(ii) Qualification for any present or future U.S. Government approval under section (9)(c)(2) of the Shipping Act, 1916 (46 U.S.C. App. 808(c)(2)) for placement under foreign registry or operation under the authority of a foreign country, and

(iii) Any other privilege to ever fish anywhere in the world;

(4) *Crab reduction permit requirements.* (i) Except as otherwise provided in paragraph (i) of this section, the crab reduction permit must in each bid:

(A) Be the crab license that NMFS issued on the basis of the bidder's reduction fishing history,

(B) Be non-interim at the time each bidder submits its bid, and

(C) Include an area/species endorsement for any one or more reduction endorsement fisheries,

(ii) Although the Norton Sound fishery is not a reduction endorsement fishery, an area/species endorsement for the Norton Sound fishery occurring on a crab reduction permit must be surrendered and revoked (and all fishing history involving it relinquished) in the same manner as all other reduction endorsement fisheries occurring on the crab reduction permit;

(5) *Non-crab reduction permit requirements.* The non-crab reduction permit must in each bid be every license, permit, or other harvesting privilege that:

(i) NMFS issued on the basis of the fishing history of the bidder's reduction/history vessel, and

(ii) For which the bidder was the license holder of record on the effective date of this section; and

(6) *Reduction fishing history requirements.* Except as otherwise provided in paragraph (i) of this section, the reduction fishing history in each bid must that of a single reduction/history vessel.

(i) *Exceptions to the reduction fishing interest requirements*—(1) *Lost or destroyed vessel salvaged.* When a bidder has salvaged a lost or destroyed vessel and has made from the salvaged vessel the documented harvest of crab § 679.4(k)(5)(iii)(B)(*3*) of this chapter requires, the crab portion of the reduction fishing history is the salvaged vessel's documented harvest of crab; and

(2) *Lost or destroyed vessel not salvaged.* When a bidder has not salvaged the lost or destroyed vessel but has made from a replacement vessel the documented harvest of crab § 679.4(k)(5)(iii)(B)(*3*) of this chapter requires:

(i) The crab portion of the reduction fishing history is the total of the lost or destroyed vessel's documented harvest of crab through the date of such vessel's loss or destruction plus the replacement vessel's documented harvest of crab after such date, and

(ii) For the purposes of this program, the lost or destroyed vessel's documented harvest of crab merges with, and becomes a part of, the replacement vessel's documented harvest of crab; and

(3) *Acquired crab fishing history.* When a bidder, in the manner § 679.4(k)(5)(iv) of this chapter requires, has made a documented harvest of crab from one vessel and has acquired a replacement vessel's documented harvest of crab:

(i) The crab portion of the reduction fishing history is the total of the acquired documented harvest of crab through December 31, 1994, plus the documented harvest of crab after December 31, 1994, of the vessel from which the bidder made the documented crab harvest § 679.4(k)(5)(iv) of this chapter requires, and

(iii) For the purposes of this program, the acquired documented harvest of crab merges with, and becomes a part of, the non-acquired documented harvest of crab.

(j) *Determining value of reduction/history vessels' bid crab*—(1) *In each fishery.* NMFS will determine the dollar value of each reduction/history vessel's bid crab in each reduction endorsement fishery and in the Norton Sound Fishery by multiplying each reduction/history vessel's number of pounds of each species of bid crab by the average ex-vessel price per pound that the State of Alaska annually publishes for each crab species in the bid crab; and

(2) *In all fisheries.* NMFS will determine the dollar value of each reduction/history vessel's bid crab in all reduction endorsement fisheries and in the Norton Sound fishery by adding each of the products of the multiplications in paragraph (j)(1) of this section; and

(3) *Crab excluded from bid crab.* A reduction/history vessel's bid crab may not include, to the extent that NMFS has knowledge:

(i) Triangle tanner crab, grooved tanner crab, and any other crab not involved in the various area/species endorsements,

(ii) Discarded crab,

(iii) Crab caught for personal use,

(iv) Unspecified crab, and

(v) Any other crab for which the dollar value, crab fishery, landing date, or harvesting vessel NMFS cannot, for whatever reason, determine.

(k) *Determining bid score.* NMFS will determine each bid score by dividing each bid amount by the sum in paragraph (j)(2) of this section.

(l) *Determining reduction loan sub-amount*—(1) *Value of all bid crab in each fishery.* NMFS will add the dollar value of bid crab of all accepted bidders' reduction/history vessels in each reduction endorsement fishery;

(2) *Value of all bid crab in all fisheries.* NMFS will add the dollar value of bid crab of all accepted bidders' reduction/history vessels in all reduction endorsement fisheries plus the Norton Sound fishery;

(3) *Each fishery as a percentage of all fisheries.* NMFS will divide each of the sums in paragraph (l)(1) of this section by the sum in paragraph (l)(2) of this

section. The result of this calculation will be the dollar value of all bid crab in each reduction endorsement fishery as a percentage of the dollar value of all bid crab in all reduction endorsement fisheries plus the Norton Sound fishery;

(4) *Applying percentages to loan amount.* NMFS will multiply the reduction loan's full original principal amount by each of the yields in paragraph (l)(3) of this section; and

(5) *Loan sub-amount.* Each of the amounts resulting from the calculation in paragraph (l)(4) of this section will be the reduction loan subamount that a reduction endorsement fishery must repay.

(m) *Prospectively qualifying bidder and voter notification*—(1) *General.* At the appropriate point before issuing an invitation to bid, NMFS will publish a notification in the **Federal Register** listing all persons who at the time of publishing the notification prospectively are qualifying bidders and qualifying voters;

(2) *Qualifying bidder list.* The prospectively qualifying bidder list will include the names and addresses of record of each license holder of record for all non-interim crab licenses except only crab licenses whose sole area/species endorsement is for the Norton Sound fishery;

(3) Qualifying voter list. The prospectively qualifying voter list will include the names and addresses of record of each license holder of record for all non-interim and interim crab licenses except only crab licenses whose sole area/species endorsement is for the Norton Sound fishery;

(4) *Basis of lists.* NMFS will base both the lists on the RAM Program's license holder records for crab licenses meeting the requirements of § 679.4(k)(5) of this chapter as well as the requirements of this section;

(5) *Purpose.* The purpose of the notification is to provide the public notice of:

(i) The prospectively qualifying bidders, and

(ii) The prospectively qualifying voters; and

(6) *Public comment.* Any person who wants to comment about the notification has 30 days from the notification's publication date to do so. Persons should send their comments to both FSD and the RAM Program (at addresses that the notification will specify). Comments may address:

(i) Persons who appear on one or more lists but should not,

(ii) Persons who do not appear on one or more lists but should, and

(iii) Persons who believe their names and/or business mailing addresses appearing on one or more lists are incorrect.

(n) *Invitation to bid*—(1) *Notification.* At the appropriate point after issuing the notification in paragraph (m) of this section, NMFS will publish the invitation to bid in the **Federal Register** notification further specified in § 600.1009(c) of this subpart, along with a bidding form and terms of capacity reduction agreement. No person may, however, bid at this stage;

(2) *Notification contents.* The invitation to bid notification will state all applicable bid submission requirements and procedures (including, but not limited to, those included in this section). In particular, the invitation to bid notification will:

(i) State the date on which NMFS will invite bids by mailing an invitation to bid to each person on the prospectively qualifying bidder list,

(ii) State a bid opening date, before which a bidder may not bid, and a bid closing date, after which a bidder may not bid,

(iii) State a bid expiration date after which each bid expires unless, prior to that date, NMFS accepts the bid by mailing a written acceptance notice to the bidder at the bidder's address of record,

(iv) State the manner of bid submission and the information each bidder must submit for NMFS to deem a bid responsive,

(v) State any other information required for bid submission, and

(vi) Include a facsimile of the invitation to bid, along with a bidding form and terms of capacity reduction agreement comprising the entire terms and conditions of the reduction contract under which each bidder must bid and under which NMFS must accept a bid; and

(3) *Mailing.* On the date specified in this notification, NMFS will invite bids by mailing the invitation to bid and a bidding package, including a bidding form terms of capacity reduction agreement, to each person then on the prospectively qualifying bidder list. NMFS will not mail the invitation to bid to any potential co-bidder because NMFS will not then know which bids may include a co-bidder. Each qualifying bidder is solely responsible to have any required co-bidder properly complete the bid. No person may bid before receiving the invitation to bid and the bidding package that NMFS mailed to that person.

(o) *Bids*—(1) *Content.* Each invitation to bid that NMFS mails to a qualifying bidder will have a bid form requiring each bid to:

(i) Identify, by name, regular mail address, telephone number, and (if available) electronic mail address, the qualifying bidder and each co-bidder,

(ii) State the bid amount in U.S. dollars,

(iii) Identify, by crab license number, the qualifying bidder's crab reduction permit and include an exact copy of this crab license (which the RAM Program issued),

(iv) Identify, by vessel name and official number, the bidder's reduction/privilege vessel, and include an exact copy of this vessel's official document (which NVDC issued),

(v) Identify, by license or permit number, each of the bidder's non-crab reduction permits; and include an exact copy of each of these licenses or permits (which the RAM Program issued for licenses or permits involving species under the jurisdiction of NMFS' Alaska Region and which other NMFS offices issued for licenses or permits involving species under those offices' jurisdiction),

(vi) Identify, separately for crab and for each other species:

(A) The qualifying bidder's reduction fishing history, and

(B) The dates that each portion of the reduction fishing history encompasses; the name and official number of the reduction/history vessel or vessels which gave rise to it; and the dates during which the qualifying bidder owned such vessels or, if the qualifying bidder acquired any reduction fishing history from another person, the name of the person from which the qualifying bidder acquired such reduction fishing history and the manner in which and the date on which the qualifying bidder did so,

(vii) State, declare, and affirm that the qualifying bidder holds the crab reduction permit and retains the complete reduction fishing history, and is fully and legally entitled to offer both in the manner this section requires,

(viii) State, declare, and affirm that either the qualifying bidder or the co-bidder owns the reduction/privilege vessel and holds the non-crab reduction permit and is fully and legally entitled to offer both in the manner that this section requires, and

(ix) Provide any other information or materials that NMFS believes is necessary and appropriate; and

(2) *Rejection.* NMFS, regardless of bid scores, will reject any bid that NMFS believes is unresponsive to the invitation to bid. All bid rejections will constitute final agency action as of the date of rejection. Before rejection, NMFS may, however, contact any bidder to attempt to correct a bid deficiency if

NMFS, in its discretion, believes the attempt warranted.

(p) *Acceptance*—(1) *Reverse auction.* NMFS will determine which responsive bids NMFS accepts by using a reverse auction in which NMFS first accepts the responsive bid with the lowest bid score and successively accepts each additional responsive bid with the next lowest bid score until either there are no more responsive bids to accept or acceptance of the last responsive bid with the next lowest bid score would cause the reduction cost to exceed $100 million. If two or more responsive bid scores are exactly the same, NMFS will first accept the bid that NMFS first received;

(2) *Notification.* NMFS will, after the conclusion of a successful referendum, notify accepted bidders that NMFS had, before the referendum, accepted their bids; and

(3) *Post-acceptance reduction permit transfer.* After NMFS has accepted bids, neither the RAM Program (nor any other NMFS office) will transfer to other persons any reduction permits that accepted bidders included in the bids unless and until FSD advises the RAM Program (or some other NMFS office) that the resulting reduction contracts are no longer in effect because a referendum failed to approve the fee that this section requires to repay this program's reduction loan.

(q) *Reduction contracts subject to successful post-bidding referendum condition.* Although this program involves no fishing capacity reduction specifications under this subpart, each bid, each acceptance, and each reduction contract is nevertheless subject to the successful post-bidding referendum condition that § 600.1009(a)(3) of this subpart specifies for bidding results that do not conform to the fishing capacity reduction specifications.

(r) *Post-bidding referendum*—(1) *Purpose.* NMFS will conduct a post-bidding referendum whose sole purpose is to determine whether, based on the bidding results, qualifying voters who cast referendum ballots in the manner that this section requires authorize the fee required to repay this program's reduction loan;

(2) *Manner of conducting.* NMFS will mail a referendum ballot to each person then on the prospectively qualifying voter list for each crab license that the person holds and otherwise conduct the referendum as specified in § 600.1010 of this subpart;

(3) *One vote per crab license.* Each qualifying voter may cast only one vote for each crab license that each qualifying voter holds;

(4) *Crab license numbers on ballots.* Each referendum ballot that NMFS mails will contain the license number of the prospectively qualifying voter's crab license to which the ballot relates;

(5) *Potential reduction results stated.* Each referendum ballot that NMFS mails will state the aggregate potential reduction results of all the bids that NMFS accepted, including:

(i) The amount of reduction that all accepted bids potentially effect, including:

(A) The number of crab reduction permits, together with each area/species endorsement for which each of these licenses is endorsed,

(B) The number of reduction/privilege vessels and reduction/history vessels, and

(C) The aggregate and average dollar value of bid crab (together with the number of pounds of bid crab upon which NMFS based the dollar value), in each reduction endorsement fishery and in the reduction fishery, for all reduction/history vessels during the period for which NMFS calculates the dollar value of bid crab,

(ii) The reduction loan sub-amount that each reduction endorsement fishery must repay if a referendum approves the fee, and

(iii) Any other useful information NMFS may then have about the potential sub-fee rate initially necessary in each reduction endorsement fishery to repay each reduction loan sub-amount; and

(6) *Notice that condition fulfilled.* If the referendum is successful, NMFS will notify accepted bidders, in the manner that § 600.1010(d)(6)(iii) of this subpart specifies, that a successful referendum has fulfilled the reduction contracts' successful post-bidding referendum condition specified in paragraph (q) of this section.

(s) *Reduction method.* In return for each reduction payment, NMFS will permanently:

(1) Revoke each crab reduction permit;

(2) Revoke each non-crab reduction permit;

(3) Revoke each reduction fishing privilege (which revocation will run with the reduction/privilege vessel's title in the manner § 600.1009(a)(5)(ii)(A) of this subpart requires and in accordance with 46 U.S.C. 12108(d));

(4) Effect relinquishment of each reduction fishing history for the purposes specified in this section by noting in the RAM Program records (or such other records as may be appropriate for reduction permits issued elsewhere) that the reduction fishing history has been relinquished under this section and will never again be available to anyone for any fisheries purpose; and

(5) Otherwise restrict in accordance with this subpart each reduction/privilege vessel and fully effect the surrender, revocation, restriction, relinquishment, withdrawal, or extinguishment by other means of all components of each reduction fishing interest.

(t) *Reduction payment tender and disbursement*—(1) *Fishing continues until tender.* Each accepted bidder may continue fishing as it otherwise would have absent the program until NMFS, after a successful referendum, tenders reduction payment to the accepted bidder;

(2) *Notification to the public.* After a successful referendum but before tendering reduction payment, NMFS will publish a notification in the **Federal Register** listing all proposed reduction payments and putting the public on notice:

(i) Of the crab reduction permits, the reduction/privilege vessels, the reduction fishing histories, and the non-crab reduction permits upon whose holding, owning, retaining, or other legal authority representations accepted bidders based their bids and NMFS based its acceptances, and

(ii) That NMFS intends, in accordance with the reduction contracts, to tender reduction payments in return for the actions specified in paragraph (s) of this section;

(3) *Public response.* The public has 30 days after the date on which NMFS publishes the reduction payment tender notification to advise NMFS in writing of any holding, owning, or retaining claims that conflict with the representations upon which the accepted bidders based their bids and on which NMFS based its acceptances;

(4) *Tender and disbursement parties.* NMFS will tender reduction payments only to accepted bidders, unless otherwise provided contrary written instructions by accepted bidders. Creditors or other parties with secured or other interests in reduction/privilege vessels or reduction permits are responsible to make their own arrangements with accepted bidders;

(5) *Time of tender.* At the end of the reduction payment tender notification period, NMFS will tender reduction payments to accepted bidders, unless NMFS then knows of a material dispute about an accepted bidder's authority to enter into the reduction contract with respect to any one or more components of the reduction fishing interest that warrants, in NMFS' discretion, an alternative course of action;

(6) *Method of tender and disbursement.* NMFS will tender reduction payment by requesting from each accepted bidder specific, written instructions for paying the reduction payments. Upon receipt of these payment instructions, NMFS will immediately disburse reduction payments in accordance with the payment instructions; and

(7) *Effect of tender.* Concurrently with NMFS' tender of reduction payment to each accepted bidder:

(i) All fishing activity for any species anywhere in the world in any way associated with each accepted bidder's reduction fishing interest must cease,

(ii) Each accepted bidder must retrieve all fixed fishing gear for whose deployment the accepted bidder's reduction/privilege vessel was responsible, and

(iii) NMFS will fully exercise its reduction contract rights with respect to the reduction fishing interest by taking the actions specified in paragraph (s) of this section.

(u) *Fee payment and collection*—(1) *Fish sellers who pay the fee.* Any person who harvests any crab, but whom ADF&G's fisheries reporting requirements do not require to record and submit an ADF&G fish ticket for that crab, is a fish seller for the purpose of paying any fee on that crab and otherwise complying with the requirements of § 600.1013 of this subpart;

(2) *Fish buyers who collect the fee.* Any person whom ADF&G's fisheries reporting requirements require to record and submit an ADF&G fish ticket for any crab that another person harvested is a fish buyer for the purpose of collecting the fee on that crab and otherwise complying with the requirements of § 600.1013 of this subpart; and

(3) *Persons who are both fish sellers and fish buyers and both pay and collect the fee.* Any person who harvests any crab, and whom ADF&G's fisheries reporting requirements require to record and submit an ADF&G fish ticket for that crab, is both a fish seller and a fish buyer for the purpose of paying and collecting the fee on that crab and otherwise complying with the requirements of § 600.1013 of this subpart.

(v) *Fishing prohibition and penalties*—(1) *General.* Fishing, for the purpose of this section, includes the full range of activities defined in the term ''fishing'' in the Magnuson-Stevens Fishery Conservation and Management Act (16 U.S.C. 1801),

(2) *Prohibitions.* Concurrently with NMFS' tender of each reduction payment, and with the sole exception in paragraph (t)(7)(i) of this section, no person whatsoever may, and it is unlawful for any person to:

(i) Fish with or attempt to fish with, or allow others to fish with or attempt to fish with, the reduction/privilege vessel anywhere in the world for any species under any conditions and regardless of the reduction/privilege vessel's ownership or registry for so long as the reduction/privilege vessel exists. This prohibition includes, but is not limited to, fishing on the high seas or in the jurisdiction of any foreign country (to the extent prohibited by law) while operating under U.S. flag,

(ii) Place or attempt to place, or allow others to place or attempt to place, the reduction/privilege vessel under foreign flag or registry,

(iii) Operate or attempt to operate, or allow others to operate or attempt to operate, the reduction/privilege vessel under the authority of a foreign country to the extent prohibited by law,

(iv) Otherwise avoid or attempt to avoid, or allow others to avoid or attempt to avoid, the revocation of the reduction fishing privilege with respect to any reduction/privilege vessel, and

(v) Make any claim or attempt to make any claim, or allow others to claim or attempt to make any claim, for any present or future limited access fishing license or permit in any U.S. fishery (including, but not limited to, any quota allocation under any present or future individual quota allocation system) based in any way on any portion of a reduction fishing interest surrendered, revoked, restricted, relinquished, withdrawn, or extinguished by other means under this section; and

(3) *Penalties.* The activities that this paragraph prohibits are subject to the full penalties provided in § 600.1017 of this subpart, and immediate cause for NMFS to take action to, among other things:

(i) At the reduction/privilege vessel owner's expense, seize and scrap the reduction/privilege vessel, and

(ii) Pursue such other remedies and enforce such other penalties as may be applicable.

(w) *Program administration*—(1) *FSD responsibilities.* FSD is responsible for implementing and administering this program. FSD will:

(i) Issue all notifications and mailings that this section requires,

(ii) Prepare and issue the invitation to bid,

(iii) Receive bids,

(iv) Reject bids,

(v) Score bids,

(vi) Make acceptances,

(vii) Prepare and issue referendum ballots,

(viii) Receive referendum ballots,

(ix) Tally referendum ballots,

(x) Determine referendum success or failure,

(xi) Tender and disburse reduction payments,

(xii) Administer reduction contracts,

(xiii) Administer fees and reduction loan repayment, and

(xiv) Discharge all other management and administration functions that this section requires;

(2) *RAM Program responsibilities.* Upon FSD's advice, the RAM Program (for fishing licenses under the jurisdiction of NMFS's Alaska Region) and any other appropriate NMFS authority (for fishing licenses under the jurisdiction of any other NMFS office) will revoke reduction permits and effect the surrender of fishing histories in accordance with this section; and

(3) *NVDC and MARAD responsibilities.* FSD will advise NVDC, MARAD, such other agency or agencies as may be involved, or all of them to revoke reduction/privilege vessels' fisheries trade endorsements and otherwise restrict reduction/privilege vessels in accordance with this section.

(x) *Reduction loan and reduction loan sub-amounts.* [Reserved]

[FR Doc. 03–30795 Filed 12–11–03; 8:45 am]

BILLING CODE 3510–22–S

Proposed Rules

Federal Register
Vol. 68, No. 239
Friday, December 12, 2003

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

Agricultural Marketing Service

7 CFR Part 929

[Docket Nos. AO–341–A6; FV02–929–1]

Cranberries Grown in the States of Massachusetts, et al.; Secretary's Decision and Referendum Order on Proposed Amendment of Marketing Agreement and Order No. 929

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Proposed rule and referendum order.

SUMMARY: This decision proposes amendments to the marketing agreement and order for cranberries grown in Massachusetts, Rhode Island, Connecticut, New Jersey, Wisconsin, Michigan, Minnesota, Oregon, Washington, and Long Island in the State of New York, and provides growers and processors with the opportunity to vote in a referendum to determine if they favor the changes. The amendments are based on those proposed by the Cranberry Marketing Committee (Committee), which is responsible for local administration of the order and other interested parties representing cranberry growers and handlers. This action is a partial decision on six of the proposed amendments listed in the notice of hearing. It has been determined that these amendments need to be expedited. The amendments include increasing Committee membership and related amendments. The proposed amendments are intended to improve the operation and functioning of the cranberry marketing order program.

DATES: The referendum will be conducted from January 19 to January 30, 2004. The representative period for the purpose of the referendum is September 1, 2002, through August 31, 2003. Pursuant to the Paperwork Reduction Act, comments on information collection burden that would result from this proposal must be received by February 10, 2004.

ADDRESSES: Interested persons are invited to submit written comments concerning the information collection burden. Comments must be sent to the Docket Clerk, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, 1400 Independence Avenue, SW., STOP 0237, Washington, DC 20250–0237; Fax: (202) 720–8938, or E-mail: *moab.docketclerk@usda.gov*. All comments should reference the docket number and the date and page number of this issue of the **Federal Register** and will be made available for public inspection in the Office of the Docket Clerk during regular business hours, or can be viewed at: *http://www.ams.usda.gov/fv/moab.html*.

FOR FURTHER INFORMATION CONTACT: Kathleen M. Finn, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, 1400 Independence Avenue, SW., STOP 0237, Washington, DC 20250–0237; telephone: (202) 720–2491, or Fax: (202) 720–8938. Small businesses may request information on compliance with this regulation by contacting Jay Guerber, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, 1400 Independence Avenue, SW., STOP 0237, Washington, DC 20250–0237; telephone (202) 720–2491; Fax (202) 720–8938.

SUPPLEMENTARY INFORMATION: Prior documents in this proceeding: Notice of hearing issued on April 23, 2002, and published in the May 1, 2002, issue of the **Federal Register** (67 FR 21854).

This administrative action is governed by the provisions of sections 556 and 557 of title 5 of the United States Code and, therefore, is excluded from the requirements of Executive Order 12866.

Preliminary Statement

The proposed amendments were formulated based on the record of a public hearing held in Plymouth, Massachusetts on May 20 and 21, 2002; in Bangor, Maine on May 23, 2002; in Wisconsin Rapids, Wisconsin on June 3 and 4, 2002; and in Portland, Oregon on June 6, 2002. The hearing was held to consider the proposed amendment of Marketing Agreement and Order No. 929, regulating the handling of cranberries grown in the States of Massachusetts, Rhode Island, Connecticut, New Jersey, Wisconsin, Michigan, Minnesota, Oregon, Washington, and Long Island in the State of New York, hereinafter referred to collectively as the ''order.'' The hearing was held pursuant to the provisions of the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601 *et seq.*), hereinafter referred to as the ''Act,'' and the applicable rules of practice and procedure governing the formulation of marketing agreements and marketing orders (7 CFR part 900). The notice of hearing contained numerous proposals submitted by the Committee, other interested parties and one proposed by the Agricultural Marketing Service (AMS). This action is a partial decision addressing a portion of the amendments listed in the notice of hearing that have been determined necessary to be expedited. Other proposed amendments listed in the notice of hearing will be addressed in a separate decision.

The proposed amendments included in this decision would: Increase Committee membership to 13 grower members, 1 public member, 9 grower alternate members and 1 public alternate member; incorporate a ''swing'' position whereby the group (either the major cooperative or growers representing other than the major cooperative) which handles more than 50 percent of the total volume produced is assigned an additional seat; revise nomination and selection provisions of the order, as well as quorum and voting requirements, to reflect the change in Committee membership; authorize tenure limitations to be restarted with the seating of the expanded Committee; re-establish districts and allocate the revised membership among those districts; allow the Committee to request tax identification numbers for voting purposes; authorize mail nominations for independent members; revise the alternate member provisions to reflect the change in Committee membership and for clarity purposes; and require Committee member nominee disclosure of non-regulated cranberry production.

The Fruit and Vegetable Programs of AMS proposed to allow such changes as may be necessary to the order, if any of the proposed amendments are adopted, so that all of the order's provisions conform to the effectuated amendments.

Thirty-two witnesses testified at the hearing. These witnesses represented

cranberry growers and handlers in the States currently covered by the order and in Maine. Some witnesses supported the proposed amendments, while others were opposed to the recommended changes or suggested modifications to them.

At the conclusion of the hearing, the Administrative Law Judge fixed August 9, 2002, as the final date for interested persons to file proposed findings and conclusions or written arguments and briefs based on the evidence received at the hearing on proposal numbers 1, 3, 7 and 13. The Administrative Law Judge fixed September 13, 2002, as the final date for interested persons to file proposed findings and conclusions or written arguments and briefs based on evidence received at the hearing on all other proposals. This briefing period was extended until September 20, 2002. A total of 17 briefs were filed, 16 of which addressed proposals in this decision.

Regarding the proposals being discussed in this decision, the Committee filed a brief in support of its proposed amendments. Linda and Paul Rinta and Stephen L. Lacey (attorney for Clement Pappas & Company and Cliffstar Corporation) filed briefs requesting that all proposals relating to Committee structure be considered together. The Cape Cod Cranberry Growers' Association (CCCGA) filed a brief opposing a portion of proposal on the Committee structure. Ranger Cranberry Co., LLC, a Wisconsin grower, filed a brief supporting a modification to the Committee structure. Nine of the 11 briefs recommended that growers from the major cooperative be required to vote independently for Committee representatives rather than the current method of nomination by the cooperative management. All discussions on briefs pertaining to the proposals being recommended in this decision have been considered.

Proposals Being Recommended in this Decision

The Committee's proposal to amend the Committee structure included: Increasing the membership; incorporating a member-at-large position; revising nomination and selection procedures, as well as quorum and voting requirements to reflect the increase in Committee membership; authorizing tenure limitations to be restarted with the seating of the expanded Committee; authorizing mail nominations; allowing the Committee to request tax identification numbers for voting purposes; and changing how alternates may fill positions on any member's absence. This proposal provided for amendments to §§ 929.20, 929.21, 929.22, 929.23, 929.27 and 929.32.

Two other interested parties submitted proposals relating to restructuring the Committee. Stephen L. Lacey on behalf of Clement Pappas and Company, Inc., and Cliffstar Corporation proposed an amendment to § 929.22 to alter the way nominations of cooperative members on the Committee are conducted by requiring cooperative nominees to be selected through an election process administered by the Committee. The Wisconsin Cranberry Cooperative proposed amendments to §§ 929.22 and 929.23 to allow for equitable representation for all cooperative marketing associations in the industry.

Stephen Lacey also proposed an amendment to § 929.20 to require Committee member disclosure of unregulated production.

Material Issues

The material issues in this decision presented on the record of the hearing are as follows:

1. Whether to increase Committee membership to 13 grower members, 1 public member, 9 grower alternate members and 1 public alternate member; incorporate a ''swing'' position whereby the entity (either the major cooperative or other than the major cooperative) which handles more than 50 percent of the total volume produced is assigned an additional seat; incorporate nomination and selection procedures to reflect the change in Committee membership; allow the Committee to request tax identification numbers for voting purposes; authorize mail nominations for independent members; modify the quorum and voting requirements to reflect the increased number of Committee members; restart tenure limitations to begin with the seating of the expanded Committee; and revise and clarify which alternates may fill positions in any member's absence.

2. Whether to require Committee member disclosure of non-regulated production.

3. Whether to expedite the decision on any or all of the proposals by omitting the recommended decision and proceeding directly to the Secretary's decision and referendum order.

Findings and Conclusions

The following findings and conclusions on the material issues are based on the record of the hearing.

Material Issue Number 1

Section 929.20 should be amended to increase Committee membership to 13 grower members, 1 public member, 9 grower alternate members and 1 public alternate member and to reestablish districts. This section should also be amended to incorporate a ''member-at-large'' position whereby the group (either growers representing the major cooperative or growers representing entities other than the major cooperative) that handles more than 50 percent of the total volume produced is assigned an additional seat.

Section 929.21 should be amended to restart tenure limitations with the seating of the expanded Committee and allow the initial members of the newly formed Committee to be seated for at least one term.

Section 929.22 should be amended to revise nomination procedures to reflect the change in Committee membership and to allow the reestablished Committee to be nominated as soon as possible.

Section 929.22 should be amended to allow the Committee to request tax identification numbers for voting purposes.

Section 929.22 should be amended to authorize mail nominations for growers who represent entities other than the major cooperative.

Section 929.27 should be amended to revise and clarify which alternate members can be seated in place of absent members.

Section 929.32 should be amended to incorporate quorum and voting requirements to reflect the increased number of Committee members.

Currently, the Committee is composed of 7 grower members, each with an alternate, and 1 public member and alternate. The public member position is not required. The production area is divided into 4 districts and at least 1 member and alternate represent each district. The term of office for members and alternate members is 2 years beginning on August 1 of each even-numbered year, and members are limited to 3 consecutive terms. Those members who serve 3 consecutive terms are not eligible to serve as either a member or alternate member on the Committee until they have been off the Committee for at least 1 full two-year term. There are no tenure requirements for alternate members.

Representation is divided among 4 districts. District 1 includes the States of Massachusetts, Rhode Island and Connecticut. District 2 includes the State of New Jersey and Long Island in the State of New York. District 3

includes the States of Wisconsin, Michigan and Minnesota. District 4 includes the States of Oregon and Washington.

Any cooperative marketing association that handles more than two-thirds of the total volume of cranberries produced during the fiscal period during which nominations are made, or affiliated growers, nominates 4 persons to serve as members and 4 persons to serve as alternate members. At least one nominee must be from Oregon or Washington (District 4). For growers not affiliated with the cooperative marketing association, the committee holds nomination meetings in Districts 1, 2 and 3 to select nominees for the remaining 3 positions. District 4 growers participate in the District 3 nomination procedure by mail ballot. Growers are entitled to cast one vote for the nominee in his or her respective district. USDA selects the members from the nominations made.

Five members constitute a quorum and any action of the Committee requires at least five concurring votes. If the public member is present and chooses to vote, six members constitute a quorum and any Committee actions require at least six concurring votes.

Section 929.27 sets forth that an alternate member shall act in the place and stead of his or her member. In the event both the member and alternate are absent, the Committee may designate any other alternate member to serve in the absent member and alternate's place. This provision also provides that no more than 4 cooperative members or alternates can serve as members at the same meeting and that the grower alternate cannot serve for a non-industry member.

For the 2002 selection process, no cooperative marketing association handled more than two-thirds of the volume of cranberries produced during the 2001–2002 year. The order does not specify how the Committee should be structured under this circumstance. The order provides that members and alternate members shall serve until their respective successors are selected and have been qualified. Therefore, the current cooperative members of the Committee representing the major cooperative, as previously selected, will remain seated until an amendment to the order, if any, is adopted to address this situation. Nominations and selections were made for the 3 independent member and alternate seats.

Increasing Committee Membership

The Committee proposed increasing Committee membership from 7 grower members and 7 grower alternates to 13 grower members and 9 grower alternates. As in the current order, there would be 1 public member and alternate, but the public member position would be required. Six members would represent the cooperative and six members would represent independent growers. The remaining grower position would represent the group (either the cooperative or independents) that handled more than 50 percent of the volume of cranberries produced in the prior crop year.

The Committee's proposal retains 4 marketing order districts but recommends that they be reestablished to accommodate the expanded production area States.

District 1 would include Massachusetts, Rhode Island, Connecticut, New York and Maine. Currently, District 1 includes Massachusetts, Rhode Island and Connecticut. District 2 would include New Jersey and Delaware. Currently, District 2 includes New Jersey and Long Island in the State of New York. District 3 would remain unchanged and include Wisconsin, Michigan and Minnesota. District 4 would remain unchanged and include Oregon and Washington. The expansion of the production area is not being considered in this document. Therefore, for purposes of discussion, the existing districts and production area are being used in this decision.

Under the Committee's proposal, there would be 2 cooperative members (with 1 alternate member) and 2 independent members (with 1 alternate member) each for Districts 1 and 3. There would be 1 cooperative member and alternate member and 1 independent member and alternate member each for Districts 2 and 4. The member-at-large position would be selected from any of the marketing order districts.

Record evidence indicated that the additional representation in Districts 1 and 3 is based, in large part, on the percentage of the production these two districts represent. During the 2000 crop year, production in District 1 represented 35 percent, District 2 represented 9 percent, District 3 represented 46 percent and District 4 represented 10 percent of total cranberry production.

The Committee manager testified that increasing grower membership would provide more opportunities for a larger and more diverse group of growers to actively participate in the Committee process. He further testified that expansion of the membership is very important to ensuring that the industry would benefit from new ideas, approaches, viewpoints, and perspectives brought to the complex environment facing the cranberry industry.

In support of increasing membership, a witness representing the major cooperative testified that the increased Committee size would allow for broader representation of growers from different producing areas while recognizing different volumes of cranberries being produced in different growing areas. He testified that without increasing the membership, it would be difficult to recognize the larger volume of cranberries produced in Wisconsin and Massachusetts without reducing representation from growing areas that produce lower volumes like New Jersey, Washington and Oregon.

The record revealed that the Committee appointed an amendment subcommittee in 1997 to deliberate on ways to improve the marketing order. On modifying Committee membership, many alternatives were discussed. Alternatives included leaving the membership at 8 and increasing the membership to 9, 11 or 13. The primary reason for agreeing on membership of 13 involved determining how to allocate membership among the districts. The subcommittee believed that it was important to recognize the larger growing areas by providing them with at least one additional member. Equally important was to provide opportunities for membership for smaller growing areas.

The subcommittee carefully considered increased costs. To compromise on this issue, the subcommittee recommended a lower number of alternates. In addition, discussions involved whether it was necessary for alternate members to attend every meeting. There were differing opinions on this, but most agreed that it was important for alternates to stay current with Committee activities so they are more prepared to serve as a member when needed.

Witnesses testified in opposition to the Committee's proposal. Two witnesses were opposed to the increase in Committee size. A Wisconsin grower/handler testified that the additional costs associated would be excessive. Another witness representing the views of the Wisconsin Cranberry Growers Association believed that increasing the number of Committee members could hinder the Committee's ability to make timely decisions and would increase program administrative costs, which are ultimately borne by the growers.

Other witnesses testified in opposition to the allocation of membership under the Committee's proposal. A Wisconsin grower/handler testified that this allocation was inequitable to independent growers in Wisconsin. He testified that membership should consistently be based on the volume of cranberries produced. This witness was primarily concerned that under the Committee's proposal, the State of Wisconsin would be grossly underrepresented on the Committee while other States would be significantly overrepresented. He offered alternatives that would provide the Wisconsin district with an additional seat by transferring a seat from one of the other districts.

Another alternative discussed suggested that the number of growers should also be considered in allocating membership. Under this scenario, the State of Massachusetts would be allocated an additional seat.

A witness representing the Wisconsin Cranberry Grower's Association, also agreed that membership should be modified to be proportional to production. He suggested 3 districts be established providing seats based on volume of cranberries produced and by association with independent and cooperative growers.

Another Wisconsin grower proposed retaining the current 8 member Committee. She proposed having 3 districts—East coast, Midwest and West coast. There would be no allocation between cooperative and independent growers. Two members would be allocated for each district, with 1 swing vote for the growers affiliated with the handler who handled more than 50 percent of the crop.

Record evidence supports modifying the Committee structure as proposed by the Committee. Increasing membership on the Committee should allow more growers to participate in the decision-making processes of the Committee. The benefits of increasing membership outweigh associated increased costs by providing more growers opportunities to have a voice on decisions that impact their livelihood. In addition, increasing membership will allow for more diverse membership and new and different ideas on the direction the Committee should follow in the future. Testimony indicated that a larger Committee would enable a larger number of growers to better understand how the marketing order works and the rationale behind the decisions. More growers becoming familiar with these complicated regulatory issues can only help to further disseminate information to even more industry members. Allowing more opportunities for growers to actively participate in this process will benefit the progress of the Committee.

Increasing membership will also allow larger representation of growing areas that produce the majority of the volume of cranberries and still recognize the importance of all producing areas, regardless of size.

Allocating the membership equally between the largest cooperative and the rest of the industry will provide an appropriate balance between representatives in the industry who may have different ideas on Committee determinations based on their affiliation. With this allocation, no group can impose their will on the other. Committee recommendations will need to have more than the votes of one group to pass. In addition, the member-at-large position will allow for the dominant group to be recognized by providing that group with an additional seat.

Having 2 members from the districts that represent Wisconsin and Massachusetts reasonably recognizes the fact that those districts have a great economic interest at stake when more significant actions, such as volume regulation, are considered by the Committee. It is important to take into account the significance of the smaller growing regions, while recognizing that the potential scale of the impact increases with the volume of cranberries produced and regulated. In this regard, the Committee's proposal improves the current structure of the Committee.

Allowing the smaller volume districts to have 1 member recognizes their significance to the industry. Using volume alone as a means of determining Committee membership does not take into consideration smaller growing regions. Although volume is certainly one criterion to be considered, opportunities must be provided for input by all segments of the industry.

The proponents of providing District 3 an additional independent member based on the State of Wisconsin's comparative volume produced based their opinion solely on volume of production. However, USDA concludes, based on the reasons mentioned above, that providing an additional seat for District 3 at the exclusion of membership from Districts 2 or 4 is not desirable.

Similar concerns would result with regard to the alternative proposed at the hearing to have 3 districts and no differentiation of membership based on cooperative or independent members. The proponent of this alternative was not concerned that it would be possible for the largest handler's growers to win all the seats. The chances for that happening would be real under this scenario and must be considered. Although the approach is simple and keeps the membership at its current level, this alternative could result in the undesirable result of one entity having every seat.

The increase in Committee membership will likely increase costs to the Committee with the additional members attending meetings. Currently, 16 representatives generally attend meetings, as all alternates are entitled to attend each meeting. With a 14 member Committee and 9 alternates, there is the potential that costs will increase to send an additional 7 persons to meetings if all alternates attend. However, the benefits of broadening the membership of the Committee and equitably allocating seats would outweigh these increased costs. Since the implementation of volume regulations, more growers are expressing interest in being a part of the Committee's recommendations. Expansion of the Committee will allow more growers the opportunity to be involved in the process. The Committee's recommendation to reduce the number of alternates will provide appropriate district coverage for members that cannot attend meetings, while taking costs into account.

By increasing the membership to 14 and establishing 4 districts as proposed by the Committee, regional representation will be maintained and additional representation to the largest growing districts will be provided. Committee and subcommittee deliberations on this issue were extensive and many alternatives were discussed. The Committee recommended the most equitable number and allocation of Committee membership while considering associated costs.

Regarding the public member and alternate position, the Committee proposed requiring that position to be a part of the administrative body as opposed to the current structure where that position is not required. There was no opposition testimony on this, and the record evidence is that the public member's views are an important aspect of the Committee's decision making and should therefore be required.

For the above reasons, it is recommended that § 929.20 be amended to increase Committee membership to 13 grower members, 1 public member, 9 grower alternates and 1 public alternate and to reestablish districts to accommodate the additional members. Included in the 13 grower members will be one member-at-large position (who

will have an alternate), which will be discussed later in this decision. Of the remaining 12 grower members, 6 will represent the major cooperative and 6 will represent growers from groups other than the major cooperative. Four districts will be established as follows:

District 1 will represent the States of Massachusetts, Rhode Island and Connecticut. There will be 2 members from the major cooperative and 1 alternate member, and 2 members from other than the major cooperative and 1 alternate member.

District 2 will represent the State of New Jersey and Long Island in the State of New York. There will be 1 member from the major cooperative and 1 alternate member, and 1 member from other than the major cooperative and 1 alternate member.

District 3 will represent the States of Wisconsin, Michigan, and Minnesota. There will be 2 members from the major cooperative and 1 alternate member, 2 members from other than the major cooperative and 1 alternate member.

District 4 will represent the States of Oregon and Washington. There will be 1 member from the major cooperative and 1 alternate member, 1 member from other than the major cooperative and 1 alternate member.

The member-at-large position can be from any of the marketing order districts.

The order language should also provide that the Committee may establish, with USDA's approval, rules and regulations for the implementation and operation of this section. The Committee recommended this provision in the event a clarification or procedural change was needed in the future.

Nomination Procedures

With the recommended expansion of the Committee and the establishment of a member-at-large position, it is necessary to modify the nomination procedures to correspond to the new Committee structure.

Allocation of Membership

The Committee's proposed amendment to the nomination procedures allocates membership on the Committee based upon the expanded Committee.

As proposed by the Committee, if the cooperative marketing association handles more than 50 percent of the total volume of cranberries produced, USDA would select 6 cooperative producer members representing growers from each of the 4 districts, 1 member-at-large cooperative producer member from any of the marketing order districts, 6 independent producer members representing growers from each of the 4 districts, 1 public member, 4 cooperative alternate members representing each of the 4 districts, 4 independent alternate members representing each of the 4 districts, 1 cooperative alternate at large member from any district, and 1 public member alternate.

If the cooperative marketing association handles less than 50 percent of the total volume of cranberries produced, the Committee proposed that USDA would select 6 cooperative producer members representing growers from each of the 4 districts, 6 independent producer members representing growers from each of the 4 districts, 1 member-at-large independent producer member from any of the marketing order districts, 1 public member, 4 cooperative alternate members representing each of the 4 districts, 4 independent alternate members representing each of the 4 districts, 1 independent alternate at large member from any district, and 1 public member alternate.

The Committee proposed that the 2 independent producer nominees receiving the highest number of votes cast in Districts 1 and 3 would be declared the independent member nominees from each of those districts. The nominee receiving the third highest number of votes cast in Districts 1 and 3 would be declared the independent alternate member nominee from each of those districts. The independent producer nominee receiving the highest number of votes cast in Districts 2 and 4 would be declared the independent member nominee from each of those districts. The independent producer nominee receiving the second highest number of votes cast in Districts 2 and 4 would be declared the independent alternate member nominee from each of those districts.

If the independent growers are entitled to the member-at-large position, a separate election would be conducted. The producer receiving the highest number of votes would be declared the independent member-at-large and the producer receiving the second highest number of votes would be declared the independent alternate member-at-large.

Testimony revealed that the amendment subcommittee appointed by the Committee deliberated at length on the nomination procedures and, after consensus was reached, recommended the proposal to the full Committee.

The Committee's proposal does not modify the current order language that authorizes the cooperative or its growers to nominate qualified persons for the allotted member and alternate positions. Under the Committee's modified proposal, the group, either cooperative or independent, that handles more than 50 percent of the volume of cranberries handled, is awarded the member-at-large seat.

At the hearing, the Committee proposed modifying their amendment regarding the member-at-large position in two regards. First, there is currently more than one cooperative marketing association in the industry. The proposed amendment published in the notice of hearing did not take this into consideration. The Committee proposed amending this section by allowing the cooperative marketing association that handles the greatest volume of cranberries produced during the fiscal period in which nominations are made to nominate the cooperative members and alternates.

The second modification made by the Committee to the amendment published in the notice of hearing was to change the criteria used to determine which group is entitled to the member-at-large position from sales of cranberries to volume of cranberries handled. Testimony revealed that using handler sales could be problematic and administratively burdensome.

Witnesses opposed to combining the smaller cooperatives with the largest cooperative testified that if the volume handled by the two current cooperatives were combined to determine which group is awarded the additional seat, the largest cooperative could handle 49 percent of the crop and the smaller cooperative could handle 2 percent. Under that scenario, the major cooperative would be allocated the additional seat. Witnesses did not believe it would be equitable for the major cooperative to have less than 50 percent of the volume handled and be entitled to an additional seat. A witness for the smaller cooperative testified that if his cooperative cannot be represented in the group with the dominant cooperative, he believes his cooperative should be able to participate in the independent elections to provide more opportunities for his cooperative to be represented.

In addition, a brief filed on this issue on behalf of a handler states that the hearing record does not support establishing the threshold for determining which group is entitled to the member-at-large position as 50 percent. The brief states that the cooperative should be entitled to an additional seat only if it handles more than 66⅔ percent of the crop. In addition, the brief states that the Committee must demonstrate how conditions in the industry have changed

since the order was amended in 1962 and established a 66⅔ percent threshold to limit the cooperative to 4 seats.

At the time the order was promulgated, the major cooperative handled more than 80 percent of the cranberries produced. The threshold for membership established at that time had nothing to do with allocating additional seats to a dominant group based on volume handled. The purpose of allowing 4 seats to the cooperative handling more than two-thirds of the volume of cranberries handled was to ensure their membership was limited to 4 seats, rather than guaranteeing them a certain number of seats. Conditions in the industry have changed in that the major cooperative now handles approximately two-thirds of the volume of cranberries produced. The current order language does not address how the industry should be structured in the event the major cooperative's percentage of volume handled falls below the two-thirds threshold and the order should be amended to address this inadequacy.

With the Committee's recommendation of the member-at-large position, it is intended that the dominant group in the industry be awarded an additional seat on the Committee. The Committee recognized that the potential scale of the impact of Committee recommendations increases with the volume of cranberries produced and regulated. For this reason, the Committee recommended assigning an additional seat to the dominant group. It seems eminently reasonable to use a simple majority as a means of determining which group is entitled to an additional seat. Therefore, the threshold for determining the dominant group should be fifty percent.

It has been concluded previously in this decision that the committee should be expanded. Therefore, it is necessary to revise current nomination provisions to accommodate the increase in seats on the committee. Nomination procedures for the independent members based on the increased membership as proposed by the Committee are found to be reasonable and are being recommended for adoption. Based on record evidence, smaller cooperatives should be allowed similar opportunities to be represented on the Committee. In addition, because the large cooperative will continue to nominate its members to the Committee if it chooses, it is necessary to modify this section of the nomination provisions regarding the independent and small cooperative seats.

It is important that all growers are provided the opportunity for membership on the Committee and have a voice in who should represent their interests. Alternatives discussed included allowing the smaller cooperative to participate in the independent elections, as suggested by witnesses representing the small and large cooperative. Record evidence supports the notion that smaller cooperatives should not be combined with the dominant cooperative in the nomination process. They should be provided a greater opportunity to be represented on the Committee. Therefore, smaller cooperatives should be authorized to participate in the independent elections. It is expected that these growers can easily become a part of this nomination process, with minimal additional administrative expenses by the Committee. Although this process does not guarantee any smaller cooperatives membership on the Committee, it provides the same opportunities as those provided for the independent nominees.

In addition, it is reasonable that the threshold for determining which entity will be assigned the member-at-large position should be based on the volume handled by the major cooperative versus all others. This specifically addresses the concerns expressed at the hearing where the major cooperative could be assigned the member-at-large position while handling less than a majority of the crop. Only the major cooperative's volume handled will be counted to determine if they are the dominant group entitled to an additional seat on the Committee.

Since members of small cooperatives and independent growers will be participating in the same nomination process, it is necessary to modify the terminology used in defining the representation. In setting forth the nomination procedures and to determine which group is assigned the member-at-large position, the terminology will be changed from growers that represent ''cooperatives'' and ''independents'' to growers that represent the ''major cooperative'', which will be the dominant cooperative in the industry and growers that represent ''other than the major cooperative''.

For the above stated reasons, the Committee's proposal establishing nomination procedures for the expanded Committee is being recommended for adoption, with modifications as discussed.

Sales Versus Handle in Determining Member-at-Large Position

The Committee's proposal as set forth in the notice of hearing recommended using the percentage of handler sales of cranberries as opposed to the percentage of volume handled in determining which entity is entitled to the member-at-large position. At the hearing, the Committee modified this portion of the proposal to use volume handled in determining the member-at-large position. According to testimony, the Committee realized that using handler sales could be problematic and administratively burdensome.

According to testimony from a grower who was a member of the amendment subcommittee, the reason the subcommittee recommended sales was that some of the independent handlers believed that their sales were climbing faster than the major cooperative. In addition, the subcommittee thought sales would be a better choice since the threshold for determining the dominant group was being established to 50 percent. This subcommittee member stated that there was much discussion and controversy on determining what constituted a sale, but that the consensus was that the first sale would be the one that counted.

One of the reasons the Committee modified their proposal from handler sales back to volume handled was that it would be difficult to gain consensus on how sales would be allocated. In its brief, the Committee stated that even the proponents of the amendment found the terms ''sale'' and ''sold'' confusing when questions arose about the possibility of double accounting of cranberry inventories when interhandler transfers occur. The debate centered on which handler would be entitled to take credit for the sale. When a handler buys from another handler, it is a sale for the first handler. When the second handler resells the cranberries to its customer, it is also a sale.

The Committee does report sales in its inventory reports for information purposes based on handler reports. The reporting of this data is for informational purposes only.

It was determined by the Committee that due to these complexities and the possibility of an increased administrative burden associated with using handler sales as a basis for assigning the additional seat, the threshold should be based on volume handled. Under the order, ''Handle'' means to can, freeze, or dehydrate cranberries with the production area, or to sell, consign, deliver, or transport fresh cranberries in or out of the production area. Handlers are accustomed to reporting figures based on handling of cranberries, and the Committee has an internal mechanism in place to track interhandler transfers

to ensure that double accounting does not take place.

This is not to be confused with grower sales which are used in establishing each grower's sales history. Grower deliveries (or sales) to handlers are easily tracked for the purposes of computing sales histories.

Record evidence does not support basing the member-at-large position on handler sales. The hearing record indicated there could be confusion and possible controversy in coming to consensus on determining what constitutes a sale. As stated in the record, handlers have been reporting volumes handled since the order was implemented. There have been very few problems associated with defining what is ''handled''. The Committee manager testified that there are safeguards in place that allow the Committee to crosscheck and assure that proper numbers are being reported.

Therefore, the member-at-large position should be determined by calculating the volume of cranberries handled.

Major Cooperative's Nomination of Members

Two proposed amendments submitted by industry representatives recommended altering the way the nominations of the major cooperative are currently authorized under the order by requiring cooperative nominees to be selected through an election process administered by the Committee.

The Committee's proposal did not modify the current order language that authorizes the cooperative, or its growers to nominate qualified persons for the allotted member and alternate positions.

Proponents of changing the nomination procedures for the cooperative testified that the major cooperative's growers should be provided the right to vote for a member on the Committee. It was testified that both groups should nominate members the same way.

A proponent testified that allowing the cooperative to nominate its members without direct input from its growers while independent members are nominated through a voting process has caused controversy in the industry and a lack of confidence in Committee activities. He testified that the cooperative nominees should be nominated in the same manner as independents, through an election process administered by the Committee.

The witness further testified that to allow the cooperative growers to elect their nominees would bolster industry confidence in the Committee, ensure better representation of the interests of growers, and more clearly demonstrate desires of industry to USDA and the public. He testified that there may be a slight increase in Committee expenses if the cooperative is required to nominate its members through an election process due to additional nomination procedures. The number of Committee meetings would remain the same so costs would not increase in that regard. He believed that any increase would be outweighed by benefits of ensuring that the Committee better represents the needs of producers while bolstering public confidence in the Committee.

Another proponent, representing a small cooperative, testified that the Committee's proposal for nomination procedures where the small cooperatives are combined with the large cooperative would provide no opportunity for his organization to be represented on the Committee. He believed his proposal would address this by allowing all cooperative growers to nominate and vote for the cooperative representatives on the Committee.

A witness in support of the proposals testified that under the process that independent members are selected, if a grower is unhappy with the way an independent member voted during a meeting, the grower's recourse is to try to ensure that that member does not get elected during the next election. He testified that the major cooperative's growers do not have that opportunity because their members are nominated by management.

A representative of the major cooperative testified in opposition to the proposals. He stated that the current nomination procedures for cooperative members on the Committee are consistent with the principles of cooperative governance. He testified that the board of the major cooperative is charged with the responsibility and authority to oversee the operation of the cooperative's business. Committee nominations being made by their cooperative helps assure that they carefully consider the collective voice growers provide through their cooperative.

The order currently authorizes the cooperative marketing organization, or the growers affiliated therewith, to nominate its members. The cooperative has two options under this provision and currently chooses to allow the board to make the nominations. It also has the option of conducting an election of its growers to nominate the seats to the Committee.

Congress recognized the importance of cooperatives as representative of the collective voice of many growers when the Act was enacted. It is not USDA's intent to regulate the internal operations of cooperative management through an amendment to the marketing order. The order authorizes the cooperative or its growers to nominate seats to the Committee. That discretion should remain with the cooperative.

Record evidence supports that the nomination by the cooperative for cooperative representatives to the Committee should remain unchanged in that the cooperative or the growers affiliated therewith, shall nominate its members. Therefore, the proposals to change the way the cooperative nominates its members are denied.

Tenure

The term of office for members and alternates on the Committee is currently 2 years. Committee members are limited to 3 consecutive terms. The Committee is proposing that the term limitations for the current members be reset. In its proposal, the Committee recommended that current Committee members who have not met the 3 consecutive term limitation and who are re-nominated and selected would be able to serve an additional 3 consecutive 2-year terms before becoming ineligible to serve on the Committee.

Testimony revealed that with the increase in Committee membership, a loss of a member solely due to term limitations could have an adverse impact on the Committee's decision-making abilities, particularly when there are new and inexperienced members selected for membership. Restarting term limitations when the expanded Committee is seated would ensure that experienced and knowledgeable members could remain on the Committee. There was no opposition testimony regarding resetting term limits at the hearing.

A grower/handler who is opposed to term limits in general testified that with the small turnout for nominations and limited growers to be nominated in some districts, there should not be term limits. He believed that term limits take away growers' rights to choose who they want to represent them. A suggestion was made to allow an exemption from term limits in the event another grower was not available to fill the position.

Since it is recommended that the Committee be re-structured by increasing membership, it is determined that term limitations should be reset to allow for a smooth transition of the new Committee. With the increase in membership, it is possible that there would be members that have never served on the Committee before. It is critical to maintain the experience and

expertise needed so that the Committee can continue its operations with a minimum of disruptions. Resetting the tenure limitations simultaneously with the seating of the expanded Committee would provide the experienced members opportunities to remain on the Committee and assist in transitioning the newer members as they become familiar with the regulatory process.

Regarding the testimony on the need for term limits, it is USDA's view that a limit on tenure for Committee members would improve representation on the Committee by allowing for different and more contemporary ideas, and that such a limit would be beneficial to the Committee's operations. However, the issue of the smaller districts not having enough growers who want to be on the Committee is a concern. If a district with 15 growers only had one or two growers interested in serving on the Committee, it would be detrimental to have a qualified member step down because of term limits and have no one willing to step in. It does not appear that this would be an issue in districts with many growers, like Districts 1 and 3.

In its brief, the Committee suggested a change to alleviate this situation. It proposed modifying the language in that provision to provide that members who have served 3 consecutive terms must leave the Committee for at least one full term before becoming eligible to serve again ''unless specifically exempted by the Secretary.'' The Committee's reason for including this language is to allow the Committee to petition USDA to retain an incumbent member beyond term limits if it is unable to find a new member to serve. The Committee believes this would ensure that growers from specified districts would continue to have representation.

Because of the small number of growers in some districts, this situation could prove problematic in the future. For this reason, the phrase ''unless specifically exempted by the Secretary'' is being added to paragraph (c) of § 929.21. This addition should not discourage the continued search by the Committee for new and diverse membership.

The nomination provisions (§ 929.22) provided that nominations for the re-established Committee shall be held as soon as practicable after adoption of this amendment. Depending upon the timing of adoption of this amendment, new members could be nominated and selected to serve on the Committee close to the time of the next selection period.

Therefore, USDA has added a proviso under this provision that initial members of the re-established Committee shall be seated for a minimum of one full term. For example, if a change in Committee structure becomes effective in March of 2004, the nomination process would commence immediately. Members selected through this process would serve up to August 2004 and at least two years from August 2004. This would help provide continuity on the Committee. In addition, the tenure limits would not start until August 1 of the first even numbered year after seating of the new Committee so that term limits and tenure can be computed concurrently.

Therefore, § 929.21 is proposed to be amended to restart tenure limitations on August 1 of the first even numbered year the new members serve. If this proposal were adopted, any past time served would not be counted toward any member's tenure. The term of office for each member and alternate member of the Committee would be for 2 years, beginning on August 1 of each even-numbered year and ending on the second succeeding July 31. Tenure limits would start on August 1 of the first even numbered year served.

Exceptions are possible if deemed necessary by USDA. Term limits do not apply to alternates.

Quorum and Voting Requirements

An increase in membership necessitates a proportionate increase to the number of members necessary to constitute a quorum and the number of concurring votes necessary to approve actions of the Committee. The Committee's proposal included such modifications.

Specifically, the Committee recommended that 10 members must be present to constitute a quorum which expands to 11 if the public member is present. The Committee also proposed that the concurring votes necessary to pass any action be 10 if the public member is absent or abstains from voting and 11 if the public member votes.

Adoption of this proposal would retain the super majority requirement for passing Committee actions that is in the current order. Concerns were raised at the hearing that these requirements were too stringent but testimony revealed that having stringent voting requirements ensures that consensus is reached among Committee members prior to any action being passed. Also, this proposal maintains the same requirements that are in the current order.

Therefore, based on the above discussion, § 929.32 is to be modified as proposed by the Committee. Implementation of this amendment, if adopted, would correspond to the establishment of the new Committee.

Mail Nominations

Currently, the Committee is required to hold meetings in Districts 1, 2, and 3 to elect independent nominees for member and alternate member positions on the Committee. District 4 growers who participate with District 3 in nominations are authorized to participate by mail.

The Committee proposes eliminating the requirement for holding meetings of independent growers within each of the districts to nominate nominees for independent member and alternate members and authorizing all nominations to be conducted by mail. The record revealed that this proposal will allow growers greater opportunities to participate in Committee activities. The Committee would recommend procedures to USDA, wherein nominations could be made through a call for nominations mailed to each eligible independent producer. Such notification could contain a deadline for eligible, independent producers to submit the name of eligible, independent nominees. The Committee would prepare and mail a ballot to each grower. The ballots would be tallied and the nominations made in accordance with the nomination procedures.

Following the end of the voting period, ballots received by the deadline would be separated by district and tallied in accordance with the nomination procedures for independent members.

If the group other than the major cooperative were entitled to the member-at-large position, it is the Committee's intent that the member-at-large position and independent nominations would take place simultaneously. This could cause confusion among growers interested in either position. To address this issue, testimony indicated that the Committee would need to develop and recommend procedures in the event the group other than the major cooperative is entitled to this seat. Section 929.22(i) provides authority for the Committee, with the approval of the Secretary, to issue rules and regulations to carry out the provisions of this section. The Committee may recommend regulations to clarify and implement this section, especially if there is any confusion in conducting nominations for the member-at-large position in the instance where it is assigned to the group representing growers from other than the major cooperative.

The Committee expects that costs in conducting nominations under this

proposal would be decreased by not having to travel to hold meetings within the marketing order districts. There was no opposition testimony on authorizing mail balloting.

It is determined that adoption of this proposal would have a positive impact by allowing more producers greater opportunity to participate in Committee activities. It should also provide for greater participation in the voting process as well as reduce costs associated with holding nomination meetings. Therefore, this proposal is recommended for adoption.

Selection

The Committee proposed modifying this section to conform to the proposed increase in Committee structure. This section authorizes USDA to select the members and alternates on the Committee based on the nominees appointed in accordance with § 929.22. This section has been modified to correspond with the nomination procedures as discussed previously.

Using Tax Identification Numbers

The Committee proposed that a grower's tax identification number be used in the independent voting process to ensure that only eligible independent growers qualify for nomination and voting procedures. The Committee testified that using the tax identification number would assure that only eligible, independent producers qualify to nominate, be nominated and cast ballots in the independent nomination process.

Currently, the Committee uses a ''grower identification number'' or ''farm unit.'' The unit is based on growers' acreage and ownership of the property as reported to the Committee. Although this method has been mostly efficient, there are incidences where growers subdivide their acreage so they can track production from each bog/marsh. In these instances, growers are qualified to obtain separate grower numbers for each subdivided parcel and thereby, would have one vote for each grower number assigned.

A grower/handler testified in opposition to this proposal because he believes it provides incentives for abuse. He advised that using tax identification numbers would make it possible for his company to break up its properties and receive 100 tax identification numbers. The witness supports the current method of identifying properties as farm units.

In its brief, the Committee stated that if the proposal to authorize mail balloting is approved, a mechanism should be in place to discourage growers to subdivide their acreage in order to gain the ability to cast multiple ballots on behalf of a nominee. The Committee believes that growers who subdivide their bogs/marshes do so for a variety of reasons unrelated to the nomination process.

Requiring one tax identification number for one nomination vote more appropriately clarifies the voting procedure. Growers may have reasons other than nomination voting to apply for multiple tax identification numbers as well as for subdividing their properties. However, tax identification numbers are considered more cumbersome to obtain than grower identification numbers and it would be less likely that growers would do so merely to obtain multiple votes in the nomination procedures.

One grower testified that it would be unlikely that she would get another tax identification number because it would be too cumbersome. She supported the use of tax identification numbers as being a consistent way to keep track of properties. It is agreed that this would be a more efficient method of ensuring that growers are eligible to be nominated and vote in Committee member elections. Therefore, it is recommended that the order be amended to authorize the use of tax identification numbers in the voting process for growers that represent other than the major cooperative.

Alternates Authorized To Fill Member Positions

The Committee proposal would also clarify which alternates could be seated in place of absent members. This change is needed to conform to the proposed change in Committee structure. The current language in this section states that not more than 4 members from each group can serve as members at the same meeting. Since there would be a minimum of 6 members from each group in the proposed Committee, this language must be changed to reflect the change in Committee structure. This proposal would also be beneficial for clarity because the proposed change in Committee structure would have only 9 alternates selected to accommodate 14 members.

As proposed, alternate members representing cooperative marketing organizations cannot be seated to serve in the place of either an independent or public member. Alternates representing independents cannot be seated to serve in the place of either cooperative marketing organizations or the public member, and the alternate public member cannot be seated to serve in the place of either the cooperative marketing organizations or independent members. There was no opposition testimony on this proposal.

The Committee's proposal designates the groups of representatives on the Committee as cooperatives and independents. This decision modifies those designations as growers representing the major cooperative and growers representing other than the major cooperative. Because of this change, it is necessary to modify the language in the proposal to conform to this proposed amendment.

Therefore, the amendatory text is being modified to provide that an alternate member representing the major cooperative cannot serve for a member representing other than the major cooperative or the public member. Likewise, an alternate member representing other than the major cooperative cannot serve for a member representing the major cooperative or the public member. The public alternate member cannot serve in place of any industry members.

This proposed change is necessary to reflect the proposed change in Committee structure. In addition, because the proposal would provide fewer alternates than members, this clarification would be beneficial as it more specifically designates which member seat each alternate can replace in the member's absence. Therefore, record evidence herein supports amending § 929.27, with modifications.

The record supports these proposed amendments to §§ 929.20, 929.21, 929.22, 929.23, 929.27 and 929.32, with modifications.

Material Issue Number 2

Section 929.20 should be amended to require Committee industry member and alternate member nominees' disclosure of non-regulated cranberry production. Currently, nominees for member and alternate member positions on the Committee are required to complete a qualification form providing information on the nominee's relation to the cranberry industry. This information includes how long the grower has been in the cranberry business, its associated handler, and involvement in cranberry associations. The information collected is used to determine whether nominees are eligible to serve in the positions for which they were nominated. Currently, there is no reporting requirement for members or alternate members regarding non-regulated production.

A proposal was made by an attorney representing a cranberry handler and recommended that Committee members also be required to submit information regarding their interest in foreign cranberry production. He testified that

foreign countries and States not regulated under the order are starting to emerge as significant producers of cranberries. Many producers in the production area are involved in this production. The proponent testified that when nominees for Committee representatives have a financial interest in the production of cranberries that are not subject to the order's regulations, it could be perceived as a conflict of interest, especially when these members are voting on issues as critical as volume regulation.

This proposal would require Committee grower nominees and alternate grower nominees to disclose any financial interest in non-regulated production at the time of their nomination. The proponent believes it would be fair for growers to be informed of nominees' interests in production that would not be subject to order requirements.

The proponent testified that this proposal would help maintain the integrity of the Committee and its actions by providing assurance that the Committee is acting in the best interest of production area producers. He suggested this information could be disclosed at meetings held for election of nominees or it could be required information on the qualifications statement currently required by nominees. He testified that this would ensure that growers are informed of this information prior to casting their vote to nominate a representative. He explained that it is not the intent of the proposal to bar potential members from serving on the Committee, as these producers are valuable members of the industry whose extensive knowledge can benefit the Committee.

The proponent testified that the proposal is not intended to require disclosure of information such as the number of acres, financial information, or the nature of the business relationship as that level of detail could be proprietary in nature. The intent is to merely require the nominees to acknowledge the interest without divulging proprietary information. He further testified that the producers should only be required to report their individual interest in non-regulated production and not that of their handler.

Although there was no opposition to the concept of requiring this information, questions arose at the hearing regarding what the term ''financial interest'' would entail. For example, testimony indicated that the selling of vines, irrigation equipment, fertilizer, and etc. to foreign cranberry interests would not constitute financial interest.

Testimony indicated that the disclosure would not need to include detailed financial information but instead be limited to only a general acknowledgement as to the nature of the financial interests, such as part and majority ownership.

The record supports adding the requirement under § 929.20 that nominees be required to acknowledge financial interest in non-regulated production. Because mail nominations are being authorized with this action, this information cannot be collected at nomination meetings. The collection of this information shall be added to the qualification statement required to be completed by nominees prior to selection. The information required would be an acknowledgement of financial interest in non-regulated production. In the event there is confusion in determining the nature or extent of information necessary for this proposed amendment, the committee may establish, with the approval of USDA, rules and regulations for the implementation and operation of this section in accordance with paragraph (e) of § 929.20.

Record evidence supports amending § 929.20 by adding a requirement that grower nominees and alternate grower nominees of the Committee shall disclose annually any financial interest in the production of cranberries that are not subject to regulation by this part.

Material Issue Number 3

The Committee requested expedited rulemaking on all of their proposals. This document sets forth a decision on Committee proposals 1 (Committee structure); 19 (Committee member disclosure of non-regulated production) and 20 (Committee nomination procedures) filed by Stephen Lacey on behalf of Clement Pappas & Company, Inc. and Cliffstar Corporation; and 23 (Committee nomination procedures) and 24 (Committee selection procedures) filed by the Wisconsin Cranberry Cooperative.

Evidence presented at the hearing established that the proposals relating to changing the Committee's administrative body need to be expedited. All other proposals will be addressed in a separate decision.

The order currently states that any cooperative marketing organization that handled more than two-thirds of the total volume of cranberries produced during the fiscal period during which nominations for membership on the Committee are made, or the growers affiliated therewith, shall nominate four or more qualified persons for members and four or more qualified persons for alternate members. There is currently no cooperative marketing organization that handles more than two-thirds of the total volume of cranberries produced. Because the current order does not specify how the Committee should be structured in this event, the order should be amended as soon as possible to address this inadequacy. Consequently, it is determined that emergency conditions exist and the issuance of a recommended decision is therefore being omitted. In accordance with the rules of practice (7 CFR part 900), it is found and determined that the record establishes a basis as noted above for proceeding directly to a Secretary's decision and referendum order. The proposed expedited amendments are to §§ 929.20, 929.21, 929.22, and 929.23.

The proposal clarifying how alternates may fill positions in any member's absence must be expedited as well. This proposal modifies § 929.27. The current order language states that not more than four members and alternate members selected from the large cooperative shall serve as members at the same meeting. Since the Committee is being expanded, there will be a minimum of six members and three alternates serving at the same meeting. Therefore, this provision should be changed at the same time the Committee structure is expanded.

As stated above, for the proposals recommending altering the Committee structure and clarifying how alternates fill absent member positions, the recommended decision is being omitted. These proposals were listed in the notice of hearing as proposal numbers 1, 2, 20, 23, and 24. Proposal number 19, submitted by Stephen Lacey, recommended adding a paragraph to § 929.20, which would require Committee member disclosure of unregulated production. This proposal is being included to simplify the amendment of this section. The remaining proposals will be resolved in a separate decision.

Small Business Considerations

Pursuant to the requirements set forth in the Regulatory Flexibility Act (RFA), AMS has considered the economic impact of this action on small entities. Accordingly, AMS has prepared this interim regulatory flexibility analysis.

The purpose of the RFA is to fit regulatory actions to the scale of business subject to such actions so that small businesses will not be unduly or disproportionately burdened. Marketing orders and amendments thereto are unique in that they are normally brought about through group action of essentially small entities for their own

benefit. Thus, both the RFA and the Act are compatible with respect to small entities.

Small agricultural producers have been defined by the Small Business Administration (SBA) (13 CFR 121.201) as those having annual receipts of less than $750,000. Small agricultural service firms, which include handlers regulated under the order, are defined as those with annual receipts of less than $5,000,000.

Interested persons were invited to present evidence at the hearing on the probable regulatory and informational impact of the proposed amendments on small businesses. The record indicates that these amendments would not result in additional regulatory requirements being imposed on some cranberry growers and handlers.

There are about 20 handlers currently regulated under Marketing Order No. 929. In addition, the record indicates that there are about 1,250 producers of cranberries in the current production area.

Based on recent years' price and sales levels, AMS finds that nearly all of the cranberry producers and some of the handlers are considered small under the SBA definition. In 2001, a total of 34,300 acres were harvested with an average U.S. yield per acre of 156.2 barrels. Grower prices in 2001 averaged $22.90 per barrel. Average total annual grower receipts for 2001 are estimated at $153,375 per grower. However, there are some growers whose estimated sales would exceed the $750,000 threshold. Thus, these proposed amendments will apply almost exclusively to small entities.

Five handlers handle over 97 percent of the cranberry crop. Using Committee data on volumes handled, AMS has determined that none of these handlers qualify as small businesses under SBA's definition. The remainder of the crop is marketed by about a dozen grower-handlers who handle their own crops. Dividing the remaining 3 percent of the crop by these grower-handlers, all would be considered small businesses.

This decision proposes that the order be amended: (1) To increase Committee membership to 13 members, 1 public member, 9 grower alternate members, 1 public alternate member; to incorporate a ''swing'' position whereby the entity (either the major cooperative or the group representing other than the major cooperative) which handles more than 50 percent of the total volume of cranberries produced is assigned an additional seat; incorporate nomination and selection procedures to reflect the change in Committee membership; establish districts to reflect the change in Committee membership and to include additional States; allow the Committee to request tax identification numbers for voting purposes and authorize mail nominations for independent members; revise and clarify the provisions for alternates to reflect the change in Committee structure; and (2) require Committee member disclosure of non-regulated cranberry production.

The proposed amendment to increase Committee membership to 13 members, 1 public member, 9 grower alternate members, 1 public alternate member would increase the Committee's size by 6 members and 1 alternate member. This would likely increase costs to the Committee with the additional members attending meetings. If alternate members are not required to attend all meetings, costs could be reduced. However, the record evidence supports increasing the Committee. The benefits of broadening the membership of the Committee and equitably allocating seats would outweigh increased costs. Since the implementation of volume regulations, more growers are expressing interest in being a part of the Committee's processes. Expansion of the Committee would allow more growers the opportunity to be involved in the process. The Committee's recommendation to not have one alternate for each member would provide appropriate district coverage for members that cannot attend meetings while taking costs into account. By increasing the membership to 14 and establishing 4 districts, regional representation would be maintained and additional representation to the largest growing regions would be provided.

The proposal to include a member-at-large position on the Committee to the entity (either the major cooperative or the group representing other than the major cooperative) that handles more than 50 percent of the total volume of cranberries produced would provide an additional member and alternate to the dominant group. This allows for recognition that the scale of the impact increases with the volume of cranberries produced and regulated.

The proposed amendment to reset term limitations for the current members would help maintain the experience and expertise needed so that the Committee can continue its operations with a minimum of disruptions.

The proposed amendment to allow nominations to be conducted by mail would allow more growers greater opportunity to participate on the Committee and provide for greater participation in the voting process. Administrative Committee costs associated with holding nomination meetings would decrease.

The proposed amendment to use growers' tax identification numbers in the voting process for the group representing other than the major cooperative would help ensure that only eligible growers qualify for nomination and the voting process.

The proposed amendment to revise and clarify which alternates can be seated in place of absent members is necessary to conform to the proposed change in Committee structure. In addition, it would be beneficial as it more specifically designates which member seats each alternate can replace in the member's absence.

The proposed amendment to require Committee member disclosure of non-regulated cranberry production would ensure that growers are informed of this information prior to casting their vote to nominate a representative on the Committee.

All of these changes are designed to enhance the administration and functioning of the marketing agreement and order to the benefit of the industry. Accordingly, it is determined that the benefits of implementing the proposed revisions of the order would outweigh any associated costs. Costs are not anticipated to be significant.

Paperwork Reduction Act

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. chapter 35), this notice announces that AMS is seeking approval from the Office of Management and Budget (OMB) for a new information collection request for Cranberries grown in 10 States, Marketing Order No. 929.

Title: Cranberries grown in the States of Massachusetts, *et al.*, Marketing Order No. 929.

OMB Number: 0581–NEW.

Type of Request: New collection.

Abstract: The information collection requirements in this request are essential to carry out the intent of the Act, to provide the respondents the type of service they request, and to administer the cranberry marketing order program, which has been operating since 1962.

Specifically, if the membership on the Committee is increased, the overall burden of completion of Committee generated forms and reports relative to Committee membership would increase due to additional membership. In addition, if the proposed amendment to require Committee member disclosure of non-regulated production is authorized, the qualification statement would have to be modified to include

this information. Total burden hours for completion of qualification forms for grower members and alternates is .58 hours. The additional membership and information required would increase this amount by .375 hours, or a total of .955 hours. There would be no increase in the non-regulated disclosure proposal since that would only entail an acknowledgement as to whether the member has a financial interest in non-regulated production.

If the proposed amendment to authorize mail nominations is approved, a nomination form and ballot would be necessary to conduct mail nominations. It is estimated that there are approximately 500 growers who would be entitled to vote by mail ballot once every two years. The estimated time to complete the nomination form would be approximately 5 minutes for an annual increase in burden hours of 20.75. The estimated time to complete the ballot would be approximately 5 minutes for an annual increase in burden hours of 20.75.

If the proposed amendment to require growers to submit a tax identification number is approved, this information will be added to the grower sales and acreage report form (Form No. CMC–GSAR–1) currently approved under OMB. With minimal amount of time needed to add this number on the form, there will be no increase in burden for growers to complete this form.

The information collection would be used only by authorized representatives of USDA, including AMS, Fruit and Vegetable Programs' regional and headquarters staff, and authorized Committee employees. Authorized Committee employees will be the primary users of the information and AMS is the secondary user.

The request for approval for the new information collection under the order is as follows:

Cranberry Marketing Order Member and Alternate Member Nomination Form

Estimate of Burden: Public reporting burden for this collection of information is estimated to average 5 minutes per response.

Respondents: Cranberry growers.

Estimated Number of Respondents: 500.

Estimated Number of Responses per Respondent: .50.

Estimated Total Annual Burden on Respondents: 20.75 hours.

Cranberry Marketing Order Member and Alternate Member Ballot

Estimate of Burden: Public reporting burden for this collection of information is estimated to average 5 minutes per response.

Respondents: Cranberry growers.

Estimated Number of Respondents: 500.

Estimated Number of Responses per Respondent: .50.

Estimated Total Annual Burden on Respondents: 20.75 hours.

Comments: Comments are invited on: (1) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) the accuracy of the agency's estimate of the burden of the collection of information, including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on those who are to respond, including the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

Comments should reference OMB No. 0581–NEW and the Cranberry marketing order, and be sent to USDA in care of the Docket Clerk at the previously mentioned address. All comments received will be available for public inspection during regular business hours at the same address.

All responses to this notice will be summarized and included in the request for OMB approval. All comments will become a matter of public record.

As mentioned before, AMS is seeking approval from OMB for the additional burden imposed by the *Cranberry Marketing Order Member and Alternate Member Nomination Form and Cranberry Marketing Order Member and Alternate Member Ballot.* Upon OMB approval, the additional burden will be merged into the information collection currently approved under OMB No. 0581–0189, Generic OMB Fruit Crops.

In addition to the information collection burden, a 60-day comment period is invited to allow interested persons to respond to this proposal. All written comments timely received will be considered prior to finalization of this decision.

These provisions and any additional provisions modifying reporting and recordkeeping burdens that generate from these proposed amendments would not be effective until receiving OMB approval. Current information collection requirements for part 929, including referendum ballots, are approved by OMB under OMB number 0581–0189.

As with all Federal marketing order programs, reports and forms are periodically reviewed to reduce information requirements and duplication by industry and public sector agencies.

The Department has not identified any relevant Federal rules that duplicate, overlap or conflict with this proposed rule. These amendments are designed to enhance the administration and functioning of the marketing order to the benefit of the industry.

Committee meetings regarding these proposals as well as the hearing dates were widely publicized throughout the cranberry industry, and all interested persons were invited to attend the meetings and the hearing and participate in Committee deliberations on all issues. All Committee meetings and the hearing were public forums and all entities, both large and small, were able to express views on these issues.

Civil Justice Reform

The amendments proposed herein have been reviewed under Executive Order 12988, Civil Justice Reform. They are not intended to have retroactive effect. If adopted, the proposed amendments would not preempt any State or local laws, regulations, or policies, unless they present an irreconcilable conflict with the amendments.

The Act provides that administrative proceedings must be exhausted before parties may file suit in court. Under section 608c(15)(A) of the Act, any handler subject to an order may file with the Secretary a petition stating that the order, any provision of the order, or any obligation imposed in connection with the order is not in accordance with law and request a modification of the order or to be exempted therefrom. A handler is afforded the opportunity for a hearing on the petition. After the hearing the Secretary would rule on the petition. The Act provides that the district court of the United States in any district in which the handler is an inhabitant, or has his or her principal place of business, has jurisdiction to review the Secretary's ruling on the petition, provided an action is filed not later than 20 days after date of the entry of the ruling.

Rulings on Briefs of Interested Persons

Briefs, and the evidence in the record were considered in making the findings and conclusions set forth in this decision. To the extent that the suggested findings and conclusions filed by interested persons are inconsistent with the findings and conclusions of

this decision, the requests to make such conclusions are denied.

Annexed hereto and made a part hereof is the document entitled ''Order Amending the Order Regulating the Handling of Cranberries Grown in the States of Massachusetts, Rhode Island, Connecticut, New Jersey, Wisconsin, Michigan, Minnesota, Oregon, Washington, and Long Island in the State of New York.'' This document has been decided upon as the detailed and appropriate means of effectuating the foregoing findings and conclusions.

It is hereby ordered, that this entire decision be published in the **Federal Register**.

Referendum Order

It is hereby directed that a referendum be conducted in accordance with the procedure for the conduct of referenda (7 CFR part 900.400 *et seq.*) to determine whether the issuance of the annexed order amending the order regulating the handling of cranberries grown in the States of Massachusetts, Rhode Island, Connecticut, New Jersey, Wisconsin, Michigan, Minnesota, Oregon, Washington, and Long Island in the State of New York is approved or favored by growers and processors, as defined under the terms of the order, who during the representative period were engaged in the production or processing of cranberries in the production area.

The representative period for the conduct of such referendum is hereby determined to be September 1, 2002, through August 31, 2003.

The agent of the Secretary to conduct such referendum is hereby designated to be Kenneth G. Johnson, Regional Manager, DC Marketing Field Office, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, 4700 River Road, Unit 155, Suite 2A04, Riverdale, Maryland 20737; telephone (301) 734–5243.

List of Subjects in 7 CFR Part 929

Cranberries, Marketing agreements, Reporting and recordkeeping requirements.

Dated: December 4, 2003.

A. J. Yates,

Administrator, Agricultural Marketing Service.

Order Amending the Order Regulating the Handling of Cranberries Grown in the States of Massachusetts, Rhode Island, Connecticut, New Jersey, Wisconsin, Michigan, Minnesota, Oregon, Washington, and Long Island in the State of New York [1]

Findings and Determinations

The findings and determinations hereinafter set forth are supplementary and in addition to the findings and determinations previously made in connection with the issuance of the order; and all of said previous findings and determinations are hereby ratified and affirmed, except insofar as such findings and determinations may be in conflict with the findings and determinations set forth herein.

(a) *Findings and Determinations Upon the Basis of the Hearing Record.*

Pursuant to the provisions of the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601 *et seq.*), and the applicable rules of practice and procedure effective thereunder (7 CFR part 900), a public hearing was held upon the proposed amendments to the Marketing Agreement and Order No. 929 (7 CFR part 929), regulating the handling of cranberries grown in the States of Massachusetts, Rhode Island, Connecticut, New Jersey, Wisconsin, Michigan, Minnesota, Oregon, Washington, and Long Island in the State of New York.

Upon the basis of the evidence introduced at such hearing and the record thereof, it is found that:

(1) The marketing agreement and order, as amended, and as hereby proposed to be further amended, and all of the terms and conditions thereof, will tend to effectuate the declared policy of the Act;

(2) The marketing agreement and order, as amended, and as hereby proposed to be further amended, regulate the handling of cranberries grown in the production area in the same manner as, and is applicable only to persons in the respective classes of commercial and industrial activity specified in the marketing order upon which hearings have been held;

(3) The marketing agreement and order, as amended, and as hereby proposed to be further amended, are limited in application to the smallest regional production area which is practicable, consistent with carrying out the declared policy of the Act, and the issuance of several orders applicable to subdivisions of the production area would not effectively carry out the declared policy of the Act;

(4) The marketing agreement and order, as amended and as hereby proposed to be further amended, prescribe, insofar as practicable, such different terms applicable to different parts of the production area as are necessary to give due recognition to the differences in the production and marketing of cranberries grown in the production area; and

(5) All handling of cranberries grown in the production area as defined in the marketing agreement and order, as amended, and as hereby proposed to be further amended, is in the current of interstate or foreign commerce or directly burdens, obstructs, or affects such commerce.

Order Relative to Handling

It is therefore ordered, that on and after the effective date hereof, all handling of cranberries grown in the States of Massachusetts, Rhode Island, Connecticut, New Jersey, Wisconsin, Michigan, Minnesota, Oregon, Washington, and Long Island in the State of New York, shall be in conformity to, and in compliance with, the terms and conditions of the said order as hereby proposed to be amended as follows:

The provisions of the proposed marketing agreement and the order amending the order will be and are the terms and provisions of this order amending the order and are set forth in full herein.

PART 929—CRANBERRIES GROWN IN THE STATES OF MASSACHUSETTS, RHODE ISLAND, CONNECTICUT, NEW JERSEY, WISCONSIN, MICHIGAN, MINNESOTA, OREGON, WASHINGTON, AND LONG ISLAND IN THE STATE OF NEW YORK

1. The authority citation for 7 CFR part 929 continues to read as follows:

Authority: 7 U.S.C. 601–674.

2. Revise ''929.20 to read as follows:

929.20 Establishment and membership.

(a) There is hereby established a Cranberry Marketing Committee consisting of 13 grower members, and 9 grower alternate members. Except as hereafter provided, members and alternate members shall be growers or

[1] This order shall not become effective unless and until the requirements of § 900.14 of the rules of practice and procedure governing proceedings to formulate marketing agreements and marketing orders have been met.

employees, agents, or duly authorized representatives of growers.

(b) The committee shall include one public member and one public alternate member nominated by the committee and selected by the Secretary. The public member and public alternate member shall not be a cranberry grower, processor, handler, or have a financial interest in the production, sales, marketing or distribution of cranberries or cranberry products. The committee, with the approval of the Secretary, shall prescribe qualifications and procedures for nominating the public member and public alternate member.

(c) Members shall represent each of the following subdivisions of the production areas in the number specified in Table 1. Members shall reside in the designated district of the production area from which they are nominated and selected. Provided, that there shall also be one member-at-large who may be nominated from any of the marketing order districts.

(1) District 1: The States of Massachusetts, Rhode Island and Connecticut;

(2) District 2: The State of New Jersey and Long Island in the State of New York.

(3) District 3: The States of Wisconsin, Michigan, and Minnesota.

(4) District 4: The States of Oregon and Washington.

TABLE 1

Districts	Major cooperative members	Major cooperative alternates	Other than major cooperative members	Other than major cooperative alternates
1	2	1	2	1
2	1	1	1	1
3	2	1	2	1
4	1	1	1	1
Any		1 member-at-large		

(d) *Disclosure of unregulated production.* All grower nominees and alternate grower nominees of the committee shall disclose any financial interest in the production of cranberries that are not subject to regulation by this part.

(e) The committee may establish, with the approval of the Secretary, rules and regulations for the implementation and operation of this section.

3. Revise § 929.21 to read as follows:

§ 929.21 Term of office.

(a) The term of office for each member and alternate member of the committee shall be for two years, beginning on August 1 of each even-numbered year and ending on the second succeeding July 31. *Provided:* That following adoption of this amendment, the term of office for the initial members and alternates shall also include any time served prior to August 1 of the first even numbered year served. Members and alternate members shall serve the term of office for which they are selected and have been qualified or until their respective successors are selected and have been qualified.

(b) Beginning on August 1 of the even-numbered year following the adoption of this amendment, committee members shall be limited to three consecutive terms. This limitation on tenure shall not include service on the committee prior to the adoption of this amendment or service on the committee by the initial members prior to August 1 of the first even-numbered year served and shall not apply to alternate members.

(c) Members who have served three consecutive terms must leave the committee for at least one full term before becoming eligible to serve again unless specifically exempted by the Secretary. The consecutive terms of office for alternate members shall not be so limited.

4. Revise § 929.22 to read as follows:

§ 929.22 Nomination.

(a) *Initial members.* As soon as practicable after adoption of this amendment, the committee shall hold nominations in accordance with this section. The names and addresses of all nominees shall be submitted to the Secretary for selection as soon as the nomination process is complete. Nominees selected for the initial Committee, following adoption of this amendment, shall serve a minimum of one two-year term beginning on August 1 of the first even numbered year served.

(b) *Successor members.* Beginning on June 1 of the even-numbered year following the adoption of this amendment, the committee shall hold nominations in accordance with this section.

(c) Whenever any cooperative marketing organization handles more than fifty percent of the total volume of cranberries produced during the fiscal period in which nominations for membership on the committee are made, such cooperative or growers affiliated therewith shall nominate:

(1) Six qualified persons for members and four qualified persons for alternate members of the committee. These members and alternate members shall be referred to as the major cooperative members and alternate members. Nominee(s) for major cooperative member and major cooperative alternate member shall represent growers from each of the marketing order districts designated in § 929.20.

(2) A seventh major cooperative member shall be referred to as the major cooperative member-at-large. The major cooperative member-at-large may be nominated from any of the marketing order districts.

(3) Six qualified persons for members and four qualified persons for alternate members of the committee shall be nominated by those growers who market their cranberries through entities other than the major cooperative marketing organization. Nominees for member and alternate member representing entities other than the major cooperative marketing organization shall represent growers from each of the marketing order districts as designated in § 929.20(c).

(d) Whenever any major cooperative marketing organization handles 50 percent or less of the total volume of cranberries produced during the fiscal period in which nominations for membership on the committee are made, the major cooperative or growers affiliated therewith, shall nominate:

(1) Six qualified persons for major cooperative members and four qualified persons for major cooperative alternate members of the committee. Nominees for member and alternate member shall represent growers from each of the

marketing order districts as designated in § 929.20(c).

(2) Six qualified persons for members and four qualified persons for alternate members of the committee shall be nominated by those growers who market their cranberries through entities other than the major cooperative marketing organization. Nominees for member and alternate member shall represent growers from each of the marketing order districts as designated in § 929.20(c).

(3) A seventh member nominee shall be referred to as the member-at-large representing entities other than the major cooperative marketing organization. The member-at-large may be nominated from any of the marketing order districts.

(e) Nominations of qualified member nominees representing entities other than the major cooperative marketing organization shall be made through a call for nominations sent to all eligible growers residing within each of the marketing order districts. The call for such nominations shall be by such means as are recommended by the committee and approved by the Secretary.

(1) The names of all eligible nominees from each district received by the committee, by such date and in such form as recommended by the committee and approved by the Secretary, will appear on the nomination ballot for that district.

(2) Election of the member nominees and alternate member nominees shall be conducted by mail ballot.

(3) Eligible growers shall participate in the election of nominees from the district in which they reside.

(4) When voting for member nominees, each eligible grower shall be entitled to cast one vote on behalf of him/herself.

(5) The nominee receiving the highest number of votes cast in districts two and four shall be the member nominee representing entities other than the major cooperative marketing organization from that district. The nominee receiving the second highest number of votes cast in districts two and four shall be the alternate member representing entities other than the major cooperative marketing organization from that district.

(6) The nominees receiving the highest and second highest number of votes cast in districts one and three shall be the member nominees representing entities other than the major cooperative marketing organization from that district. The nominee receiving the third highest number of votes cast in districts one and three shall be the alternate member representing entities other than the major cooperative marketing organization from that district.

(f) Nominations for the member-at-large representing entities other than the major cooperative marketing organization shall be made through a call for nominations sent to all eligible growers residing within the marketing order districts. The call for such nominations shall be by such means as recommended by the committee and approved by the Secretary.

(1) Election of the member-at-large shall be held by mail ballot sent to all eligible growers in the marketing order districts by such date and in such form as recommended by the committee and approved by the Secretary.

(2) Eligible growers casting ballots may vote for a member-at-large nominee from marketing order districts other than where they produce cranberries.

(3) When voting for the member-at-large nominee, each eligible grower shall be entitled to cast one vote on behalf of him/herself.

(4) The nominee receiving the highest number of votes cast shall be designated the member-at-large nominee representing entities other than the major cooperative marketing organization. The nominee receiving the second highest number of votes cast shall be declared the alternate member-at-large nominee representing entities other than the major cooperative marketing organization.

(g) The committee may request that growers provide their federal tax identification number(s) in order to determine voting eligibility.

(h) The names and addresses of all successor member nominees shall be submitted to the Secretary for selection no later than July 1 of each even-numbered year.

(i) The committee, with the approval of the Secretary, may issue rules and regulations to carry out the provisions or to change the procedures of this section.

5. Revise § 929.23 to read as follows:

§ 929.23 Selection.

(a) From nominations made pursuant to § 929.22(b), the Secretary shall select members and alternate members to the committee on the basis of the representation provided for in § 929.20 and in paragraph (b) or (c) of this section.

(b) Whenever any cooperative marketing organization handles more than 50 percent of the total volume of cranberries produced during the fiscal year in which nominations for membership on the committee are made, the Secretary shall select:

(1) Six major cooperative members and four major cooperative alternate members from nominations made pursuant to § 929.22(c)(1).

(2) One major cooperative member-at-large from nominations made pursuant to § 929.22(c)(2), and

(3) Six members and four alternate members from growers who market their cranberries through other than the major cooperative marketing organization made pursuant to § 929.22(c)(3).

(c) Whenever any major cooperative marketing organization handles 50 percent or less of the total volume of cranberries produced during the fiscal year in which nominations for membership on the committee are made, the Secretary shall select:

(1) Six major cooperative members and four major cooperative alternate members from nominations made pursuant to § 929.22(d)(1).

(2) Six members and four alternate members from nominations made pursuant to § 929.22(d)(2).

(3) One member-at-large representing entities other than the major cooperative marketing organization from nominations made pursuant to § 929.22(d)(3).

6. Revise § 929.27 to read as follows:

§ 929.27 Alternate members.

An alternate member of the committee, shall act in the place and stead of a member during the absence of such member, and may perform such other duties as assigned. In the event of the death, removal, resignation, or disqualification of a member, an alternate shall act for him/her until a successor for such member is selected and has qualified. In the event both a member and alternate member from the same marketing order district are unable to attend a committee meeting, the committee may designate any other alternate member to serve in such member's place and stead at that meeting provided that:

(a) An alternate member representing the major cooperative shall not serve in place of a member representing other than the major cooperative or the public member.

(b) An alternate member representing other than the major cooperative shall not serve in place of a major cooperative member or the public member.

(c) A public alternate member shall not serve in place of any industry member.

7. Revise § 929.32 to read as follows:

§ 929.32 Procedure.

(a) Ten members of the committee, or alternates acting for members, shall

constitute a quorum. All actions of the committee shall require at least ten concurring votes: Provided, if the public member or the public alternate member acting in the place and stead of the public member, is present at a meeting, then eleven members shall constitute a quorum. Any action of the committee on which the public member votes shall require eleven concurring votes. If the public member abstains from voting on any particular matter, ten concurring votes shall be required for an action of the committee.

(b) The committee may vote by mail, telephone, fax, telegraph, or other electronic means; Provided that any votes cast by telephone shall be confirmed promptly in writing. Voting by proxy, mail, telephone, fax, telegraph, or other electronic means shall not be permitted at any assembled meeting of the committee.

(c) All assembled meetings of the committee shall be open to growers and handlers. The committee shall publish notice of all meetings in such manner as it deems appropriate.

[FR Doc. 03–30598 Filed 12–11–03; 8:45 am]

BILLING CODE 3410–02–P

DEPARTMENT OF THE INTERIOR

National Park Service

36 CFR Part 7

RIN 1024–AC97

Lake Meredith National Recreation Area, Personal Watercraft Use

AGENCY: National Park Service, Interior.

ACTION: Proposed rule.

SUMMARY: The National Park Service (NPS) is proposing to designate areas where personal watercraft (PWC) may be used in Lake Meredith National Recreation Area, Texas. This proposed rule implements the provisions of the NPS general regulations authorizing a park unit to allow the use of PWC by promulgating a special regulation. The NPS *Management Policies 2001* directs individual parks to determine whether PWC use is appropriate for a specific park unit based on an evaluation of that park's enabling legislation, resources and values, other visitor uses, and overall management objectives.

DATES: Comments must be received by February 10, 2004.

ADDRESSES: Comments on the proposed rule should be sent to the Superintendent, Lake Meredith National Recreation Area, P.O. Box 1460, Fritch, TX 79036–1460, Fax: (806) 857–2319, e-mail: *LAMR_Superintendent@nps.gov*. If you comment by e-mail, please include ''PWC rule'' in the subject line and your name and return address in the body of your Internet message. Also, you may hand deliver comments to the Superintendent, Lake Meredith National Recreation Area, 419 East Broadway, Fritch, Texas.

For additional information see ''Public Participation'' under **SUPPLEMENTARY INFORMATION** below.

FOR FURTHER INFORMATION CONTACT: Judy Shafer, Office of Policy and Regulations, National Park Service, 1849 C Street, NW., Room 7250, Washington, DC 20240. Phone: (202) 208–7068. E-mail: *Judy_Shafer@nps.gov.*

SUPPLEMENTARY INFORMATION:

Background

Additional Alternatives

This proposed rule would implement portions of the preferred alternative in the Environmental Assessment published March 10, 2003. The public should be aware that two other alternatives were presented in the EA, including a no-PWC alternative, and those alternatives should also be reviewed and considered when making comments on this proposed rule.

Personal Watercraft Regulation

On March 21, 2000, the National Park Service published a regulation (36 CFR 3.24) on the management of personal watercraft (PWC) use within all units of the National Park System (65 FR 15077). This regulation prohibits PWC use in all national park units unless the NPS determines that this type of water-based recreational activity is appropriate for the specific park unit based on the legislation establishing that park, the park's resources and values, other visitor uses of the area, and overall management objectives. The regulation banned PWC use in all park units effective April 20, 2000, except 21 park units. The regulation established a 2-year grace period following the final rule publication to provide these 21 park units time to consider whether PWC use should be allowed.

Description of Lake Meredith National Recreation Area

Lake Meredith National Recreation Area is near Fritch, Texas, in the center of the Texas Panhandle, about 40 miles northeast of Amarillo, Texas. The reservoir was formed in the 1960s when the U.S. Bureau of Reclamation constructed Sanford Dam on the Canadian River. The dam was built to supply water to 11 communities in the Panhandle by means of 322 miles of pipeline. The National Recreation Area consists of about 45,000 acres; the historic average reservoir pool covers about 10,000 acres.

Lake Meredith is a major site of water-based recreation in the Panhandle, averaging more than 1.5 million visits per year from 1992 to 1999. There are no comparable large bodies of water or land that provide such recreational diversity in the Panhandle area. The largest nearby recreation area is Palo Duro Canyon State Park, a beautiful scenic and historic area, but lacks the water resources of Lake Meredith.

The lands and waters of Lake Meredith National Recreation Area support a major sport fishery and contain facilities for camping, picnicking, and boating. Lake Meredith is the only public land in a radius of approximately 50 miles that permits the hunting of deer, quail, ducks, and other migratory birds.

Congress created Lake Meredith National Recreation Area on November 28, 1990. Public Law 101–628 states this National Park System unit is ''to provide for public outdoor recreation use and enjoyment of the lands and waters associated with Lake Meredith in the State of Texas, and to protect the scenic, scientific, cultural, and other values contributing to the public enjoyment of such lands and waters'' (16 U.S.C. 460eee). By making Lake Meredith part of the National Park System, Congress emphasized the importance of protecting and interpreting the natural and cultural resources of the park. The legislation codified the long-standing administrative arrangements between the Bureau of Reclamation and the NPS.

Purpose of Lake Meredith National Recreation Area

The purpose of the park is addressed in the following statements excerpted from the park's *Strategic Plan*.

1. Provide for the safe public use, understanding, and enjoyment of the diverse recreational opportunities.

2. Educate the public to instill an understanding and sense of stewardship of the cultural, natural, historic, scenic and recreational resources of the park.

3. Provide opportunities for scientific study of natural and cultural resources.

Significance of Lake Meredith National Recreation Area

The following park resources and values define the significance of Lake Meredith:

1. The impounding of the Canadian River in 1965 created a man-made lake that fulfills outdoor recreational needs such as sport fishing, hunting, boating, horseback riding, hiking, scuba diving,

and bird watching for the five-state region of the Texas Panhandle Plains.

2. The Lake, located on the windswept, arid plains of the Texas Panhandle Plains, is the largest body of water within a 200-mile radius and provides the main water source for three-quarters of a million people in 11 cities.

3. The scenic, colorful Canadian River breaks contain the evidence of over 12,000 years of human occupation and use.

4. The lake, wetlands, and High Plains prairie provide premier habitat for migratory waterfowl and endangered species, including but not limited to, bald eagle, Arkansas River shiner, and the state-listed Texas horned lizard.

5. The park protects a portion of the significant High Plains ecosystem, including the imperiled Texas cottonwood/tall grass community.

6. The park contains special geological features, such as ''filled chimneys,'' agatized Alibates dolomite, and the Canadian River cut, which exposes more than 250 million years of geologic history and divides the High Plains to the north from the Llano Estacado (Staked Plains) to the south.

Authority and Jurisdiction

Under the National Park Service's Organic Act of 1916 (Organic Act) (16 U.S.C. 1 *et seq.*) Congress granted the NPS broad authority to regulate the use of the Federal areas known as national parks. In addition, the Organic Act (16 U.S.C. 3) allows the NPS, through the Secretary of the Interior, to ''make and publish such rules and regulations as he may deem necessary or proper for the use and management of the parks * * *''

16 U.S.C. 1a–1 states, ''The authorization of activities shall be conducted in light of the high public value and integrity of the National Park System and shall not be exercised in derogation of the values and purposes for which these various areas have been established * * *''

As with the United States Coast Guard, NPS's regulatory authority over waters subject to the jurisdiction of the United States, including navigable waters and areas within their ordinary reach, is based upon the Property and Commerce Clauses of the U.S. Constitution. In regard to the NPS, Congress in 1976 directed the NPS to ''promulgate and enforce regulations concerning boating and other activities on or relating to waters within areas of the National Park System, including waters subject to the jurisdiction of the United States * * *'' (16 U.S.C. 1a–2(h)). In 1996 the NPS published a final rule (61 FR 35136, July 5, 1996) amending 36 CFR 1.2(a)(3) to clarify its authority to regulate activities within the National Park System boundaries occurring on waters subject to the jurisdiction of the United States.

PWC Use at Lake Meredith National Recreation Area

All different types of vessels can be found on Lake Meredith on any given day. These vessels include canoes, rowboats, PWC, runabouts, day cruisers, ski boats, sailboats , and houseboats. Activities on the lake associated with boating include sightseeing, water skiing, fishing, hunting, scuba diving, swimming, camping, racing, and sailing. Boaters mainly come from communities in and around the Panhandle, but also from Kansas, Colorado, and New Mexico.

Boaters launch vessels at any of the five developed launch ramps or at other designated primitive launch sites or campground sites, depending on the lake level. Due to sedimentation and low river volume, only rafts and canoes are able to access the river upstream from the lake proper when water levels are high enough. Also a lot of boaters who camp at shoreline campgrounds dock their boats near their campsite.

Vessel and other watercraft use in Lake Meredith have occurred since the reservoir was opened for recreational use in 1965. PWC use began to appear on the lake during the late 1970s, when PWC were first manufactured, and their use has steadily increased. NPS estimates that PWC comprise approximately 20% of the vessels use on Lake Meredith. The primary use season is May through September (estimate 3,500 PWC visitor-days) with the off-season October through March (estimate 575 PWC visitor-days).

Most PWC users gain access to the reservoir from campgrounds and they operate wherever the lake is navigable. They do not commonly operate in the intermittent flowing Canadian River because it is normally too shallow, contains dense vegetation and a heavy load of suspended sediment. Access to streambeds in side canyons of the reservoir is also limited because of dense vegetation and shallow water levels.

Boating Accidents and Violation Notices

When PWC's are involved in accidents there is a potential for greater damage and injury. PWCs are designed for speeds up to seventy miles per hour and for stunt-like maneuvers. Therefore, accidents between PWCs and fixed objects typically result in more serious damage and personal injuries. Industry representatives report that PWC accidents decreased in some states in the late 1990s. The National Transportation Safety Board reported that in 1996 personal watercraft represented 7.5% of state-registered recreational vessels but accounted for 36% of recreational boating accidents (NTSB 1998). From 1997 to 2001, thirteen boating incidents occurred on Lake Meredith. Of the thirteen boating incidents, seven had minor damage and six had extensive damage. During the same time period, there were six incidents involving PWCs. Of the six incidents involving PWCs, five had minor damage and one had extensive damage. Between 1997 and 2001, 41 search and rescue missions were reported for vessels and five search and rescue missions for PWCs.

Boating regulations are enforced by NPS law enforcement staff and Texas Parks and Wildlife Department officers. Between 1997 and 2001, NPS rangers issued 393 written violation notices to all watercraft operators on Lake Meredith, with 271 violations to boats and 122 violations to PWC operators. The majority of violations for vessels were due to failing to pay the recreation fee, violating no-wake zones, towing without an observer, and riding on gunwales or bows.

Resource Protection and Public Use Issues

Lake Meredith National Recreation Area Environmental Assessment

The National Park Service has prepared a draft Environmental Assessment (EA). The EA was available for public review and comment from March 10 to April 9, 2003. During this rule making a copy of the EA will remain on the park's Web site at *www.nps.gov/lamr*.

The purpose of the environmental assessment was to evaluate a range of alternatives and strategies for the management of PWC use, ensuring the protection of park resources and values, and offering recreational opportunities as provided for in the National Recreation Area's enabling legislation, purpose, mission, and goals. The analysis assumed an alternative would be implemented beginning in 2002 and considered a 10-year use period, from 2002 to 2012.

The Environmental Assessment evaluated three alternatives concerning the use of PWC at Lake Meredith National Recreation Area. Two of the alternatives considered in the Environmental Assessment would permit PWC use in the park under certain conditions. Alternative A allows

PWC use under a special regulation that includes certain current provisions of the Superintendent's Compendium. The Superintendent's Compendium is terminology the NPS uses to describe the authority provided to the Superintendent under 36 CFR 1.5 and 1.7. It allows for local, park-specific regulations for a variety of issues and under certain criteria. Alternative A is also the baseline for proposing the impact analysis. However, the economic analysis discussed later in this document uses the no-action alternative as a baseline. The provisions of the Superintendent's Compendium include the following closures: the stilling basin below Sanford Dam, the waters of the Canadian River, and within 750′ of the intake tower. The stilling basin was closed because it is a designated swim beach, while the prohibition on vessels within 750 feet of the intake tower enhances safety and prevents any accidental contamination of the municipal water system. During times of heightened homeland security the park would institute a 75 foot buffer around the Dam structure itself to all vessels. Since this is a sporadic closure, it is not included in the text of the regulatory language. Waters of the Canadian River are typically too low to safely operate a vessel. The launching of boats at areas other than at a designated launch site is also prohibited.

Under alternative B Lake Meredith National Recreation Area would adopt a special regulation that would allow continued PWC operation similar to alternative A, but use would be further restricted to reduce conflicts between fishermen and PWC operators in lake areas and to protect water resources by designating and marking ''Flat Wake'' zones in a number of the canyons. These lake arms and back coves include: North Turkey Creek, Bugbee Canyon, North Canyon, North Cove, South Canyon, Sexy Canyon, Amphitheater Canyon, the coves between day markers 9 and 11, Fritch Canyon, Short Creek, Evans Canyon and Canal Canyon. In addition, the special regulation would prohibit PWC fueling on the lake except at the marina fuel dock, with an attendant providing the fuel service. PWC fueling by operators would be allowed only when the PWC is out of the water. In addition, the carrying of extra fuel onboard PWC would be prohibited.

In addition to these two alternatives for allowing restricted PWC use, a no-action alternative was considered that would continue the prohibition of all PWC use within the National Recreation Area. All three alternatives were evaluated with respect to PWC impacts on water quality, air quality, soundscapes, wildlife and wildlife habitat, threatened, endangered, or special concern species, shoreline vegetation, visitor experience, visitor conflict and safety, and cultural resources.

Based on the environmental analysis, NPS determined that Alternative B is the park's preferred alternative for managing PWC use. Alternative B is also considered the environmentally preferred alternative because it would best fulfill park responsibilities as steward of this sensitive habitat; ensure safe, healthful, productive, and aesthetically and culturally pleasing surroundings; and attain a wider range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences.

This document proposes regulations to implement Alternative B at Lake Meredith National Recreation Area. The NPS will consider the comments received on this proposed rule, as well as the comments received on the Environmental Assessment. The public should review and consider the other alternatives contained in the Environmental Assessment when making comments on this proposed rule. A copy of the Environmental Assessment is available by contacting the Superintendent, Lake Meredith National Recreation Area, P.O. Box 1460, Fritch, Texas, 79036, or by downloading the document from the park's Web site at *www.nps.gov/lamr.*

The park will begin planning efforts and public outreach for a new General Management Plan in the near future. During that planning process the environmental impacts of vessels other than PWCs will be evaluated. At that time, all vessels will be brought into alignment with regulations for PWCs and rule making proposed where needed for consistency.

The following summarizes the predominant resource protection and public use issues associated with PWC use at Lake Meredith Recreation Area. Each of these issues is analyzed in the *Lake Meredith Recreation Area, Personal Watercraft Use Environmental Assessment.*

Water Quality

Conventional two-stroke, carbureted engines today power the vast majority of PWC in use, which discharge as much as 30% of their fuel unburned directly into the water. Hydrocarbons, including benzene, toluene, ethyl benzene, and xylene (BTEX) and polyaromatic hydrocarbons (PAHs), are released. These discharges have potential adverse effects on water quality. The issue over two stroke engines operating at Lake Meredith Recreation Area will in time become a non-issue. In 1996, the Environmental Protection Agency (EPA) promulgated a rule to control exhaust emissions from new marine engines, including outboards and PWC. Emission controls provide for increasingly stricter standards beginning in model year 2006 (EPA 1996a). As a result of the rule, the EPA expects a 50% reduction in hydrocarbon emissions from marine engines from present levels by 2020 and a 75% reduction in hydrocarbon emissions by 2025. Impacts from the use of two stroke engines will diminish as this new technology replaces older two stroke engines.

Under this proposed rule PWC use would continue within the reservoir, but flat wake zones would be established in 12 coves and lake arms: North Turkey Creek, Bugbee Canyon, North Canyon, South Canyon, Sexy Canyon, Amphitheater Cove, the coves between day markers 9 and 11, North Cove, Fritch Canyon, Short Creek, Evans Canyon and Canal Canyon. It is assumed that PWC operating in the flat wake zones under this proposal would discharge gasoline and its constituents at one-quarter the rate expected at full throttle in the open-water portion of the lake. For the purpose of evaluating impacts to water quality, it was assumed that the flat wake zones were established in 2002. Area 1 is defined as Lake Meredith minus the flat wake zones and area 2 is defined as the flat wake zones.

Overall numbers and distribution of PWC would remain the same in both 2002 and 2012. In 2012 emission rates for PWC (as well as outboard motorboats) were assumed to decrease by 50%, in accordance with the U.S. Environmental Protection Agency manufacturing requirement. Also, under this proposal the PWC user education program would be enhanced to include materials describing the advantages of the U.S. EPA emission reduction programs and the anticipated benefits to water and air quality.

The environmental analysis determined that impacts from continued PWC use with management restrictions would result in short- and long-term, negligible, adverse effects on water quality based on ecotoxicological and human health benchmarks, similar to the current limits (*i.e.*, use levels before the park closed on November 7, 2002). All threshold volumes needed to dilute PWC emissions in area 2 (the 12 flat wake zones) would be smaller under this proposal than under the current limits because of the additional management restrictions (specific flat

wake zones for PWC). Prohibiting PWC fueling on the lake would further reduce the potential for accidental spills and associated impacts on water quality.

The environmental analysis determined that cumulative impacts in 2002 from PWC and motorboat use would range from negligible to moderate under this proposal. Impacts from benzene in 2002 would be moderate in area 1 and minor in area 2. Focused water quality monitoring would be needed immediately following a high-use day to confirm these impact estimates. By 2012 all threshold volumes would be substantially reduced as a result of improved emission controls and park instituted flat wake zones and PWC user education program. All cumulative impacts based on ecotoxicological and human health benchmarks would be negligible. (For an explanation of terms such as ''negligible'' and ''adverse,'' *see* page 66 of the Environmental Assessment.) Therefore, this proposal would not result in an impairment of water resources.

Air Quality

PWC emit various compounds that pollute the air. In the two-stroke engines commonly used in PWC, the lubricating oil is used once and is expelled as part of the exhaust; and the combustion process results in emissions of air pollutants such as volatile organic compounds (VOC), nitrogen oxides (NO_X), particulate matter (PM), and carbon monoxide (CO). PWC also emit fuel components such as benzene that are known to cause adverse health effects. Even though PWC engine exhaust is usually routed below the waterline, a portion of the exhaust gases go into the air. These air pollutants may adversely impact park visitor and employee health, as well as sensitive park resources.

For example, in the presence of sunlight VOC and NO_X emissions combine to form ozone. Ozone causes respiratory problems in humans, including cough, airway irritation, and chest pain during inhalation. Ozone is also toxic to sensitive species of vegetation. It causes visible foliar injury, decreases plant growth, and increases plant susceptibility to insects and disease. Carbon monoxide can affect humans as well. It interferes with the oxygen carrying capacity of blood, resulting in lack of oxygen to tissues. NO_X and PM emissions associated with PWC use can also degrade visibility. NO_X can also contribute to acid deposition effects on plants, water, and soil. However, because emission estimates show that NO_X from PWC are minimal (less than 5 tons per year), acid deposition effects attributable to PWC use are expected to be minimal.

Continuing PWC use at Lake Meredith would result in minor adverse impacts from CO and negligible impacts from VOC, PM_{10}, and NO_X, in 2002 and 2012, although emissions would be reduced slightly compared to the current circumstances.

Cumulative emission levels in 2002 and 2012 would be moderate for CO and negligible for PM_{10} and NO_X. Emission levels for VOC would be minor in 2002, decreasing to negligible in 2012 as a result of improved engine technology. Overall, PWC emissions of HC and VOC are estimated to be 25% to 38% of the cumulative boating emissions in 2002 and would be reduced to below 20% by 2012 with technology improvements. Therefore, this proposal would not result in an impairment of air quality.

Under this proposal there would be a negligible impact on visibility from PWC in both 2002 and 2012 and a minor adverse impact from ozone exposure in 2002 and 2012.

On a cumulative basis there would be negligible impact levels on visibility from all motorized watercraft in both 2002 and 2012, although $PM_{2.5}$ emissions would be reduced slightly. The impact level on ozone exposure in 2002 and 2012 is expected to remain moderate. Ozone monitoring data indicate that Lake Meredith is influenced by the transport of ozone and its precursor pollutants from south and east Texas. This proposal would not impair air quality related values.

Soundscapes

Noise impacts from PWC use are caused by a number of factors. Noise from human sources, including PWC, can intrude on natural soundscapes, masking the natural sounds that are an intrinsic part of the environment. This can be especially true in quiet places, such as in secluded lakes, coves, river corridors, and backwater areas. Also, PWC use in areas where there are nonmotorized users (such as canoeists, sailors, people fishing or picnicking, and kayakers) can disrupt the ''passive'' experience of park resources and values.

The biggest difference between noise from PWC and that from motorboats is that the former repeatedly leave the water, which magnifies noise in two ways. Without the muffling effect of water, the engine noise is typically 15 dBA louder and the smacking of the craft against the water surface results in a loud ''whoop'' or series of them. With the rapid maneuvering and frequent speed changes, the impeller has no constant ''throughput'' and no consistent load on the engine. Consequently, the engine speed rises and falls, resulting in a variable pitch. This constantly changing noise is often perceived as more disturbing than the constant noise from motorboats.

PWC users tend to operate close to shore, to operate in confined areas, and to travel in groups, making noise more noticeable to other recreationists. Motorboats traveling back and forth in one area at open throttle or spinning around in small inlets also generate complaints about noise levels; however, most motorboats tend to operate away from shore and to navigate in a straight line, thus being less noticeable to other recreationists.

The environmental analysis determined that impacts from noise from PWC use would have temporary, minor, adverse impacts at most locations at Lake Meredith Recreation Area over the short and long term. However, there would be beneficial impacts on the back coves where flat wake restrictions would be in effect under this proposed rule. Impact levels would be related to the number of PWC operators, as well as the sensitivity of other visitors. Over the long term PWC noise levels would be reduced with the introduction of newer engine technologies.

Cumulative noise impacts from PWC and motorboat use, as well as other visitor activities, would be temporary, minor, and adverse over the short and long term, with these sounds heard occasionally throughout the day. Under this proposed rule there will be a beneficial impact on the back coves since these areas would be designated as flat wake zones. For the most part, natural sounds would still predominate at most locations within the recreation area. The highest concentration of sound impacts would occur near the boat launches and marinas. Therefore, this proposal would not impair soundscapes.

Wildlife and Wildlife Habitat

This proposed rule intends to protect birds and waterfowl from the effects of PWC-generated noise, especially during nesting seasons, protect fish and wildlife species and their habitat from PWC disturbances, and protect fish and wildlife from the adverse effects of bioaccumulation of contaminants from PWC emissions.

Under this proposal there would be a reduction in overall impacts caused by PWC use because of flat wake zones and water quality would be improved due to PWC fueling restrictions on the lake. Impacts on wildlife and wildlife habitat would be short term, negligible, and

adverse at most locations. All Texas and federal watercraft laws and regulations apply to PWC operators, including regulations that address reckless or negligent operation, excessive speed, hazardous wakes or washes, hours of operation, age of operator, access to the shore at flat wake speeds, distance between vessels and prohibition on operating a vessel at greater than flat wake speed less than 50 feet from the shoreline. The park enforces Texas Parks and Wildlife Department regulations through 36 CFR 3.1 and the park's concurrent jurisdiction authority. The designation of flat wake zones will restrict vessel speeds in the back coves and lake arms, which will have beneficial impact to species in back coves and lake arms. There are an estimated 60 species of mammals that occur in the Lake Meredith National Recreation Area. Common mammals include mule deer, coyote, porcupines, raccoons, foxes, squirrels, rabbits, a few bats, and several varieties of rats and mice. Larger predators include mountain lions and bobcats. Over 200 species of birds are present including wild turkey, bobwhite, scaled quail, mourning dove, roadrunner, great blue herons and red-winged blackbird. The most common of the 15 species of fish present include walleye, catfish, largemouth and sand bass, crappie, bluegill and carp. Eleven amphibian species and 32 reptile species are also found at Lake Meredith including two poisonous snakes (prairie rattlesnake and diamondback rattlesnake). Since these are generally land mammals, little wildlife uses the open water, where PWC speeds are higher.

On a cumulative basis, all visitor activities would continue to have short-term, negligible to minor, adverse effects on wildlife and wildlife habitat. All wildlife impacts would be temporary. Therefore, this proposed regulation would not impair wildlife or wildlife habitat.

Threatened, Endangered, or Special Concern Species

This proposed regulation aims to protect threatened or endangered species, or species of special concern, and their habitats from PWC disturbances. The Endangered Species Act (16 U.S.C 1531 *et seq.*) mandates that all federal agencies consider the potential effects of their actions on species listed as threatened or endangered. If the National Park Service determines that an action may adversely affect a federally listed species, consultation with the U.S. Fish and Wildlife Service is required to ensure that the action will not jeopardize the species' continued existence or result in the destruction or adverse modification of critical habitat. State and federally listed species were identified through discussions with park staff, informal consultation with the U.S. Fish and Wildlife Service, and project review by the Texas Parks and Wildlife Department. The U.S. Fish and Wildlife Service was contacted regarding federal threatened, endangered, and special concern species, as was the Texas Parks and Wildlife Department regarding state species. At Lake Meredith National Recreation Area it has been determined that none of the alternatives would *adversely* affect any of the listed species. However, the species at Lake Meredith that have the *potential* to be affected by proposed PWC management alternatives include the federally listed bald eagle and the Arkansas River shiner.

Continued, restricted PWC use at Lake Meredith National Recreation Area would have no impact on endangered, threatened or sensitive species. Bald Eagles are present only in the winter season when PWCs are generally not in use. Additionally, there is no known summer nesting of Bald Eagles in the park. There is designated critical habitat for the Arkansas River shiner within park boundaries in the Canadian River however, the map identifying critical habitat area is likely to change. (As part of a recent court decision, the U.S. Fish and Wildlife Service agreed to jettison its policy outlining a habitat area for the minnow and draft a new one.) The park is proposing to close that section of the river to protect this critical habitat. Therefore, there would be no perceptible changes in concerned species' populations or their habitat community structure. All impacts on these species and habitat due to PWC use would be temporary and short term. The intensity and duration of impacts are expected to remain constant over the next 10 years, since PWC numbers are anticipated to remain steady. Also, cumulative effects from all park visitor activities would not likely adversely affect these species since the identified species are not present or are not accessible during the course of normal visitor activities on Lake Meredith.

Therefore, this proposal would not result in an impairment of threatened, endangered, or special concern species.

Shoreline Vegetation

Wind and wave action erodes areas along the steeper to more moderately inclined shorelines and a sometimes cause landslides that slip into the reservoir. Vegetation is relatively sparse below the historic high water level within the steeper to moderately inclined slopes. Recent growth is present in the more shallow backwater areas with less, or relatively flat, relief. These shallow areas are frequently filled with dense vegetation growth including invasive species; they are occasionally inundated killing off adjacent disturbed day land and shallow water plants. Vegetation upon slopes offers little resistance to land or mudslides and erosion by waves and erosion is accelerated as a result of fluctuating water levels.

PWC use would have negligible adverse impacts over the short and long term because there would be no perceptible changes to plant community size, integrity or continuity now or in the future. The proposed PWC flat wake restrictions in back coves would result in beneficial impacts to shoreline vegetation from reduced wave action/erosion.

On a cumulative basis other visitor activities are more prevalent than PWC use. However, no obvious impacts currently exist, and impacts to shoreline vegetation would continue to be negligible. There would be no perceptible changes to plant community size, integrity, or continuity now or in the future. Therefore, this proposal would not impair shoreline vegetation.

Visitor Experience

In proposing this regulation for Lake Meredith, NPS aims to ease potential conflicts between PWC users and other park visitors.

To determine impacts, the current level of PWC use was calculated for areas of the recreation area. Other recreational activities and visitor experiences that are occurring in these locations were also identified. Visitor surveys and staff observations were evaluated to determine visitor attitudes and satisfaction in areas where PWC are used. Visitor survey data gathered at Lake Meredith National Recreation Area before the closure took effect suggests that the majority of visitors are satisfied with their current experiences. The potential for change in visitor experience was evaluated by identifying projected increases or decreases in both PWC and other visitor uses, and determining whether these projected changes would affect the desired visitor experience and result in greater safety concerns or additional user conflicts.

Under this proposed rule flat wake zones would be established and marked with buoys in lake arms and back coves (North Turkey Creek, Bugbee Canyon, North Canyon, North Cove, South Canyon, Sexy Canyon, Amphitheater Cove, the coves between day markers 9 and 11, Fritch Canyon, Short Creek,

Evans Canyon and Canal Canyon), and visitor education would be enhanced. PWC operators would be prohibited from fueling on the lake (except at the marina fuel dock) and from carrying extra fuel onboard. A map of the lake will be developed to identify these flat-wake zones and launching of vessels would be permitted at areas with designated concrete vessel ramps (Cedar Canyon Launch Ramp, Fritch Fortress Launch Ramp, Harbor Bay Launch Ramp, Blue West Launch Ramp, and Sanford-Yake Marina) and designated camping areas and primitive areas. Primitive or undeveloped launch sites may be opened or closed depending on lake levels. Maps will be posted at the park, on the park's web site, and informational pamphlets would be made available to the public.

Impacts on PWC Users. Flat wake restrictions established under this proposed rule would be limited only to the arms of the lake and back coves. Other flat wake restriction are imposed by 36 CFR part 3 and the Texas Water Safety Act . The State of Texas prohibits other than flat wake speeds within 50 feet of another PWC, vessel, platform, person, object or shoreline. Because PWC operators often prefer large bodies of open water, these restrictions would have a negligible adverse effect on PWC users. Fueling watercraft away from the water surface would result in a minor inconvenience.

Impacts on Other Boaters. Impacts to other boaters would be similar to those under the previous circumstance because restrictions under this proposed rule would not affect areas or hours of operation or the number of users permitted on the lake. However, anglers who fish from boats would experience a beneficial impact due to PWC flat wake restrictions in lake arms and coves, as would canoeists and kayakers who may prefer these areas. Impacts to other boaters would continue to be negligible to minor, long term, and adverse.

Impacts on Other Visitors. Impacts to other shoreline users would be similar to those under the current management. Other visitors, particularly swimmers, might notice a beneficial impact due to PWC operators refueling their watercraft out of the water and away from the shoreline. Anglers, particularly those who fish in back coves or from shorelines where such fishing is permitted, would experience beneficial impacts due to PWC speed and flat wake restrictions. Other visitors would continue to experience negligible to minor adverse impacts.

When related to other visitor activities, PWC use would not appreciably limit the visitor experience. Cumulative impacts would be moderate for PWC users but negligible over the short and long term for most other visitors because there would be little noticeable change in visitor experiences.

Visitor Conflict and Safety

Under the proposed rule Lake Meredith aims to minimize or reduce the potential for PWC user accidents, minimize or reduce the potential for safety conflicts between PWC users and other water recreationists, and provide a safe and healthful environment for park visitors.

Between 1997 and 2001 Lake Meredith park staff issued 122 written violation notices to PWC users, conducted 5 search-and-rescue operations for PWC, and towed 12 disabled PWC. In the same time period six PWC-related accidents occurred, although the only PWC-related injury recorded by park staff happened when one operator attempted to jump-start another craft. Proactive boat patrols in the past five years have resulted in increased safety—prior to 1997, there were two water-related deaths at the park every year for 30 years (although the types of watercraft involved were not documented). NPS rangers and Texas Parks and Wildlife Department officers enforce boating regulations. The Coast Guard Auxiliary also helps with boat patrols. NPS law enforcement staff focus 75% of their time on land activities and 25% on water activities.

PWC speeds, wakes, and operations near other users can pose hazards and conflicts, especially to canoeists and kayakers. Sailboaters are the primary nonmotorized vessels used in the national recreation area, and conflicts could occur with PWC. To date, few conflicts have been reported between PWC and nonmotorized boaters.

Under this proposed rule flat wake zones would be established in lake arms and back coves, and PWC user education would be enhanced.

PWC User/Swimmer Conflicts. Impacts would be similar to the current situation since the number of PWC operating within the recreation area is expected to remain constant. Flat wake zones in lake arms could have a beneficial impact on swimmers, since many popular swimming locations occur in such areas. Enhanced PWC education could benefit all visitors by decreasing the potential for conflicts. Overall, PWC use would continue to have negligible to minor adverse impacts on most swimmers at Lake Meredith National Recreation Area.

PWC Users/Other Vessel Conflicts. Impacts would be similar to previous conditions. Flat wake zones would benefit nonmotorized vessels and anglers who fish from boats. Therefore, PWC use would continue to have minor adverse impacts on other motorized boaters and negligible adverse impacts to nonmotorized vessels at Lake Meredith.

PWC Users/Other Visitor Conflicts. Establishing flat wake zones in back coves will benefit anglers who have complained about speed violations in these areas. Even though Texas boating regulations require flat wake speeds within 50 feet of the shoreline, some PWC users could be unaware of the regulations. Enhanced PWC education under this alternative would help remedy this situation. PWC use would have negligible adverse impacts to other visitors.

Continued PWC use would have short- and long-term, minor, adverse impacts on visitor conflicts and safety due to the number of visitors and boats present on high use days. Establishing flat wake zones in back coves could benefit anglers who have complained about conflicts with PWC in these areas.

Cumulative impacts related to visitor conflicts and safety would be minor for all user groups in the short and long term.

Cultural Resources

This proposed regulation aims to control PWC use and access to protect cultural resources, including sacred sites important to Native Americans. Archeological sites are common in Lake Meredith National Recreation Area. A shoreline survey was completed in 1981, and 44 prehistoric and 8 historic sites were located between the high and low waterlines. Sites along the shoreline are most threatened by natural erosion due to fluctuating reservoir water levels and wind-driven wave action. Wave action from vessels and PWC is a minor problem compared to wind-driven waves that hit the shoreline. In recent years, there have been no reports of people taking artifacts from shoreline sites.

Uncontrolled access to cultural sites remains a problem at Lake Meredith. Both PWC users and boaters can access sites along and near the shoreline. The park does not have sufficient staff to enforce regulations throughout the year.

Native American sacred sites that are listed on, or may be eligible for listing on, the National Register of Historic Places may be affected by erosion along shorelines, or by uncontrolled visitor access since riders are able to access areas less accessible to most motorcraft. Previous consultations were held with Native American tribes concerning the

exposure of human remains found eroding from the lakeshore.

PWC use within the recreation area could have minor adverse impacts on archeological sites and submerged cultural resources from possible illegal collection and vandalism. However, under this proposal a user education program and flat wake zone could limit these effects. Cumulative impacts on archeological and submerged cultural resources that are readily accessible would be minor to moderately adverse. Therefore this proposal would not impair any archeological or submerged cultural resources.

PWC-related intrusions during the use of ethnographic resources would result in short-term, minor to moderate adverse impacts. The introduction of a user education program and the expansion of flat wake zones could further limit some of these effects. Over the long term PWC noise levels could be reduced as a result of newer engine technologies.

On a cumulative basis all visitor activities could result in minor to moderate adverse impacts on those resources that are readily accessible, due to possible short-term interruptions in their use. All impacts would continue at existing levels.

This alternative would not impair any ethnographic resources.

The Proposed Rule

As established by the April 2000 National Park Service rule (36 CFR 3.24), PWC use is prohibited in all National Park System areas unless determined appropriate. The process used to identify appropriate PWC use at Lake Meredith National Recreation Area considered the known and potential effects of PWC on park natural resources, traditional uses, public health and safety. The proposed rule is designed to manage PWC use within the National Recreation Area in a manner that achieves the legislated purposes for which the park was established including providing reasonable access to the park by PWC.

NPS proposes that PWCs continue to be allowed on Lake Meredith as they have been throughout the history of the lake. Under the special regulation in 36 CFR 7.57 pertaining to Lake Meredith National Recreation Area, PWC use would continue under the same conditions that existed prior to the closure in November 2002. The following areas will be closed to all boating: the stilling basin below Sanford Dam and within 750′ feet of the intake tower (as mandated by Bureau of Reclamation for safety reasons) and the waters of the Canadian River (because of low water levels and wildlife habitat). Also, operating a vessel in excess of 5 mph or creating a wake is prohibited in all marked ''Flat Wake'' areas on the lake. Launching of vessels is permitted only at designated concrete vessel ramps and designated camping and primitive areas that also provide other types of designated launch areas. All nonconflicting Texas and federal watercraft laws and regulations would apply to PWC operators, excessive speed, hazardous wakes or washes, hours of operation, age of driver, and distance between vessels.

In addition to the previous provisions, the most significant change NPS proposes is to establish and mark with buoys flat wake zones in twelve lake arms and back coves. This modification is in response to complaints from fishermen in the park that PWCs have disrupted their fishing in some of the back coves of the lake. The objective of this proposal is to reduce or eliminate the PWC/fishermen conflict by reducing PWC speeds in these back coves. Because of the extensive fluctuation in water levels in the reservoir, the NPS proposes to place ''flat wake'' or similarly marked buoys in the water to delineate the areas where all vessels must travel at flat wake speeds within those coves identified in this proposed rule. However, should water levels drop significantly, some coves may not be accessible at all and the buoys would be removed for safekeeping until the water level(s) return to a depth that would sustain safe vessel use. At that time the buoys would be returned to the water and flat wake speed use would again be authorized.

The following would be adopted if this regulation is implemented:

1. Twelve lake arms and back coves on the lake are designated as flat-wake zones. A map of the lake would be developed to identify these flat-wake zones, and they would be clearly marked with buoys when water levels support safe vessel use. Maps would be posted at the park, on the park's web site and informational pamphlets would be made available to the public.

2. Enhance PWC user education through interpretive talks, onsite bulletins, and brochures for PWC registrants and visitors who rent personal watercraft.

3. Educate PWC users about the advantages of using watercraft with cleaner burning engines.

4. Require PWC fueling by operators onshore and out of the water. PWC fueling could continue to occur on the lake at the marina fuel dock, with an attendant providing the fuel service.

5. Prohibit carrying of extra fuel on personal watercraft.

6. Continue to monitor water quality on Lake Meredith through testing services available from other agencies.

7. Launching of PWCs would be limited to designated launch sites including concrete vessel ramps and other types of designated launch sites.

Compliance With Other Laws

Regulatory Planning and Review (Executive Order 12866)

This document is not a significant rule and has not been reviewed by the Office of Management and Budget under Executive Order 12866.

(1) This rule will not have an effect of $100 million or more on the economy. It will not adversely affect in a material way the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities. The National Park Service has completed the report ''Economic Analysis of Personal Watercraft Regulations in Lake Meredith National Recreation Area'' (LAW Engineering and Environmental Sciences, Inc.) dated September 2002.

(2) This rule will not create a serious inconsistency or otherwise interfere with an action taken or planned by another agency. Actions taken under this rule will not interfere with other agencies or local government plans, policies or controls. This rule is an agency specific rule.

(3) This rule does not alter the budgetary effects of entitlements, grants, user fees, or loan programs or the rights or obligations of their recipients. This rule will have no effects on entitlements, grants, user fees, or loan programs or the rights or obligations of their recipients. No grants or other forms of monetary supplements are involved.

(4) This rule does not raise novel legal or policy issues. This rule is one of the special regulations being issued for managing PWC use in National Park Units. The National Park Service published general regulations (36 CFR 3.24) in March 2000, requiring individual park areas to adopt special regulations to authorize PWC use. The implementation of the requirement of the general regulation continues to generate interest from the public concerning the overall effect of authorizing PWC use and National Park Service policy and park management but is not a significant controversy for this park.

Regulatory Flexibility Act

The Department of the Interior certifies that this rulemaking will not have a significant economic effect on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). This certification is based on a report entitled ''Economic Analysis of Personal Watercraft Regulations in Lake Meredith National Recreation Area'' (LAW Engineering and Environmental Services, Inc. September 2002). The focus of this study was to document the impact of this rule on ten PWC related businesses in the vicinity of Lake Meredith that may be affected by any restriction of PWC use, including PWC dealerships, a PWC rental shop, and convenience stores offering PWC storage and other boating related services. This report found that the potential loss for these businesses as a result of this rule would be minimal, as PWC users account for a very small fraction of economic activity in the region.

Small Business Regulatory Enforcement Fairness Act (SBREFA)

This rule is not a major rule under 5 U.S.C. 804(2), the Small Business Regulatory Enforcement Fairness Act. This proposed rule:

a. Does not have an annual effect on the economy of $100 million or more.

b. Will not cause a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions.

c. Does not have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises.

Unfunded Mandates Reform Act

This rule does not impose an unfunded mandate on State, local, or tribal governments or the private sector of more than $100 million per year. The rule does not have a significant or unique effect on State, local or tribal governments or the private sector. This rule is an agency specific rule and does not impose any other requirements on other agencies, governments, or the private sector.

Takings (Executive Order 12630)

In accordance with Executive Order 12630, the rule does not have significant takings implications. A taking implication assessment is not required. No taking of personal property will occur as a result of this rule.

Federalism (Executive Order 13132)

In accordance with Executive Order 13132, the rule does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment. This proposed rule only affects use of NPS administered lands and waters. It has no outside effects on other areas by allowing PWC use in specific areas of the park.

Civil Justice Reform (Executive Order 12988)

In accordance with Executive Order 12988, the Office of the Solicitor has determined that this rule does not unduly burden the judicial system and meets the requirements of sections 3(a) and 3(b)(2) of the Order.

Paperwork Reduction Act

This regulation does not require an information collection from 10 or more parties and a submission under the Paperwork Reduction Act is not required. An OMB Form 83–I is not required.

National Environmental Policy Act

The National Park Service has analyzed this rule in accordance with the criteria of the National Environmental Policy Act and has prepared an Environmental Assessment (EA). The EA was available for public review and comment March 10 to April 9, 2003. The EA will continue to be available at the park's office and on the park's Web site—*http://www.nps.gov/lamr.* A copy of the EA is available by contacting the Superintendent, Lake Meredith National Recreation Area, P.O. Box 1460, Fritch, TX 79036, or by downloading it from the Internet at *http://www.nps.gov/lamr.*

Government-to-Government Relationship With Tribes

In accordance with the President's memorandum of April 29, 1994, ''Government to Government Relations with Native American Tribal Governments'' (59 FR 22951) and 512 DM 2 have evaluated potential effects on federally recognized Indian tribes and have determined that there are no potential effects.

During the consultation process in late 2002, the NPS consulted with the tribes that claim some affiliation with Lake Meredith National Recreation Area, in writing about the development of this proposed rule and the supporting Environmental Assessment. Those Tribes include the Wichita and Affiliated Tribes; Kiowa Indian Tribe of Oklahoma; Comanche Indian Tribe, Oklahoma; Cheyenne-Arapaho Tribe, Oklahoma; Caddo Indian Tribe of Oklahoma; Jicarilla Apache Tribe, NM; Mescalero Apache Tribe, NM; Apache Tribe of Oklahoma; and, the Fort Sill Apache Tribe of Oklahoma. To date no comments have been received from any of the Native American Tribes.

Clarity of Rule

Executive Order 12866 requires each agency to write regulations that are easy to understand. We invite your comments on how to make this rule easier to understand, including answers to questions such as the following: (1) Are the requirements in the rule clearly stated? (2) Does the rule contain technical language or jargon that interferes with its clarity? (3) Does the format of the rule (grouping and order of sections, use of headings, paragraphing, etc.) aid or reduce its clarity? (4) Would the rule be easier to read if it were divided into more (but shorter) sections? (A ''section'' appears in bold type and is preceded by the symbol ''§ '' and a numbered heading; for example § 7.57 Lake Meredith National Recreation Area. (5) Is the description of the rule in the **SUPPLEMENTARY INFORMATION** section of the preamble helpful in understanding the proposed rule? What else could we do to make the rule easier to understand?

Send a copy of any comments that concern how we could make this rule easier to understand to: Office of Regulatory Affairs, Department of the Interior, Room 7229, 1849 C Street, NW., Washington, DC 20240. You may also email the comments to this address: *Exsec@ios.doi.gov.*

Drafting Information: The primary authors of this regulation are: Bill Briggs, Chief Ranger; Jim Rancier, Chief of Resource Management; Paul Eubank, Environmental Protection Specialist; Sarah Bransom, Environmental Quality Division; and Judy Shafer, Office of Policy and Regulations.

Public Participation

If you wish to comment, you may submit your comments by any one of several methods. You may mail comments to the Superintendent, Lake Meredith National Recreation Area, P.O. Box 1460, Fritch, Texas 79036. You may also comment via the Internet to *LAMR_Superintendent@nps.gov.* Please also include ''PWC Rule'' in the subject line and your name and return address in the body of your Internet message. Finally, you may hand deliver comments to the Superintendent, Lake Meredith National Recreation Area, 419 East Broadway, Fritch, Texas 79036–1460.

Our practice is to make comments, including names and addresses of respondents, available for public review during regular business hours. Individual respondents may request that we withhold their home address from the rulemaking record, which we will honor to the extent allowable by law. If you wish us to withhold your name and/or address, you must state this prominently at the beginning of your comment. However, we will not consider anonymous comments. We will make all submissions from organizations or businesses, and from individuals identifying themselves as representatives or officials or organizations or businesses, available for public inspection in their entirety.

List of Subjects in 36 CFR Part 7

National Parks, Reporting and recordkeeping requirements.

In consideration of the foregoing, the National Park Service proposes to amend 36 CFR part 7 as follows:

PART 7—SPECIAL REGULATIONS, AREAS OF THE NATIONAL PARK SYSTEM

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

Authority: 16 U.S.C. 1, 3, 9a, 460(q), 462(k); Sec. 7.96 also issued under DC Code 8–137(1981) and DC Code 40–721 (1981).

2. Section 7.57 is amended by revising the section heading and adding paragraph (h) to read as follows:

§ 7.57 Lake Meredith National Recreation Area.

* * * * *

(h) *Personal watercraft (PWC).* (1) PWC may operate on Lake Meredith except in the following closed areas: stilling basin below Sanford Dam, within 750 feet of the Sanford Dam intake tower, and on the waters of the Canadian River.

(2) PWC may operate on Lake Meredith under the following conditions:

(i) Fueling of PWC is prohibited on the lake, except at the marina fuel dock with an attendant providing the fuel service, or onshore and out of the water.

(ii) Carrying of fuel in an external or portable container onboard a PWC is prohibited.

(iii) PWC may only be launched at designated launch sites established by the Superintendent in accordance with 36 CFR 1.5 and 1.7.

(iv) PWC may not operate at greater than flat wake speed in the following designated areas: North Turkey Creek, Bugbee Canyon, North Canyon, North Cove, South Canyon, Sexy Canyon, Amphitheater Canyon, the coves between day markers 9 and 11, Fritch Canyon, Short Creek, Evans Canyon and Canal Canyon. Flat wake areas are designated by buoys marked with ''flat wake'' or other similar markings. The location of those buoys may be adjusted by the Superintendent based on reservoir water levels.

(3) The Superintendent may temporarily limit, restrict or terminate access to the areas designated for PWC use after taking into consideration public health and safety, natural and cultural resource protection, and other management activities and objectives.

Dated: November 28, 2003.

Craig Manson,

Assistant Secretary for Fish and Wildlife and Parks.

[FR Doc. 03–30556 Filed 12–11–03; 8:45 am]

BILLING CODE 4310–3A–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[CA 296–0427b; FRL–7594–1]

Revisions to the California State Implementation Plan, South Coast Air Quality Management District

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA is proposing to approve revisions to the South Coast Air Quality Management District (SCAQMD) portion of the California State Implementation Plan (SIP). These revisions concern volatile organic compound (VOC) emissions from adhesives and sealants. We are proposing to approve a local rule to regulate these emission sources under the Clean Air Act as amended in 1990 (CAA or the Act).

DATES: Any comments on this proposal must arrive by January 12, 2004.

ADDRESSES: Send comments to Andy Steckel, Rulemaking Office Chief (AIR–4), U.S. Environmental Protection Agency, Region IX, 75 Hawthorne Street, San Francisco, CA 94105–3901 or e-mail to *steckel.andrew@epa.gov*, or submit comments at *http://www.regulations.gov.*

You can inspect copies of the submitted SIP revisions, EPA's technical support document (TSD), and public comments at our Region IX office during normal business hours by appointment.

You may also see copies of the submitted SIP revisions by appointment at the following locations:

California Air Resources Board, Stationary Source Division, Rule Evaluation Section, 1001 ''I'' Street, Sacramento, CA 95814.

South Coast Air Quality Management District, 21865 E. Copley Drive, Diamond Bar, CA 91765.

A copy of the rule may also be available via the Internet at *http://www.arb.ca.gov/drdb/drdbltxt.htm.* Please be advised that this is not an EPA website and may not contain the same version of the rule that was submitted to EPA.

FOR FURTHER INFORMATION CONTACT: Yvonne Fong, EPA Region IX, (415) 947–4117, *fong.yvonnew@epa.gov.*

SUPPLEMENTARY INFORMATION: This proposal addresses the following local rule: SCAQMD 1168. In the Rules and Regulations section of this **Federal Register**, we are approving this local rule in a direct final action without prior proposal because we believe these SIP revisions are not controversial. If we receive adverse comments, however, we will publish a timely withdrawal of the direct final rule and address the comments in subsequent action based on this proposed rule.

We do not plan to open a second comment period, so anyone interested in commenting should do so at this time. If we do not receive adverse comments, no further activity is planned. For further information, please see the direct final action.

Dated: November 20, 2003.

Laura Yoshii,

Deputy Regional Administrator, Region IX.

[FR Doc. 03–30775 Filed 12–11–03; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Office of Inspector General

42 CFR Part 1001

Solicitation of New Safe Harbors and Special Fraud Alerts

AGENCY: Office of Inspector General (OIG), HHS.

ACTION: Notice of intent to develop regulations.

SUMMARY: In accordance with section 205 of the Health Insurance Portability and Accountability Act (HIPAA) of 1996, this annual notice solicits proposals and recommendations for developing new and modifying existing safe harbor provisions under the Federal and State health care programs' anti-kickback statute (section 1128B(b) of the

Social Security Act), as well as developing new OIG Special Fraud Alerts.

DATES: To assure consideration, public comments must be delivered to the address provided below by no later than 5 p.m. on February 10, 2004.

ADDRESSES: Please mail or deliver your written comments to the following address: Office of Inspector General, Department of Health and Human Services, Attention: OIG–81–N, Room 5246, Cohen Building, 330 Independence Avenue, SW., Washington, DC 20201.

We do not accept comments by facsimile (FAX) transmission. In commenting, please refer to file code OIG–81–N. Comments received timely will be available for public inspection as they are received, generally beginning approximately three weeks after publication of a document, in Room 5541 of the Office of Inspector General at 330 Independence Avenue, SW., Washington, DC, on Monday through Friday of each week from 8 a.m. to 4:30 p.m.

FOR FURTHER INFORMATION CONTACT: Joel Schaer, (202) 619–0089, OIG Regulations Officer.

SUPPLEMENTARY INFORMATION:

I. Background

A. The OIG Safe Harbor Provisions

Section 1128B(b) of the Social Security Act (the Act) (42 U.S.C. 1320a–7b(b)) provides criminal penalties for individuals or entities that knowingly and willfully offer, pay, solicit or receive remuneration in order to induce or reward business reimbursable under the Federal health care programs. The offense is classified as a felony and is punishable by fines of up to $25,000 and imprisonment for up to 5 years. The OIG may also impose civil money penalties, in accordance with section 1128A(a)(7) of the Act (42 U.S.C. 1320a–7(a)(7)), or from the Federal health care programs, in accordance with section 1128(b)(7) of the Act (42 U.S.C. 1320a–7(b)(7)).

Since the statute on its face is so broad, concern has been expressed for many years that some relatively innocuous commercial arrangements may be subject to criminal prosecution or administrative sanction. In response to the above concern, the Medicare and Medicaid Patient and Program Protection Act of 1987, section 14 of Public Law 100–93, specifically required the development and promulgation of regulations, the so-called ''safe harbor'' provisions, specifying various payment and business practices which, although potentially capable of inducing referrals of business reimbursable under the Federal health care programs, would not be treated as criminal offenses under the anti-kickback statute and would not serve as a basis for administrative sanctions. The OIG safe harbor provisions have been developed ''to limit the reach of the statute somewhat by permitting certain non-abusive arrangements, while encouraging beneficial and innocuous arrangements'' (56 FR 35952, July 29, 1991). Health care providers and others may voluntarily seek to comply with these provisions so that they have the assurance that their business practices will not be subject to any enforcement action under the anti-kickback statute or related administrative authorities.

To date, the OIG has developed and codified in 42 CFR 1001.952 a total of 22 final safe harbors that describe practices that are sheltered from liability.

B. OIG Special Fraud Alerts

The OIG has also periodically issued Special Fraud Alerts to give continuing guidance to health care providers with respect to practices the OIG finds potentially fraudulent or abusive. The Special Fraud Alerts encourage industry compliance by giving providers guidance that can be applied to their own practices. The OIG Special Fraud Alerts are intended for extensive distribution directly to the health care provider community, as well as those charged with administering the Federal health care programs.

In developing these Special Fraud Alerts, the OIG has relied on a number of sources and has consulted directly with experts in the subject field, including those within the OIG, other agencies of the Department, other Federal and State agencies, and those in the health care industry. To date, the OIG has issued 12 individual Special Fraud Alerts.

C. Section 205 of Public Law 104–191

Section 205 of Public Law 104–191 requires the Department to develop and publish an annual notice in the **Federal Register** formally soliciting proposals for modifying existing safe harbors to the anti-kickback statute and for developing new safe harbors and Special Fraud Alerts.

In developing safe harbors for a criminal statute, the OIG is required to engage in a thorough review of the range of factual circumstances that may fall within the proposed safe harbor subject area so as to uncover potential opportunities for fraud and abuse. Only then can the OIG determine, in consultation with the Department of Justice, whether it can effectively develop regulatory limitations and controls that will permit beneficial and innocuous arrangements within a subject area while, at the same time, protecting the Federal health care programs and their beneficiaries from abusive practices.

II. Solicitation of Additional New Recommendations and Proposals

In accordance with the requirements of section 205 of Public Law 104–191, the OIG last published a **Federal Register** solicitation notice for developing new safe harbors and Special Fraud Alerts on December 9, 2002 (67 FR 72894). As required under section 205, a status report of the public comments received in response to that notice is set forth in appendix G to the OIG's Semiannual Report covering the period April 1, 2003 through September, 30, 2003.[1] The OIG is not seeking additional public comment on the proposals listed in appendix G at this time. Rather, this notice seeks additional recommendations regarding the development of proposed or modified safe harbor regulations and new Special Fraud Alerts beyond those summarized in appendix G to the OIG Semiannual Report referenced above.

Criteria for Modifying and Establishing Safe Harbor Provisions

In accordance with section 205 of HIPAA, we will consider a number of factors in reviewing proposals for new or modified safe harbor provisions, such as the extent to which the proposals would affect an increase or decrease in—

- Access to health care services;
- The quality of services;
- Patient freedom of choice among health care providers;
- Competition among health care providers;
- The cost to Federal health care programs;
- The potential overutilization of the health care services; and
- The ability of health care facilities to provide services in medically underserved areas or to medically underserved populations.

In addition, we will also take into consideration other factors, including, for example, the existence (or nonexistence) of any potential financial benefit to health care professionals or providers that may vary based on their

[1] The OIG Semiannual Report can be accessed through the OIG Web site at *http://oig.hhs.gov/publications/semiannual.html.*

decisions whether to (1) order a health care item or service, or (2) arrange for a referral of health care items or services to a particular practitioner or provider.

Criteria for Developing Special Fraud Alerts

In determining whether to issue additional Special Fraud Alerts, we will also consider whether, and to what extent, the practices that would be identified in a new Special Fraud Alert may result in any of the consequences set forth above, as well as the volume and frequency of the conduct that would be identified in the Special Fraud Alert.

A detailed explanation of justifications for, or empirical data supporting, a suggestion for a safe harbor or Special Fraud Alert would be helpful and should, if possible, be included in any response to this solicitation.

Dated: November 26, 2003.

Dara Corrigan,

Acting Principal Deputy Inspector General.

[FR Doc. 03–30803 Filed 12–11–03; 8:45 am]

BILLING CODE 4150–04–P

DEPARTMENT OF TRANSPORTATION

Research and Special Programs Administration

49 CFR Parts 192 and 195

[Docket Number RSPA–97–3001]

RIN 2137–AC54

Pipeline Safety: Periodic Underwater Inspections

AGENCY: Research and Special Programs Administration (RSPA), DOT.

ACTION: Notice of proposed rulemaking.

SUMMARY: This proposed rule would amend the pipeline safety regulations to require operators of gas and hazardous liquid pipelines to have procedures for periodic inspections of pipeline facilities in offshore waters less than 15 feet deep or crossing under a navigable waterway. These inspections would ensure that the pipeline is not exposed or a hazard to navigation.

DATES: Interested persons are invited to submit written comments by February 10, 2004. Late-filed comments will be considered to the extent practicable.

ADDRESSES:

Filing Information

You may submit written comments by mail or delivery to the Dockets Facility, U.S. Department of Transportation, Room PL–401, 400 Seventh Street, SW., Washington, DC 20590–0001. It is open from 10 a.m. to 5 p.m., Monday through Friday, except Federal holidays. All written comments should identify the docket and notice numbers stated in the heading of this notice. Anyone desiring confirmation of mailed comments must include a self-addressed stamped postcard.

Privacy Act Statement

Anyone is able to search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (Volume 65, Number 70; pages 19477–78), or you may visit *http://dms.dot.gov.*

Electronic Access

You may also submit written comments to the docket electronically. To submit comments electronically, log onto the following Internet Web address: *http://dms.dot.gov.* Click on ''Help & Information'' for instructions on how to file a document electronically.

General Information

You may contact the Dockets Facility by phone at (202) 366–9329, for copies of this proposed rule or other material in the docket. All materials in this docket may be accessed electronically at *http://dms.dot.gov.*

FOR FURTHER INFORMATION CONTACT: L.E. Herrick by phone at (202) 366–5523, by fax at (202) 366–4566, or by e-mail at *le.herrick@rspa.dot.gov,* regarding the subject matter of this proposed rule. General information about RSPA's Office of Pipeline Safety (OPS) programs may be obtained by accessing OPS's Internet page at *http://ops.dot.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

RSPA/OPS Pipeline Safety Mission

RSPA/OPS has responsibility for ensuring safety and environmental protection against risks posed by the nation's approximately two million miles of gas and hazardous liquid pipelines. RSPA/OPS shares responsibility for inspecting and overseeing the nation's pipelines with State pipeline safety offices.

The Need for Periodic Underwater Inspections

On July 24, 1987, the fishing vessel Sea Chief struck and ruptured an 8 inch submerged natural gas liquids pipeline in the Gulf of Mexico. The escaping gas ignited and exploded, killing two crew members. A similar accident occurred on October 3, 1989, when the fishing vessel Northumberland struck and ruptured a 16 inch submerged gas pipeline, killing 11 crew members.

The National Transportation Safety Board (NSTB) investigated the Northumberland accident and found that the probable cause of the accident was the failure of the pipeline operator to maintain the pipeline at the burial depth to which it was initially installed. NTSB also found that the failure of RSPA/OPS to require pipeline operators to inspect and maintain submerged pipelines in a protected condition contributed to the accident. The NTSB subsequently issued Safety Recommendation P–90–29, which directed RSPA/OPS to ''develop and implement with the assistance of the Mineral Management Service (MMS), the United States Coast Guard (USCG), and the United States Army Corp of Engineers (USACE), effective methods and requirements to bury, protect, inspect the burial depth of and maintain all submerged pipelines in areas subject to damage by surface vessels and their operations.''

Joint Task Force Report on Offshore Pipelines

In response to this recommendation a multi-agency task force on offshore pipelines was formed to study the issue. The task force consisted of representatives from RSPA/OPS, USCG, Department of the Interior, MMS, Department of Commerce, National Oceanic and Atmospheric Administration/National Oceans Service, Department of Defense/USACE, Louisiana Office of Conservation, and the Texas Railroad Commission.

The task force reviewed information, views, and concerns provided by the government and the marine and pipeline industries. The assessment focused on the extent and adequacy of federal regulations, the technology for determining pipeline location and cover, the extent and availability of maps and charts depicting the location of pipelines, and possible government initiatives to enhance safety.

The task force concluded that exposed pipelines pose a potential risk to navigation safety, especially for mariners operating in the shallow, near-shore waters. The task force also

concluded that underwater inspections for depth of burial of those pipelines were not being performed despite a requirement to place pipelines below the sea floor in shallow water. To reduce the likelihood of further casualties, the task force recommended that operators inspect these pipelines at regular intervals and rebury exposed pipelines.

The task force further concluded that safety problems with submerged pipelines are not confined to the offshore areas of the Gulf of Mexico. Although the Gulf contains many submerged pipelines and has sea bottoms most prone to erosion, pipelines under a river, shipping channel, or other body of water are also susceptible to being exposed and damaged or ruptured by a vessel. The task force recommended periodic depth of burial inspections for all submerged pipelines that could pose a hazard to navigation. A copy of the report is available in the docket for this rulemaking.

Legislative Amendments

In November 1990, Congress addressed this safety issue in amendments to the Hazardous Liquid Pipeline Safety Act of 1979 and the Natural Gas Pipeline Safety Act of 1968 (Pub. L. 101–599). These amendments, in part, required the operators of offshore pipeline facilities in the Gulf of Mexico and its inlets to conduct an underwater depth-of-burial inspection of the pipeline facility and to report any exposed portion or any portion of the pipeline facility which posed a hazard to navigation to the Secretary of Transportation. The 1990 amendments also required the Secretary of Transportation to establish a mandatory, systematic, and, where appropriate, periodic pipeline inspection and reburial program for all shallow water submerged pipelines in the Gulf of Mexico and its inlets.

On December 5, 1991, RSPA/OPS published regulations requiring underwater inspections (56 FR 63764). Over 1,560 miles of pipeline in the Gulf of Mexico were inspected. Approximately 25 miles, less than two percent of the inspected pipeline was reported to be exposed or to be a hazard to navigation. In 1992, Congress expanded the requirement to include all offshore pipelines, (including over 600 miles of pipelines off California and Alaska), underwater abandoned pipeline facilities, and all other pipeline facilities which cross under, over, or through navigable waters, if the location could pose a hazard to navigation (Pub. L. 102–508).

National Research Council Report

To gain a perspective on risks to be addressed by the Congressionally mandated inspections, RSPA/OPS, in conjunction with other Federal agencies, requested that the Marine Board of the National Research Council conduct an interdisciplinary review and assessment of the many technical, regulatory, and jurisdictional issues that affect the safety of the marine pipelines in the United States' offshore waters. The Committee on the Safety of Marine Pipelines reviewed the causes of past pipeline failures, the potential for future failures, and the means of preventing or mitigating these failures. In 1994, the Marine Board issued a report, *Improving the Safety of Marine Pipelines.* A copy of this report is available for review in the docket for this rulemaking.

The committee determined that the marine pipeline network does not present an extraordinary threat to human life. Pipeline accidents involving deaths or injuries are rare. The most widespread risks are due to oil pollution, mainly from pipelines damaged by vessels and their gear. The report noted that ''[d]amage from vessels (and especially from anchors and groundings) is dramatically more significant than corrosion as a source of pollution. Ninety-five percent of the pipeline related pollution on the Outer Continental Shelf (OCS) was due to such incidents. Anchor damage alone accounted for 90 percent of the pipeline related pollution.'' The committee concluded that the risks generally could be managed with currently available technology and without major new regulations if enforcement of some current regulations is improved. Better coordination among operators and regulators in gathering safety data, assessing risks, and planning and implementing risk management programs was cited as a fundamental safety requirement. The committee noted that ''[i]n shallow water the best protection against the interference of vessels and pipelines, generally, is burial of the pipelines, with enough weight coating to keep it in place * * * [a]chieving and maintaining adequate burial requires care and vigilance.'' The committee recommended that operators inspect the depth of burial of underwater pipelines at intervals determined by analysis of the probabilities of risks. A detailed approach is outlined in the report.

High risk areas are zones of high density of pipelines; high density of vessel traffic; shallow waters; the immediate vicinity of platforms; areas of severe erosion or shift of the sea floor and high potential for flooding; and areas affected by hurricanes or severe storms. According to the Marine Board Report, surveys of pipelines could be scheduled in accordance with the relatively predictable behavior of sediment and shoreline erosion. Surveys could also be performed after the passage of major storms.

The Marine Board report identified the characteristics of the Gulf of Mexico shoreline and seabed dynamics and identified the pipeline safety issues and inspection needs associated with those dynamics as follows:

Region	Shoreline	Seabed	Pipeline safety issue
Nondeltaic	Localized retreat	Stable	Occasional exposure at shoreline deposition on seabed.
Chenier plain	Rapid and generalized retreat	Very dynamic top layer of unconsolidated muds.	Storm-induced cover loss; gradual cover loss.
Barrier Islands	Active dynamics primarily on the island and shoals.	Rapid to gradual generalized siltation; localized erosion and seabed shifting.	Rapidly changing shorelines and island/shoal crossing; storm-induced changes.
River mouth	Very rapid change; some retreat, some advance.	Slumping	Storm induced slides.

Depth of Cover inspection needs for different shorelines and seabed regimes:

Region	Without occurrence of storm	With occurrence of storm
Nondeltaic	Periodic monitoring of shoreline crossing. Monitored visually with biweekly route survey, but no less frequently than every three months.	Post storm inspection of shoreline crossing, if shoreline changes, then investigate near shore depth-of-cover. Post storm inspection of depth-of-cover is not necessary.
Chenier plain and barrier islands	Periodic monitoring of shoreline crossing. Monitored visually with biweekly route survey, but no less frequently than every three months. Periodic inspections of depth of cover. If shoreline changes, then investigate near shore depth of cover.	Post storm inspection of shoreline crossing and depth of cover.
River mouth	Periodic monitoring of shoreline crossing. Monitored visually with biweekly route survey, but no less frequently than every three months. If shoreline changes, then investigate near shore depth of cover. Periodic inspection of depth of cover is not necessary.	Post storm inspection of shoreline crossing and pipeline (in mudslide areas only).

Analysis of Pipeline Burial Surveys in the Gulf of Mexico.

In June 1997, a comprehensive study was completed by the Texas Transportation Institute to determine the need for inspections of pipeline burial depth in the Gulf of Mexico for pipelines subject to federal pipeline safety regulation. The study made several recommendations addressing administrative, depth of cover, and survey requirements. Comments on these recommendations are invited. A copy of the study is available in the docket for this rulemaking.

The study recommended that natural gas and hazardous liquid pipelines be regulated identically under the periodic depth of burial inspection regulation because the higher risk to persons or property posed by natural gas pipeline facilities is balanced by the higher risk to the environment posed by hazardous liquid pipeline facilities. The study further recommended that all pipeline facilities in waters less than 15 feet deep should be maintained 3 feet below the natural bottom and that the natural bottom should be defined in order to establish a reference point for measurement in the very soft, silty bottoms.

A risk based analysis model for the pipeline burial inspections is included as an appendix to the document.

Proposed Requirements

RSPA/OPS proposes that owners and operators of these underwater pipeline facilities be required to develop procedures to conduct periodic underwater depth of burial inspections of their submerged pipelines. The procedures would assess the risk of a pipeline becoming exposed or a hazard to navigation by taking into account the particular dynamics of the water bottom, including the probability of flotation, scour, erosion, and the impacts of major storms. The operator should also establish a timetable for inspection of underwater pipelines based on their risks.

II. Comments Requested

RSPA/OPS requests comments from industry and the public on the following topics:

A. Performance Versus Prescriptive

Pipelines found exposed by inspections conducted under the initial inspection program ranged in age from 10 years to 46 years. They were in areas that experienced a variety of erosion levels and storms. Analysis of this information was not persuasive in eliminating any of the potentially affected pipeline from an underwater inspection requirement.

This proposed rulemaking is performance based. It would require an operator to determine the optimal inspection intervals for each of their pipeline facilities. A directionally bored crossing 25 feet beneath a stable river would have dramatically different inspection requirements than a pipeline in a soft, silty bottom prone to erosion or tidal scour.

A prescriptive requirement would mandate a specific inspection interval and protocol. These intervals would be the maximum allowable. Inspections would also be required following a major storm, earthquake, or period of increased or substantial erosion. Comments are solicited on the relative merits of these approaches.

B. Hazard to Navigation

Under the current regulations for offshore inspections in the Gulf of Mexico, ''Navigational Hazard'' is defined as a pipeline that is buried less than 12 inches below the sea bed in waters less than 15 feet deep, as measured from the mean low water (49 CFR 195.2). This proposed rule would increase the cover requirement to 24 inches and revise the definition to include inland navigable waterways. The increased depth of cover requirement is necessary because a vessel's hull or anchor can easily penetrate below 12 inches, especially in soft, silty bottoms.

Current regulations currently in effect for hazardous liquid pipelines require a burial depth of 48 inches for normal excavations or 24 inches in rock for deepwater port safety zones; 36 inches for normal excavation or 18 inches in rock for all other offshore areas underwater less than 12 feet deep as measured from the mean low tide; and 48 inches for normal excavation or 18 inches in rock for all crossings of inland bodies of water with a width of at least 100 feet from high water mark to high water mark (49 CFR 195.248).

C. Navigable Waters

The phrase ''Navigable waters of the United States'' (33 CFR 329.4) describes the Federal jurisdiction and can include water where there is little likelihood that vessels could be damaged by pipelines. Under this proposed rule, the affected navigable waterways are those waterways with a substantial likelihood of commercial navigation.

Oak Ridge National Laboratory and Vanderbilt University have created a geographic database of navigable waterways in and around the United States. The database, called the National Waterways Network, was created with input from the National Waterway GIS Design Committee, which is composed of representatives of the USACE, DOT's Bureau of Transportation Statistics (BTS), Volpe National Transportation Systems Center; Maritime Administration; Military Traffic Management Command; Tennessee Valley Authority; U.S. Environmental

Protection Agency; U.S. Census Bureau; USCG; and DOT's Federal Railroad Administration. The database includes commercially navigable waterways and non-commercially navigable waterways. The database can be downloaded from BTS' Web site at *http://www.bts.gov/gis/ntatlas/networks.html.* Pipeline operators will be able to determine which areas of their pipeline intersect these designated commercially navigable waterways.

D. Reporting Requirements

The Act requires the Secretary to establish requirements for the operators to report potential or existing navigational hazards to the Secretary of Transportation through the appropriate USCG office. Current regulations at 49 CFR 192.612 and 195.413 on depth of burial inspection and reburial programs require pipeline operators to report to the USCG Regional Response Center the location of any hazard to navigation within 24 hours of discovery. The operator is also required to file a project report with RSPA/OPS within 60 days after the completion of the inspection. This proposed rule would maintain these requirements. Comments are specifically requested regarding the burden this reporting requirement may place upon operators.

E. Marking Exposed Pipelines Pending their Reburial

The Act specifies that ''[t]he operator shall mark the location of the hazardous part with a Coast Guard approved marine buoy or marker.'' This proposed rule would maintain the depth of burial inspection and reburial program required by 49 CFR 192.612 and 195.413. The location of the reported hazard to navigation would be marked with USCG approved markers, placed at the ends of the pipeline segment and at intervals of not over 500 yards, except that a pipeline segment of less than 200 yards need only be marked at the center.

F. Reburial Requirements

MMS issues rights-of-way permits for pipelines on the OCS and requires that all newly constructed pipelines be buried to a depth of 36 inches in water less than 200 feet (30 CFR 250.153). OPS construction standards require that all newly constructed gas and hazardous liquid pipelines in offshore waters less than 12 feet deep must have a minimum of 36 inches of cover or 18 inches of cover in consolidated rock. Newly constructed gas and hazardous liquid pipeline in offshore waters from 12 feet to 200 feet deep must be installed so that the top of the pipeline is below the sea bed (49 CFR 192.327, 192.248, 192.319, and 192.246). This proposed rule would require that the exposed pipelines or pipelines which are a hazard to navigation be reburied to meet these requirements.

G. Abandoned Pipelines

The Act mandated that ''pipeline facility'' include underwater abandoned pipeline facilities and that if the abandoned facility had no operator, then the most recent operator of the facility was to be deemed the operator of the facility. On September 8, 2000, OPS issued a final rule requiring the last operator of an abandoned pipeline, offshore or crossing under, over, or through commercially navigable waterways, to submit a report of the abandonment to the Secretary of Transportation. Because it does not appear that these abandoned lines pose a hazard to navigation, this proposal would not apply to abandoned lines. Information collected under 49 CFR 192.727 and 195.59 will be considered to assess the danger posed by abandoned lines. Any requirements found to be necessary for abandon lines will be considered in a separate rulemaking.

H. Exposed Pipeline

Under current regulations in 49 CFR parts 192 and 195, ''Exposed pipeline'' means a pipeline where the top of the pipe is protruding above the seabed in water less than 15 feet (4.6 meters) deep, as measured from the mean low water level. This proposed rule would revise that definition to read ''exposed underwater pipeline'' to clarify that a pipeline can also be exposed onshore.

I. Gulf of Mexico and Its Inlets

Under current regulations ''Gulf of Mexico and its inlets'' means the waters from the mean high water mark on the coast of the Gulf of Mexico and its inlets open to the sea (excluding rivers, tidal marshes, lakes, and canals) seaward to include the territorial sea and OCS to a depth of 15 feet (4.6 meters), as measured from the mean low water level. This proposed rule would amend this definition to acknowledge that the Gulf of Mexico extends beyond a depth of 15 feet.

J. Underwater Natural Bottom

The Marine Board of the National Research Council recommended that the underwater natural bottom be defined to reduce confusion regarding the reference point for measuring cover. This proposed rule would establish this point as the surface which reflects a 50 kHz fathometer signal.

III. Advisory Committees

The Technical Hazardous Liquid Pipeline Safety Standards Committee is a Federal advisory committee established under section 204 of the Hazardous Liquid Pipeline Safety Act of 1974 (HLPSA) (49 App. U.S.C. 2003). The Technical Pipeline Safety Standards Committee is a Federal advisory committee established under section 4 of the Natural Gas Pipeline Safety Act of 1968 (NGPSA). These committees advise DOT on the feasibility, reasonableness, and practicability of standards imposed under HLPSA and NGPSA. RSPA/OPS will submit this proposal to the advisory committees and report on their recommendations prior to the issuance of a final rule.

IV. Regulatory Analyses and Notices

A. Paperwork Reduction Act

A copy of the Paperwork Reduction Analysis for this proposal has been put in the public docket for this rule. The following is a summary of the highlights of this analysis. Approximately 125 pipeline operators are potentially subject to this new requirement. It will take approximately 500 hours to develop and implement a program to determine the need for periodic inspection. The total industry time to develop this program is 62,500 hours.

Comments are invited on: (a) The need for the proposed collection of information for the proper performance of the functions of the agency, including whether the information will have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information including the validity of the methodology and assumptions used; (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 those who are to respond, including the use of appropriate automated, electronic, mechanical, or other technological collection techniques.

B. Executive Order 12866 and DOT Policies and Procedures

A regulatory evaluation for this proposed rule has been prepared and placed in the public docket for review and comment. Below is a summary of the findings of the regulatory evaluation. This proposed rule is a response to Congressional requirements that pipelines offshore and that cross under navigable waterways be periodically inspected and reburied if it is exposed or a hazard to navigation. The Congressional requirements come

in response to two accidents in 1980 in which fishing vessels hit underwater pipelines, resulting in multiple fatalities.

Approximately 125 companies operate underwater pipelines offshore and in navigable waterways. Under this proposal, each of these companies will be required to have formal written procedures for periodically inspecting their underwater pipeline facilities in waters less than 15 feet of depth.

A survey conducted by RSPA/OPS in 1992 determined that less than two percent of all underwater pipeline in waters of less than 15 feet were exposed or a hazard to navigation. Based on the above, RSPA/OPS believes that at most 10% of the affected underwater pipeline may need to be reinspected periodically. RSPA/OPS estimates that the initial cost of this proposal is $6.25 million with annual reinspection costs of approximately $200,000 per year. More details of the costs and benefits of this proposed rule can be found in the public docket.

C. Regulatory Flexibility Act

Based on the facts available about the anticipated impact of this rulemaking, I certify, pursuant to section 605 of the Regulatory Flexibility Act (5 U.S.C. 605), that this action will not have a significant economic impact on a substantial number of small entities. Few small entities operate pipelines subject to this proposed rule.

D. Environmental Assessment

A preliminary draft Environmental Assessment was conducted and is available in the docket. The inspection and reburial of the pipelines should not have a significant impact on the environment. Previous inspections of underwater pipelines in the Gulf of Mexico found less than two percent of the affected pipelines required reburial. This proposal only considers pipelines in less than 15 feet of water offshore and pipelines in navigable waterways. Because very little pipeline will actually require reburial this proposal will not have a significant impact on the human environment. If you disagree with the preliminary draft environmental assessment please submit your comments to the public docket.

E. Executive Order 12612—Federalism

RSPA/OPS has analyzed this action in accordance with the principles and criteria contained in Executive Order 12612 (52 FR 41685). RSPA/OPS has determined that the action does not have substantial direct effects on the States, on the relationship between the Federal government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore this rulemaking does not have sufficient federalism implications to warrant preparation of a federalism assessment.

List of Subjects

49 CFR Part 192

Administrative practice and procedure, Gas, Natural gas, Pipeline safety, Reports, Transportation.

49 CFR Part 195

Administrative practice and procedure, Hazardous liquid, Oil, Petroleum, Pipeline safety reports, Transportation.

In consideration of the foregoing, OPS proposes to amend parts 192 and 195 of title 49 of the Code of Federal Regulations as follows:

PART 192—TRANSPORTATION OF NATURAL AND OTHER GAS BY PIPELINE: MINIMUM FEDERAL SAFETY STANDARDS

1. The authority citation for part 192 would continue to read as follows:

Authority: 49 U.S.C. 5103, 60102, 60103, 60104, 60108, 60117, 60118, 60124; and 49 CFR 1.53.

2. Section 192.3 would be amended by removing the definition of ''exposed pipeline''; revising the definitions of ''Gulf of Mexico and its inlets'' and ''Hazard to navigation''; and adding definitions for ''exposed underwater pipeline'' and ''underwater natural bottom'' to read as follows:

§ 192.3 Definitions.

* * * * *

Exposed underwater pipeline means an underwater pipeline where the top of the pipe protrudes above the bottom.

* * * * *

Gulf of Mexico and its inlets means the waters from the mean high water mark of the coast of the Gulf of Mexico and its inlets open to the sea (excluding rivers, tidal marshes, lakes, and canals) seaward to include the territorial sea and OCS.

Hazard to navigation means for the purpose of this part, a pipeline where the top of the pipe is less than 24 inches (610 millimeters) below the seabed in water less than 15 feet (4.6 meters) deep, as measured from the mean low water level.

* * * * *

Underwater natural bottom means a surface that reflects a 50 kHz fathometer signal.

3. Section 192.612 would be amended by revising paragraph (a) to read as follows:

§ 192.612 Underwater inspection and reburial of pipelines.

(a) Each operator shall prepare and follow a procedure to conduct periodic underwater inspections of its offshore pipeline facilities and those crossing under navigable waterways in waters less than 15 feet deep to ensure that the pipeline is not exposed or a hazard to navigation. The procedures must be in effect one year from the publication date of the Final Rule.

* * * * *

PART 195—TRANSPORTATION OF HAZARDOUS LIQUIDS BY PIPELINE

1. The authority citation for part 195 would continue to read as follows:

Authority: 49 U.S.C. 5103, 60102, 60104, 60108, 60109, 60118; and 49 CFR 1.53.

2. Section 195.2 would be amended by removing the definition of ''exposed pipeline''; revising the definitions of ''Gulf of Mexico and its inlets''; and ''hazard to navigation''; and adding definitions for ''exposed underwater pipeline'' and ''underwater natural bottom'' to read as follows:

§ 195.2 Definitions.

* * * * *

Exposed underwater pipeline means an underwater pipeline where the top of the pipe protrudes above the bottom.

Gulf of Mexico and its inlets means the waters from the mean high water mark of the coast of the Gulf of Mexico and its inlets open to the sea (excluding rivers, tidal marshes, lakes, and canals) seaward to include the territorial sea and the OCS.

Hazard to navigation means for the purpose of this part, a pipeline where the top of the pipe is less than 24 inches (610 millimeters) below the seabed in water less than 15 feet (4.6 meters) deep, as measured from the mean low water level.

* * * * *

Underwater natural bottom means the surface that reflects a 50 kHz fathometer signal.

3. Section 195.413 would be amended by revising paragraph (a) to read as follows:

§ 195.413 Underwater inspection and reburial of pipelines.

(a) Except for gathering lines of 4½-inch (114 mm) nominal outside diameter or smaller, each operator shall prepare and follow a procedure to conduct periodic underwater inspections of its offshore pipeline facilities and those crossing under navigable waterways in waters less than 15 feet deep to ensure that the pipeline is not exposed or a hazard to navigation.

The procedures must be in effect one year from the publication date of the Final Rule.

* * * * *

Issued in Washington, DC, on December 4, 2003.

Stacey L. Gerard,

Associate Administrator for Pipeline Safety.

[FR Doc. 03–30655 Filed 12–11–03; 8:45 am]

BILLING CODE 4910–60–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 648

[Docket No. 031126296–3296–01; I.D. 111903B]

RIN 0648–AQ84

Fisheries of the Northeastern United States; Atlantic Herring Fishery

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Proposed 2004 specifications for the Atlantic herring fishery; request for comments.

SUMMARY: NOAA Fisheries proposes specifications for the 2004 Atlantic herring fishery. The regulations for the Atlantic herring fishery require NMFS to publish specifications for the upcoming year and to provide an opportunity for public comment. The intent of the specifications is to conserve and manage the Atlantic herring resource and provide for a sustainable fishery.

DATES: Comments must be received no later than 5 p.m., Eastern Standard Time, on January 12, 2004.

ADDRESSES: Copies of supporting documents, including the Environmental Assessment, Regulatory Impact Review, Initial Regulatory Flexibility Analysis (EA/RIR/IRFA), Essential Fish Habitat Assessment, and the Stock Assessment and Fishery Evaluation (SAFE) Report for the 2001 Atlantic Herring Fishing Year are available from Paul J. Howard, Executive Director, New England Fishery Management Council, 50 Water Street, Mill 2, Newburyport, MA 01950. The EA/RIR/IRFA is accessible via the Internet at http://www.nero.nmfs.gov/ro/doc/nero.html.

Written comments on the proposed specifications should be sent to Patricia A. Kurkul, Regional Administrator, National Marine Fisheries Service, 1 Blackburn Drive, Gloucester, MA 01930. Mark on the outside of the envelope: ''Comments--2004 Herring Specifications.'' Comments may also be sent via facsimile (fax) to (978) 281–9135. Comments will not be accepted if submitted via e-mail or the Internet.

FOR FURTHER INFORMATION CONTACT: Eric Jay Dolin, Fishery Policy Analyst, (978) 281–9259, e-mail at eric.dolin@noaa.gov, fax at (978) 281–9135.

SUPPLEMENTARY INFORMATION:

Regulations implementing the Atlantic Herring Fishery Management Plan (FMP) require the New England Fishery Management Council's (Council) Atlantic Herring Plan Development Team (PDT) to meet at least annually, no later than July each year, with the Atlantic States Marine Fisheries Commission's (Commission) Atlantic Herring Plan Review Team (PRT) to develop and recommend the following specifications for consideration by the Council's Atlantic Herring Oversight Committee: Allowable biological catch (ABC), optimum yield (OY), domestic annual harvest (DAH), domestic annual processing (DAP), total foreign processing (JVPt), joint venture processing (JVP), internal waters processing (IWP), U.S. at-sea processing (USAP), border transfer (BT), total allowable level of foreign fishing (TALFF), and reserve (if any). The PDT and PRT also recommend the total allowable catch (TAC) for each management area and subarea identified in the FMP. As the basis for its recommendations, the PDT reviews available data pertaining to: Commercial and recreational catch; current estimates of fishing mortality; stock status; recent estimates of recruitment; virtual population analysis results and other estimates of stock size; sea sampling and trawl survey data or, if sea sampling data are unavailable, length frequency information from trawl surveys; impact of other fisheries on herring mortality; and any other relevant information. Recommended specifications are presented to the Council for adoption and recommendation to NMFS.

Proposed 2004 Specifications

Taking into account existing scientific data and the ongoing activity to develop Amendment 1 to the Atlantic Herring Fishery Management Plan, the Council recommended at its May 2003 meeting that the 2003 specifications should be maintained for 2004, consistent with the PDT's recommendation. Based on the Council's recommendations, NMFS proposes the specifications and Area TACs contained in the following table.

SPECIFICATIONS AND AREA TACS FOR THE 2004 ATLANTIC HERRING FISHERY

Specification	Proposed Allocation (mt)
ABC	300,000
OY	250,000
DAH	250,000
DAP	226,000
JVPt	20,000
JVP	10,000 (Area 2 and 3 only)
IWP	10,000
USAP	20,000 (Area 2 and 3 only)
BT	4,000
TALFF	0
Reserve	0
TAC - Area 1A	60,000 (January 1 May 31, landings cannot exceed 6,000)
TAC - Area 1B	10,000
TAC - Area 2	50,000 (TAC reserve: 70,000)
TAC - Area 3	60,000

Maintaining the 2003 specifications for the 2004 fishing year is prudent and is unlikely to have significant biological consequences to the herring stock or its subcomponents in the short term. The Transboundary Resource Assessment Committee (TRAC) met in St. Andrew's, New Brunswick, from February 10–14, 2003. Both a U.S. and a Canadian assessment of the herring resource were presented and reviewed at the meeting. The two assessments diverged greatly and no consensus was reached regarding which assessment was more accurate or how the two could be reconciled. Because of this discrepancy, the TRAC information cannot be utilized at this time to support the development of different specifications for the 2004 fishing year. The expectation is that the analysis and evaluation of the TRAC results will continue and that the resulting information will inform the development of Amendment 1.

Classification

This proposed rule has been determined to be exempt from review under E.O. 12866.

The Council and NMFS prepared an initial regulatory flexibility analysis (IRFA) as required under section 603 of the Regulatory Flexibility Act. The IRFA describes the economic impact that this proposed rule, if adopted, would have on small entities. A summary of the analysis follows:

A description of the reasons why this action is being considered, and the objectives of this proposed rule can be found in the preamble to this proposed rule and are not repeated here. This action does not contain any collection-

of-information, reporting, or recordkeeping requirements. It would not duplicate, overlap, or conflict with any other Federal rules.

All of the affected businesses (fishing vessels) are considered small entities under the standards described in NOAA Fisheries guidelines because they have gross receipts that do not exceed $3.5 million annually. Based on 2002 data, there are an estimated 140 vessels prosecuting the fishery, 37 of which average more than 2000 lb of herring per trip. In assessing economic impacts for the 2004 specifications, landings from the 2002 fishery were used as a proxy for 2003 landings since 2002 was the last year in which a complete set of data was available. In addition, landings in the 2002 fishery are utilized as a baseline to determine impacts of the 2004 fishery. This presumes no significant change in production between the 2002 and 2003 fisheries. Since vessel level data are not readily available, changes in revenue are viewed as a proxy for changes in vessel profitability.

The specification of 250,000 mt for OY and DAH was approved for the 2003 fishery and is recommended for the 2004 fishery. At this level, there could be an increase of up to 158,169 mt in herring landings or $22,618,167 in revenue based on a market price of $143/mt, thus, allowing individual vessels to increase their profitability under the 2004 specifications. For the 2003 specifications, the Council also considered OY alternatives of 300,000 and ≤1,000,000 mt. At these OY level there would be increased potential revenues to a greater extent than the proposed 2004 alternative of 250,000 mt. In addition, at these levels there could be risks to the health of the herring stock. An additional alternative for DAH of 230,000 mt would also increase potential profits for the herring fleet although not to the extent of the proposed DAH.

Based on the proposed 2004 DAP specification of 226,000 mt, there could be an increase of up to 134,169 mt in herring landings or $19,186,167 in revenue based on $143/mt as compared to 2002 actual landings and revenue. Revenues to the fleet would also increase under the Council's proposed 2003 DAP alternatives of 236,000 mt and 176,000 mt. This would be true of any alternative greater than 91,831 mt, the total harvest for the 2002 fishery. However, the magnitude of economic impact of the DAP will rely on the processing sector's ability to expand markets and increase capacity to handle larger amounts of herring in 2004.

Overall, if the full amount of the JVP (10,000 mt) is harvested, revenues to the participating U.S. vessels would be approximately $1.4 million, based on an average price of $143/mt. However, little of the 10,000 mt JVP allocation was utilized in 2002, and the JVP allocation in 2003 is not expected to be fully utilized. As of June 2003, no JVP activity for herring has occurred during the 2003 fishing year. There is no indication at this time that demand for the JVP allocation will increase in 2004. As a result, no substantial economic impacts are expected in 2004 from continuing the 2003 specification of 10,000 mt for JVP. The Council also considered a JVP alternative of 5,000 mt for the 2003 specifications. This specification could yield an increase in revenue to participating US vessels since the specification is greater than what was actually harvested in the 2002 fishery. However, potential benefits would be far less than those estimated for a 10,000 mt JVP.

Approximately 6,132 mt of the 10,000 mt allocation of IWP was utilized in 2002. There is no indication at this time that demand for the IWP allocation will increase in 2004. As a result, no significant economic impacts are expected in 2004 from continuing the 2003 specifications for IWP.

The rollover of 2003 specifications should allow vessels to continue to expand into Areas 2 and 3, resulting in economic gains for individual vessels. The Area 1A and 1B TACs of 60,000 and 10,000 mt, respectively, have remained unchanged since the 2000 fishery. In 2002, the Area 1A TAC for the directed herring fishery was fully utilized and is expected to be fully utilized for the 2004 fishery. Therefore, no change is expected in profitability of vessels from the 2004 Area 1A specification, all other things being equal. Since only 7,416 mt of herring were harvested in Area 1B in 2002, the proposed 2004 specification of 10,000 mt should allow for increased economic benefits to individual vessels prosecuting the 2004 specification. Since the allocation of 20,000 mt to USAP has never been utilized, continuing to keep it at 20,000 mt in 2004 (or to keep it as a separate category) will not result in economic impacts in the short-term. The long-term implication of keeping USAP as a separate specification that gets an allocation, even though the allocation has never been utilized, is that it discourages investment in a form of processing that may be better able to respond to changing market and stock conditions, and it may have encouraged investment in more permanent onshore processing capacity.

The Council, in its 2003 EA/RIR/IRFA document, considered a Committee recommendation to reduce USAP by 5,000 mt, but rejected it based on comments that a vessel may enter the fishery in 2003 that could fully utilize the 20,000 mt specification. The reduction of the specification to 15,000 mt would reduce potential profits of USAP operations when compared to the status quo specification of 20,000 mt, although as yet, no part of USAP has been utilized.

Dated: December 8, 2003.

Rebecca Lent,

Deputy Assistant Administrator for Regulatory Programs, National Marine Fisheries Service.

[FR Doc. 03–30796 Filed 12–11–03; 8:45 am]

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Notices

Federal Register

Vol. 68, No. 239

Friday, December 12, 2003

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.

COMMITTEE FOR PURCHASE FROM PEOPLE WHO ARE BLIND OR SEVERELY DISABLED

Procurement List; Proposed Additions

AGENCY: Committee for Purchase from People Who Are Blind or Severely Disabled.

ACTION: Proposed additions to Procurement List.

SUMMARY: The Committee is proposing to add to the Procurement List products and services to be furnished by nonprofit agencies employing persons who are blind or have other severe disabilities.

DATES: Comments must be received on or before: January 11, 2004.

ADDRESSES: Committee for Purchase From People Who Are Blind or Severely Disabled, Jefferson Plaza 2, Suite 10800, 1421 Jefferson Davis Highway, Arlington, Virginia, 22202–3259.

FOR FURTHER INFORMATION CONTACT: Sheryl D. Kennerly, (703) 603–7740.

SUPPLEMENTARY INFORMATION: This notice is published pursuant to 41 U.S.C. 47(a)(2) and 41 CFR 51–2.3. Its purpose is to provide interested persons an opportunity to submit comments of the proposed actions. If the Committee approves the proposed additions, the entities of the Federal government identified in the notice for each product or service will be required to procure the products and services listed below from nonprofit agencies employing persons who are blind or have other severe disabilities.

Regulatory Flexibility Act Certification

I certify that the following action will not have a significant impact on a substantial number of small entities. The major factors considered for this certification were:

1. If approved, the action will not result in any additional reporting, recordkeeping or other compliance requirements for small entities other than the small organizations that will furnish the products and services to the government.

2. If approved, the action will result in authorizing small entities to furnish the products and services to the government.

3. There are no known regulatory alternatives which would accomplish the objectives of the Javits-Wagner-O'Day Act (41 U.S.C. 46–48c) in connection with the products and services proposed for addition to the Procurement List. Comments on this certification are invited. Commenters should identify the statement(s) underlying the certification on which they are providing additional information.

End of Certification

The following products and services are proposed for addition to Procurement List for production by the nonprofit agencies listed:

Products

Product/NSN: CD
7045–00–NIB–0191 (25 PK SPINDLE 700 MB 80 Min. 48 X CDR)
7045–00–NIB–0192 (50 PK SPINDLE 700 MB 80 Min. 48 X CDR)
7045–00–NIB–0194 (30 PK SPINDLE 700 MB 4X–10X 80 min. CDRW)
Product/NSN: DVD
7045–00–NIB–0196 (5 PK DVD+R IMATION 4.7 GB)
7045–00–NIB–0197 (25 PK DVD+R SPINDLE 4.7 GB)
7045–00–NIB–0198 (5 PK DVD–R IMATION 4.7 GB)
7045–00–NIB–0199 (25 PK DVD–R SPINDLE 4.7 GB)
7045–00–NIB–0200 (5 PK DVD+RW IMATION 4.7 GB)
7045–00–NIB–0201 (25 PK DVD+RW SPINDLE 4.7 GB)
NPA: North Central Sight Services, Inc., Williamsport, Pennsylvania
Contract Activity: Office Supplies & Paper Products Acquisition Center, New York, New York

Services

Service Type/Location: Custodial Services Dan E. Russell Federal Building, Gulfport, Mississippi
NPA: Mississippi Goodworks, Inc., Gulfport, Mississippi
Contract Activity: GSA, Property Management Center (4PMB), Atlanta, Georgia
Service Type/Location: Installation Support Services
Naval Surface Warfare Detachment, White Sands Missile Range, White Sands, New Mexico
NPA: Tresco, Inc., Las Cruces, New Mexico
Contract Activity: Army Contracting Agency, White Sands Directorate, White Sands, NM

Sheryl D. Kennerly,

Director, Information Management.

[FR Doc. 03–30782 Filed 12–11–03; 8:45 am]

BILLING CODE 6353–01–P

COMMITTEE FOR PURCHASE FROM PEOPLE WHO ARE BLIND OR SEVERELY DISABLED

Procurement List; Additions

AGENCY: Committee for Purchase from People Who Are Blind or Severely Disabled.

ACTION: Additions to Procurement List.

SUMMARY: This action adds to the Procurement List products and services to be furnished by nonprofit agencies employing persons who are blind or have other severe disabilities.

EFFECTIVE DATE: January 11, 2004.

ADDRESSES: Committee for Purchase From People Who Are Blind or Severely Disabled, Jefferson Plaza 2, Suite 10800, 1421 Jefferson Davis Highway, Arlington, Virginia 22202–3259.

FOR FURTHER INFORMATION CONTACT: Sheryl D. Kennerly, (703) 603–7740.

SUPPLEMENTARY INFORMATION: On October 10, and October 17, 2003, the Committee for Purchase From People Who Are Blind or Severely Disabled published notice (68 FR 58651, and 59775/58776) of proposed additions to the Procurement List.

After consideration of the material presented to it concerning capability of qualified nonprofit agencies to provide the products and services and impact of the additions on the current or most recent contractors, the Committee has determined that the products and services listed below are suitable for procurement by the Federal Government under 41 U.S.C. 46–48c and 41 CFR 51–2.4.

Regulatory Flexibility Act Certification

I certify that the following action will not have a significant impact on a substantial number of small entities. The major factors considered for this certification were:

1. The action will not result in any additional reporting, recordkeeping or other compliance requirements for small entities other than the small organizations that will furnish the products and services to the government.

2. The action will result in authorizing small entities to furnish the products and services to the government.

3. There are no known regulatory alternatives which would accomplish the objectives of the Javits-Wagner-O'Day Act (41 U.S.C. 46–48c) in connection with the products and services proposed for addition to the Procurement List.

End of Certification

Accordingly, the following products and services are added to the Procurement List:

Products

Product/NSN: SKILCRAFT SAVVY
BK–1260 General Purpose Disinfectant Detergent—32 oz./7930–00–NIB–0176
BK–1260 General Purpose Disinfectant Detergent—1 Gallon/7930–00–NIB–0177
BK–1260 General Purpose Disinfectant Detergent—5 Gallon/7930–00–NIB–0178
BK–1260 General Purpose Disinfectant Detergent—55 Gallon/7930–00–NIB–0179
BK–14 Heavy Duty Degreasing Detergent—32 oz./7930–00–NIB–0144
BK–14 Heavy Duty Degreasing Detergent—1 Gallon/7930–00–NIB–0145
BK–14 Heavy Duty Degreasing Detergent—5 Gallon/7930–00–NIB–0146
BK–14 Heavy Duty Degreasing Detergent—55 Gallon/7930–00–NIB–0147
TR–43 Commercial Vehicle Cleaner—1 Gallon/7930–00–NIB–0127
TR–43 Commercial Vehicle Cleaner—5 Gallon/7930–00–NIB–0142
TR–43 Commercial Vehicle Cleaner—55 Gallon/7930–00–NIB–0143
NPA: Susquehanna Association for the Blind and Visually Impaired, Lancaster, Pennsylvania.
Contract Activity: Office Supplies & Paper Products Acquisition Center, New York, New York.

Services

Service Type/Location: Grounds Maintenance Newport Research Facilities, Newport, New York
NPA: Herkimer County Chapter, NYSARC, Inc., Herkimer, New York
Contract Activity: Air Force Research Laboratory/IFKO, Rome, New York
Service Type/Location: Janitorial/Custodial Eugene Outpatient Clinic, Department of Veteran Affairs, Eugene, Oregon
NPA: Garten Services, Inc., Salem, Oregon
Contract Activity: VA Medical Center, Roseburg, Oregon
Service Type/Location: Janitorial/Custodial Finger Lakes National Forest, Hector District Ranger Office, Hector, New York
NPA: Schuyler County Chapter, NYSARC, Inc., Watkins Glen, New York
Contract Activity: USDA, Forest Service, Rutland, Vermont
Service Type/Location: Janitorial/Custodial Robert J. Dole U.S. Courthouse, Kansas City, Kansas
NPA: Independence and Blue Springs Industries, Inc., Independence, Missouri
Contract Activity: GSA, Service Contracts (6PEF–C), Kansas City, Missouri
Service Type/Location: Switchboard Operation
Greater Los Angeles Health Care System, Los Angeles, California
At the following locations:
Los Angeles Ambulatory Care Center
Sepulveda Ambulatory Care Center
VA Medical Center, West Los Angeles
NPA: Lighthouse for the Blind of Houston, Houston, Texas
Contract Activity: VA Network Business Center, Long Beach, California
Service Type/Location: Switchboard Operation
Veterans Affairs Medical Center, Salem, Virginia
NPA: Virginia Industries for the Blind, Charlottesville, Virginia
Contract Activity: VA Medical Center, Hampton, Virginia

This action does not affect current contracts awarded prior to the effective date of this addition or options that may be exercised under those contracts.

Sheryl D. Kennerly,

Director, Information Management.

[FR Doc. 03–30783 Filed 12–11–03; 8:45 am]

BILLING CODE 6353–01–P

DEPARTMENT OF COMMERCE

Bureau of Industry and Security

Material Technical Advisory Committee; Notice of Partially Closed Meeting

The Materials Technical Advisory Committee will meet on January 15, 2004, 10:30 a.m., Herbert C. Hoover Building, Room 3884, 14th Street between Constitution and Pennsylvania Avenues, NW., Washington, DC. 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

Public Session

1. Opening remarks and introductions.

2. Presentation of papers and comments by the public.

3. Reports on status of recent Australia Group (AG) proposals.

4. Introduction or new U.S. proposals for AG controls.

Closed Session

5. Discussion of matters properly classified under Executive Order 12958, dealing with U.S. export control programs and strategic criteria related thereto.

A limited number of seats will be available during the public session of the meeting. Reservations are not accepted. 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 Committee members, the materials should be forwarded prior to the meeting to the address below: Ms. Lee Ann Carpenter, BIS MS: 1099D, U.S. Department of Commerce, 14th St., and Constitution Ave., NW., Washington, DC 20230.

The Assistant Secretary for Administration, with the concurrence of the delegate of the General Counsel, formally determined on February 6, 2003, 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.

For more information, call Lee Ann Carpenter at (202) 482–2583.

Dated: December 8, 2003.

Lee Ann Carpenter,

Committee Liaison Officer.

[FR Doc. 03–30760 Filed 12–11–03; 8:45 am]

BILLING CODE 3510–JT–M

DEPARTMENT OF COMMERCE

International Trade Administration

[A-570–881]

Antidumping Duty Order: Certain Malleable Iron Pipe Fittings From the People's Republic of China

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

ACTION: Notice of Antidumping Duty Order.

EFFECTIVE DATE: December 12, 2003.

FOR FURTHER INFORMATION CONTACT: Anya Naschak, Helen Kramer, or Ann

Barnett-Dahl at (202) 482–6375, (202) 482–0405, or (202) 482–3833, respectively; Antidumping and Countervailing Duty Enforcement Group III, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230.

SUPPLEMENTARY INFORMATION:

Scope of Order

For purposes of this order, the products covered are certain malleable iron pipe fittings, cast, other than grooved fittings, from the People's Republic of China. The merchandise is classified under item numbers 7307.19.90.30, 7307.19.90.60 and 7307.19.90.80 of the Harmonized Tariff Schedule (HTSUS). Excluded from the scope of this order are metal compression couplings, which are imported under HTSUS number 7307.19.90.80. A metal compression coupling consists of a coupling body, two gaskets, and two compression nuts. These products range in diameter from 1/2 inch to 2 inches and are carried only in galvanized finish. Although HTSUS subheadings are provided for convenience and U.S. Customs and Border Protection (CBP) purposes, the Department's written description of the scope of this proceeding is dispositive.

Antidumping Duty Order

In accordance with section 735(a) of the Act, the Department made its final determination that malleable iron pipe fittings (MPF) from the People's Republic of China (the PRC) is being sold at less-than-fair-value (LTFV). *See Notice of Final Determination of Sales at Less Than Fair Value: Certain Malleable Iron Pipe Fittings from the PRC*, 68 FR 61395 (October 28, 2003). Subsequently, the Department amended its final determination of the antidumping duty investigation of MPF from the PRC to correct certain ministerial errors in the final margin calculation. *See Notice of Amended Final Determination of Sales at Less Than Fair Value: Certain Malleable Iron Pipe Fittings from the People's Republic of China*, 68 FR 65873 (November 24, 2003). On December 3, 2003, the International Trade Commission (ITC) notified the Department of Commerce (the Department) of its final determination, pursuant to section 735(b)(1)(A)(ii) of the Tariff Act of 1930, as amended (the Act), that the industry in the United States producing MPF is threatened with material injury by reason of import of the subject merchandise from the PRC. In accordance with section 736(a)(1) of the Act, the Department will direct CBP to assess, upon further advice by the administering authority, antidumping duties equal to the amount by which the normal value of the merchandise exceeds the U.S. price of the merchandise for all relevant entries of MPF from the PRC.

Section 736(b)(2) of the Act provides that duties shall be assessed on subject merchandise entered, or withdrawn from warehouse, for consumption on or after the date of publication of the ITC's notice of final determination if that determination is based on the threat of material injury and is not accompanied by a finding that injury would have resulted but for the imposition of suspension of liquidation of entries since the Department's preliminary determination. In addition, section 736(b)(2) of the Act requires CBP to refund any cash deposits or bonds of estimated antidumping duties posted since the Department's preliminary antidumping determination if the ITC's final determination is based on a threat of material injury.

Because the ITC's final determination in this case is based on the threat of material injury and is not accompanied by a finding that injury would have resulted but for the imposition of suspension of liquidation of entries since the Department's preliminary determination, section 736(b)(2) of the Act is applicable to this order. Therefore, the Department will direct CBP to assess, upon further advice, antidumping duties on all unliquidated entries of MPF from the PRC entered, or withdrawn from warehouse, for consumption on or after the date of publication of the ITC's notice of final determination of threat of material injury in the **Federal Register** and terminate the suspension of liquidation for entries of MPF from the PRC entered, or withdrawn from warehouse, for consumption prior to that date. The Department will also instruct CBP to refund any cash deposits made, or bonds posted, between the period 90 days prior to the publication date of the Department's preliminary antidumping determination and the publication of the ITC's final determination.

On or after the date of publication of this notice in the **Federal Register**, CBP must require, at the same time as importers would normally deposit estimated duties on this merchandise, a cash deposit equal to the estimated weighted-average antidumping duty margins noted below:

Exporter/Manufacturer	Margin (percent)
Jinan Meide Casting Co., Ltd.	11.31
Beijing Sai Lin Ke Hardware Co. Ltd.	15.92
Langfang Pannext Pipe Fitting Co., Ltd.	7.35
Chengde Malleable Iron General Factory	11.18
SCE Co., Ltd.	11.18
PRC-Wide	111.36

The ''PRC-wide'' rate applies to all exporters in the PRC of subject merchandise not specifically listed above.

This notice constitutes the antidumping duty order with respect to MPF from the PRC, pursuant to section 736(a) of the Act. Interested parties may contact the Department's Central Records Unit, room B-099 of the main Commerce building, for copies of an updated list of the antidumping duty orders currently in effect.

This order is published in accordance with section 736(a) of the Act, and 19 CFR 351.211(b).

Dated: December 5, 2003.

James J. Jochum,

Assistant Secretary for Import Administration.

[FR Doc. E3–00548 Filed 12–11–03; 8:45 am]

BILLING CODE 3510–DS–S

DEPARTMENT OF COMMERCE

Interntational Trade Administration

[A–570–855]

Certain Non-Frozen Apple Juice Concentrate from the People's Republic of China: Notice of Court Decision and Suspension of Liquidation

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

SUMMARY: On November 20, 2003, in *Yantai Oriental Juice Co., et al.* v. United States and Coloma Frozen Foods, Inc., et al., Court No. 00–00309, Slip Op. 03–150, the Court of International Trade (''CIT'') affirmed the Department of Commerce's (''the Department's'') remand determinations and entered a judgment order. This litigation related to the Department's *Notice of Final Determination of Sales at Less Than Fair Value: Certain Non-Frozen Apple Juice Concentrate From the People's Republic of China*, 65 FR 19873 (April 13, 2000) and accompanying Issues and Decision Memorandum (April 6, 2000) (''*Issues and Decision Memorandum*''), and

Notice of Amended Final Determination of Sales at Less Than Fair Value and Antidumping Duty Order: Certain Non-Frozen Apple Juice Concentrate from the People's Republic of China, 65 FR 35606 (June 5, 2000) (collectively, ''*Final Determination*'').

In its remand determinations, the Department reviewed the record evidence regarding the selection of a surrogate country; the valuation of juice apples, steam coal, and ocean freight; and the calculation of selling, general and administrative (''SG&A'') expenses, overhead, and profit. The Department found that Turkey, rather than India was the appropriate surrogate country. Juice apples, SG&A, overhead and profit were valued using surrogate value information from Turkey. Steam coal was valued using a domestic Indian price and the ocean freight rate was revised to include a rate for Detroit.

As the remand determinations resulted in changes to calculated company-specific margins, the Department also recalculated the separate rate margin it applied to producers/exporters that responded to the Department's separate rate (''Section A'') questionnaire but were not selected to respond (''separate-rate companies''). The calculated antidumping rate for Xian Yang Fuan Juice Co., Ltd. (''Fuan''), Xian Asia Qin Fruit Co., Ltd. (''Asia''), Changsha Industrial Products & Minerals Import & Export Corporation (''Changsha Industrial''), and Shandong Foodstuffs Import & Export Corporation (''Shandong Foodstuffs'') (collectively ''separate-rate companies'') is 3.83 percent.

The remand determinations also resulted in weighted average margins of zero percent for Yantai Oriental Juice Co. (''Oriental''), Qingdao Nannan Foods Co. (''Nannan''), Sanmenxia Lakeside Fruit Juice Co. Ltd. (''Lakeside''), Shaanxi Haisheng Fresh Fruit Juice Co. (''Haisheng''), and SDIC Zhonglu Juice Group Co. (''Zhonglu''). Therefore, these companies will be excluded from the antidumping duty order on certain non-frozen apple juice concentrate (''AJC'') from the People's Republic of China (''PRC'').

The PRC-wide rate of 51.74 percent is unchanged from our final determination in the investigation.

Consistent with the decision of the U.S. Court of Appeals for the Federal Circuit in *Timken Co. v. United States*, 893 F.2d 337 (Fed. Cir. 1990) (''Timken''), the Department will continue to order the suspension of liquidation of the subject merchandise until there is a ''conclusive'' decision in this case. If the case is not appealed, or if it is affirmed on appeal, the Department will instruct U.S. Customs and Border Protection to terminate the suspension of liquidation for Oriental, Nannan, Lakeside, Haisheng, and Zhonglu and revise the cash deposit rate from the investigation for Fuan, Asia, Changsha Industrial, and Shandong Foodstuffs.

EFFECTIVE DATE: December 12, 2003.

FOR FURTHER INFORMATION CONTACT: Audrey Twyman or John Brinkmann, AD/CVD Enforcement Group I, Office 1, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230; telephone: (202) 482–3534 or (202) 482–4126, respectively.

SUPPLEMENTARY INFORMATION:

Background

Following publication of the *Final Determination*, Oriental, Nannan, Lakeside, Haisheng, Zhonglu, Fuan, Asia, Changsha Industrial and Shandong Foodstuffs (collectively the ''respondents''), filed lawsuits with the CIT challenging the Department's *Final Determination*.

In the underlying investigation, the Department was required to choose a surrogate country based on ''significant production'' of ''comparable merchandise'' and ''economic comparability'' to the PRC. The Department selected India because it is economically comparable to the PRC, and a significant producer of apples and single strength apple juice, products the Department found to be comparable to AJC. The Department then valued the juice apples, SG&A, overhead, profit, steam coal and other factors of production in India. In calculating ocean freight rates, the Department included freight rates to Detroit in its calculation of an East Coast freight rate.

The Court remanded five issues to the Department.

First, the Court questioned the Department's reliance on a market study included in the petition and an annual report for an Indian company as the basis for determining that India was a significant producer of comparable merchandise. In particular, the Court found the Department had not corroborated the market study, nor had it explained the connection between the market study and the annual report, and the Department's conclusion that India was a significant producer of AJC. The Court similarly rejected the Department's determination that India's status as a significant producer of apples was relevant to the Department's treatment of India as a significant producer of comparable merchandise.

The Court directed the Department to develop sufficient evidence from the record of India's suitability as the surrogate market economy country for AJC production, or, if it could not, to select another suitable country.

Second, the Court instructed the Department to provide an explanation of why the distortions caused by the Government of India's market intervention scheme did not disturb the fair market value of Indian apples. The Court also directed the Department to explain why it treated government subsidies that enabled producers to lower their prices as market distorting, but did not apply the same treatment to such subsidies that raise prices. Furthermore, the Court requested that the Department explain why the price paid by Himachal Pradesh Horticultural Produce Marketing & Processing Corp., a government-controlled entity, should be considered a market-derived price.

Third, for steam coal valuation, the Department used Indian import statistics data because it found that the value was contemporaneous with the period of investigation and because there was no evidence to suggest that the data was aberrational or unreliable. The Court instructed the Department either to recalculate normal value using Indian domestic prices for steam coal, or explain why the use of domestic prices for steam coal was not appropriate during the period of investigation.

Fourth, the Court argued that the Department's use of data from the *Reserve Bank of India Bulletin*, rather than data from an Indian producer to value SG&A and overhead was not supported by substantial evidence on the record and instructed the Department to either recalculate these values using the financial statement of an Indian producer, or fully explain why the Department felt that the *Reserve Bank of India Bulletin* gave better financial data.

Finally, the Court instructed the Department to explain its reasoning for not calculating a separate Detroit freight rate and to explain why the Department did not weigh its calculation to reflect accurately the volume of merchandise actually shipped to each destination.

To assist it in complying with the Court's instructions, the Department opened the record and requested new information concerning possible surrogate countries. The petitioners submitted data supporting the use of Poland, while the respondents pointed to Turkish data that they had placed on the record in the investigation.

The ''Draft Results Pursuant to Court Remand'' (''*First Draft Results*'') was released to the parties on November 6,

2002. In its First Draft Results, pursuant to the analysis followed by the Court, the Department concluded that the record did not support its determination in the investigation that India was a significant producer of AJC. Instead, the Department determined that Turkey was a more appropriate surrogate country for the PRC because it was the country most economically comparable to the PRC that was also a significant producer of AJC.

Accordingly, the Department amended its calculations using Turkish data to value juice apples, SG&A expenses, overhead, and profit. The Department also changed its valuations of steam coal and East Coast freight. Because the Department's recalculated company-specific margins were all zero percent, the Department also recalculated the margin for the separate-rate companies by weighting the calculated margins of zero with the PRC-wide rate of 51.74%, resulting in a separate rates margin of 28.33%.

Comments on the *First Draft Results* were received from all parties on November 12, 2002. On November 15, 2002, the Department responded to the Court's Order by filing its ''Redetermination Pursuant to Court Remand.'' (''*First Redetermination*''). The Department's *First Redetermination* was similar to the *First Draft Results* except for the inclusion of the Department's response to comments submitted by the petitioners and respondents. The final margins in the *First Redetermination* were identical to the *First Draft Results*.

The CIT affirmed, in part, the Department's *First Redetermination* on March 21, 2003. *See Yantai Oriental Juice Co., et al. v. United States and Coloma Frozen Foods, Inc., et al.* Court No. 00–00309, Slip Op. 03–33 (March 21, 2003). The Court affirmed the Department's calculation of company-specific margins but remanded the calculation of the antidumping margin for the separate-rate companies because the Court found that the Department's methodology, weight-averaging the PRC-wide rate and the zero margins, was not supported by substantial evidence on the record.

Accordingly, the ''Draft Redetermination Pursuant to Court Remand'' (''*Second Draft Results*'') was released to the parties on April 18, 2003. In its *Second Draft Results*, the Department reviewed the record evidence and, based on information on the record, calculated a normal value and export price for the separate rate companies. Using this information, the Department calculated estimated margins for the separate rate companies and weight-averaged these margins with the zero margins for the fully-investigated companies and derived a separate rate of 4.91 percent.

Comments on the *Second Draft Results* were received on April 23, 2003. On May 5, 2003, the Department responded to the Court's Order of Remand by filing its ''Redetermination Pursuant to Court Remand.'' (''*Second Redetermination*''). The Department's *Second Redetermination* differed from the *Second Draft Results* in that in calculating export price, we removed the fully-investigated companies' constructed export price sales, and adjusted our calculations to reflect the different terms of sale. These changes resulted in a weighted-average separate-rate margin of 3.83%.

The CIT affirmed the Department's *Second Redetermination* on November 20, 2003. *See Yantai Oriental Juice Co., et al. v. United States and Coloma Frozen Foods, Inc., et al.* Court No. 00–00309, Slip Op. 03–150 (November 20, 2003).

Suspension of Liquidation

The U.S. Court of Appeals for the Federal Circuit, in *Timken*, held that the Department must publish notice of a decision of the CIT or the Federal Circuit which is not ''in harmony'' with the Department's *Final Determination*. Publication of this notice fulfills that obligation. The Federal Circuit also held that the Department must suspend liquidation of the subject merchandise until there is a ''conclusive'' decision in the case. Therefore, pursuant to *Timken*, the Department must continue to suspend liquidation pending the expiration of the period to appeal the CIT's November 20, 2003, decision or, if that decision is appealed, pending a final decision by the Federal Circuit. In the event that the CIT's ruling is not appealed, or if appealed and upheld by the Court of Appeals for the Federal Circuit, the Department will instruct U.S. Customs and Border Protection to revise cash deposit rates and liquidate relevant entries covering the subject merchandise effective the date of publication of this notice in the **Federal Register**.

Dated: December 5, 2003.

James J. Jochum,

Assistant Secretary for Import Administration.

[FR Doc. E3–00550 Filed 12–11–03; 8:45 am]

BILLING CODE 3510–DS–S

DEPARTMENT OF COMMERCE

International Trade Administration

[A–427–814]

Notice of Final Results of Antidumping Duty Administrative Review: Stainless Steel Sheet and Strip in Coils From France

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

ACTION: Notice of Final Results of Antidumping Duty Administrative Review of Stainless Steel Sheet and Strip in Coils from France.

SUMMARY: On August 7, 2003, the Department of Commerce (''Department'') published the preliminary results of the administrative review of the antidumping duty order on stainless steel sheet and strip in coils from France. The merchandise covered by the order is stainless steel sheet and strip in coils (''SSSS'') as described in the ''Scope of the Review'' section of the Federal Register notice. This review covers imports of subject merchandise from Ugine, S.A (''Ugine''). The period of review (''POR'') is July 1, 2001, through June 30, 2002.

Based on our analysis of the comments received, we have made changes in the margin calculation. Therefore, the final results differ from the preliminary results of review. The final weighted-average dumping margin for Ugine is listed below in the section entitled ''Final Results of the Review.''

EFFECTIVE DATE: December 12, 2003.

FOR FURTHER INFORMATION CONTACT: Cheryl Werner, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th and Constitution Avenue, NW., Washington, DC 20230; telephone: (202) 482–2667.

SUPPLEMENTARY INFORMATION:

Background

On August 7, 2003, the Department published the *Preliminary Results of Antidumping Duty Administrative Review: Stainless Steel Sheet and Strip in Coils from France*, 68 FR 47049 (August 7, 2003) (''*Preliminary Results*''). In accordance with 19 CFR 351.309(c)(ii), we invited parties to comment on our *Preliminary Results*. On September 8, 2003, Ugine and the Petitioners filed comments. On September 15, 2003, Ugine and the Petitioners[1] filed rebuttal comments. We

[1] The Petitioners in this case are Allegheny Ludlum, AK Steel Corporation, North American Stainless, Butler-Armco Independent Union,

Continued

have now completed the administrative review in accordance with section 751 of the Act.

Scope of the Review

For purposes of this administrative review, the products covered are certain stainless steel sheet and strip in coils. Stainless steel is an alloy steel containing, by weight, 1.2 percent or less of carbon and 10.5 percent or more of chromium, with or without other elements. The subject sheet and strip is a flat-rolled product in coils that is greater than 9.5 mm in width and less than 4.75 mm in thickness, and that is annealed or otherwise heat treated and pickled or otherwise descaled. The subject sheet and strip may also be further processed (*e.g.*, cold-rolled, polished, aluminized, coated, *etc.*) provided that it maintains the specific dimensions of sheet and strip following such processing.

The merchandise subject to this order is currently classifiable in the *Harmonized Tariff Schedule of the United States* (''HTS'') at subheadings: 7219.13.0031, 7219.13.0051, 7219.13.0071, 7219.1300.81[2], 7219.14.0030, 7219.14.0065, 7219.14.0090, 7219.32.0005, 7219.32.0020, 7219.32.0025, 7219.32.0035, 7219.32.0036, 7219.32.0038, 7219.32.0042, 7219.32.0044, 7219.33.0005, 7219.33.0020, 7219.33.0025, 7219.33.0035, 7219.33.0036, 7219.33.0038, 7219.33.0042, 7219.33.0044, 7219.34.0005, 7219.34.0020, 7219.34.0025, 7219.34.0030, 7219.34.0035, 7219.35.0005, 7219.35.0015, 7219.35.0030, 7219.35.0035, 7219.90.0010, 7219.90.0020, 7219.90.0025, 7219.90.0060, 7219.90.0080, 7220.12.1000, 7220.12.5000, 7220.20.1010, 7220.20.1015, 7220.20.1060, 7220.20.1080, 7220.20.6005, 7220.20.6010, 7220.20.6015, 7220.20.6060, 7220.20.6080, 7220.20.7005, 7220.20.7010, 7220.20.7015, 7220.20.7060, 7220.20.7080, 7220.20.8000, 7220.20.9030, 7220.20.9060, 7220.90.0010, 7220.90.0015, 7220.90.0060, and 7220.90.0080. Although the HTS subheadings are provided for convenience and customs purposes, the Department's written description of the merchandise under review is dispositive.

Excluded from the review of this order are the following: (1) sheet and strip that is not annealed or otherwise heat treated and pickled or otherwise descaled, (2) sheet and strip that is cut to length, (3) plate (*i.e.*, flat-rolled stainless steel products of a thickness of 4.75 mm or more), (4) flat wire (*i.e.*, cold-rolled sections, with a prepared edge, rectangular in shape, of a width of not more than 9.5 mm), and (5) razor blade steel. Razor blade steel is a flat-rolled product of stainless steel, not further worked than cold-rolled (cold-reduced), in coils, of a width of not more than 23 mm and a thickness of 0.266 mm or less, containing, by weight, 12.5 to 14.5 percent chromium, and certified at the time of entry to be used in the manufacture of razor blades. *See* chapter 72 of the HTS, ''Additional U.S. Note'' 1(d).

Flapper valve steel is also excluded from the scope of the order. This product is defined as stainless steel strip in coils containing, by weight, between 0.37 and 0.43 percent carbon, between 1.15 and 1.35 percent molybdenum, and between 0.20 and 0.80 percent manganese. This steel also contains, by weight, phosphorus of 0.025 percent or less, silicon of between 0.20 and 0.50 percent, and sulfur of 0.020 percent or less. The product is manufactured by means of vacuum arc remelting, with inclusion controls for sulphide of no more than 0.04 percent and for oxide of no more than 0.05 percent. Flapper valve steel has a tensile strength of between 210 and 300 ksi, yield strength of between 170 and 270 ksi, plus or minus 8 ksi, and a hardness (Hv) of between 460 and 590. Flapper valve steel is most commonly used to produce specialty flapper valves in compressors.

Also excluded is a product referred to as suspension foil, a specialty steel product used in the manufacture of suspension assemblies for computer disk drives. Suspension foil is described as 302/304 grade or 202 grade stainless steel of a thickness between 14 and 127 microns, with a thickness tolerance of plus-or-minus 2.01 microns, and surface glossiness of 200 to 700 percent Gs. Suspension foil must be supplied in coil widths of not more than 407 mm, and with a mass of 225 kg or less. Roll marks may only be visible on one side, with no scratches of measurable depth. The material must exhibit residual stresses of 2 mm maximum deflection, and flatness of 1.6 mm over 685 mm length.

Certain stainless steel foil for automotive catalytic converters is also excluded from the scope of this order. This stainless steel strip in coils is a specialty foil with a thickness of between 20 and 110 microns used to produce a metallic substrate with a honeycomb structure for use in automotive catalytic converters. The steel contains, by weight, carbon of no more than 0.030 percent, silicon of no more than 1.0 percent, manganese of no more than 1.0 percent, chromium of between 19 and 22 percent, aluminum of no less than 5.0 percent, phosphorus of no more than 0.045 percent, sulfur of no more than 0.03 percent, lanthanum of less than 0.002 or greater than 0.05 percent, and total rare earth elements of more than 0.06 percent, with the balance iron.

Permanent magnet iron-chromium-cobalt alloy stainless strip is also excluded from the scope of this order. This ductile stainless steel strip contains, by weight, 26 to 30 percent chromium, and 7 to 10 percent cobalt, with the remainder of iron, in widths 228.6 mm or less, and a thickness between 0.127 and 1.270 mm. It exhibits magnetic remanence between 9,000 and 12,000 gauss, and a coercivity of between 50 and 300 oersteds. This product is most commonly used in electronic sensors and is currently available under proprietary trade names such as ''Arnokrome III.'' [3]

Certain electrical resistance alloy steel is also excluded from the scope of this order. This product is defined as a non-magnetic stainless steel manufactured to American Society of Testing and Materials (ASTM) specification B344 and containing, by weight, 36 percent nickel, 18 percent chromium, and 46 percent iron, and is most notable for its resistance to high temperature corrosion. It has a melting point of 1390 degrees Celsius and displays a creep rupture limit of 4 kilograms per square millimeter at 1000 degrees Celsius. This steel is most commonly used in the production of heating ribbons for circuit breakers and industrial furnaces, and in rheostats for railway locomotives. The product is currently available under proprietary trade names such as ''Gilphy 36.'' [4]

Certain martensitic precipitation-hardenable stainless steel is also excluded from the scope of this order. This high-strength, ductile stainless steel product is designated under the Unified Numbering System (UNS) as S45500-grade steel, and contains, by weight, 11 to 13 percent chromium, and 7 to 10 percent nickel. Carbon, manganese, silicon and molybdenum each comprise, by weight, 0.05 percent

Zanesville Armco Independent Organization Inc., and the United Steelworkers of America, AFL-CIO/CLC.

[2] Due to changes to the HTS numbers in 2001, 7219.13.0030, 7219.13.0050, 7219.13.0070, and 7219.13.0080 are now 7219.13.0031, 7219.13.0051, 7219.13.0071, and 7219.13.0081, respectively.

[3] ''Arnokrome III'' is a trademark of the Arnold Engineering Company.

[4] ''Gilphy 36'' is a trademark of Imphy, S.A.

or less, with phosphorus and sulfur each comprising, by weight, 0.03 percent or less. This steel has copper, niobium, and titanium added to achieve aging, and will exhibit yield strengths as high as 1700 Mpa and ultimate tensile strengths as high as 1750 Mpa after aging, with elongation percentages of 3 percent or less in 50 mm. It is generally provided in thicknesses between 0.635 and 0.787 mm, and in widths of 25.4 mm. This product is most commonly used in the manufacture of television tubes and is currently available under proprietary trade names such as ''Durphynox 17.'' [5]

Finally, three specialty stainless steels typically used in certain industrial blades and surgical and medical instruments are also excluded from the scope of this order. These include stainless steel strip in coils used in the production of textile cutting tools (*e.g.*, carpet knives).[6] This steel is similar to AISI grade 420 but containing, by weight, 0.5 to 0.7 percent of molybdenum. The steel also contains, by weight, carbon of between 1.0 and 1.1 percent, sulfur of 0.020 percent or less, and includes between 0.20 and 0.30 percent copper and between 0.20 and 0.50 percent cobalt. This steel is sold under proprietary names such as ''GIN4 Mo.'' The second excluded stainless steel strip in coils is similar to AISI 420-J2 and contains, by weight, carbon of between 0.62 and 0.70 percent, silicon of between 0.20 and 0.50 percent, manganese of between 0.45 and 0.80 percent, phosphorus of no more than 0.025 percent and sulfur of no more than 0.020 percent. This steel has a carbide density on average of 100 carbide particles per 100 square microns. An example of this product is ''GIN5'' steel. The third specialty steel has a chemical composition similar to AISI 420 F, with carbon of between 0.37 and 0.43 percent, molybdenum of between 1.15 and 1.35 percent, but lower manganese of between 0.20 and 0.80 percent, phosphorus of no more than 0.025 percent, silicon of between 0.20 and 0.50 percent, and sulfur of no more than 0.020 percent. This product is supplied with a hardness of more than Hv 500 guaranteed after customer processing, and is supplied as, for example, ''GIN6''.[7]

Analysis of Comments Received

All issues raised in the case and rebuttal briefs by parties to this administrative review are addressed in the ''Issues and Decision Memorandum'' (''*Decision Memorandum*'') from Joseph A. Spetrini, Deputy Assistant Secretary for Import Administration, Group III, to James J. Jochum, Assistant Secretary for Import Administration, dated December 5, 2003, which is hereby adopted by this notice. A list of the issues which parties raised, and to which we have responded, all of which are in the *Decision Memorandum*, is attached to this notice as an Appendix. Parties can find a complete discussion of all issues raised in this review and the corresponding recommendations in this public memorandum which is on file in the Central Records Unit, Room B-099 of the main Department building. In addition, a complete version of the *Decision Memorandum* can be accessed directly on the Web at *http://ia.ita.doc.gov/*. The paper copy and electronic version of the *Decision Memorandum* are identical in content.

Changes Since the Preliminary Results

Based on our analysis of comments received, we have made changes in the margin calculation. The changes to the margin calculations include the following: (1) we corrected the double-counting of warranty expenses in the total cost of production calculation; (2) we removed imputed interest expenses from the total cost of production calculation; (3) we deducted commission expenses from the net price used in the arm's-length test; (4) we revised the offset for sales where the commission amount on the matched U.S. sale was zero.

Successorship

We determine Ugine & ALZ France to be the successor to Ugine for purposes of determining antidumping duty liability. For a complete discussion of the basis for this decision see the *Preliminary Results* (68 FR 47051, 47052). No parties have commented on our finding in the *Preliminary Results*. Therefore, Ugine & ALZ France shall be assigned the antidumping duty deposit rate in these *Final Results*.

Final Results of Review

We determine that the following percentage margin exists for the period July 1, 2001, through June 30, 2002:

STAINLESS STEEL SHEET AND STRIP IN COILS FROM FRANCE

Manufacturer/exporter/reseller	Weighted-Average Margin (percent)
Ugine & ALZ France	2.93

The Department shall determine, and U.S. Customs and Border Protection shall assess, antidumping duties on all appropriate entries. The Department will issue appraisement instructions directly to U.S. Customs and Border Protection. For duty-assessment purposes, we calculated importer-specific assessment rates by dividing the dumping margins calculated for each importer by the total entered value of sales for each importer during the period of review.

Cash Deposit Requirements

The following deposit requirements will be effective upon publication of this notice of final results of administrative review for all shipments of stainless steel sheet and strip in coils from France entered, or withdrawn from warehouse, for consumption on or after the date of publication, as provided by section 751(a)(1) of the Act: (1) The cash deposit rate for Ugine & ALZ France will be the rate shown above; (2) for previously reviewed or investigated companies not listed above, the cash deposit rate will continue to be the company-specific rate published for the most recent period; (3) if the exporter is not a firm covered in this review, a prior review, or the original less-than-fair-value (LTFV) investigation, but the manufacturer is, the cash deposit rate will be the rate established for the most recent period for the manufacturer of the merchandise; and (4) if neither the exporter nor the manufacturer is a firm covered in these or any previous reviews conducted by the Department, the cash deposit rate will be the ''all others'' rate, which is 9.38 percent.

These deposit requirements shall remain in effect until publication of the final results of the next administrative review.

Reimbursement of Duties

This notice also serves as a final reminder to importers of their responsibility under 19 CFR 351.402(f)(2) to file a certificate regarding the reimbursement of antidumping duties or countervailing 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

[5] ''Durphynox 17'' is a trademark of Imphy, S.A.

[6] This list of uses is illustrative and provided for descriptive purposes only.

[7] ''GIN4 Mo,'' ''GIN5'' and ''GIN6'' are the proprietary grades of Hitachi Metals America, Ltd.

reimbursement of the antidumping duties or countervailing duties occurred and the subsequent assessment of double antidumping duties or countervailing duties.

Notification of Interested Parties

This notice also serves as a reminder to parties subject to administrative protective orders (''APOs'') of their responsibility concerning the return or destruction of proprietary information disclosed under APO in accordance with 19 CFR 351.305, which continues to govern business proprietary information in this segment of the proceeding. Timely written notification of the return/destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to comply with the regulations and terms of an APO is a violation which is subject to sanction.

We are issuing and publishing this determination and notice in accordance with sections 751(a)(1) of the Act.

Dated: December 5, 2003.

James J. Jochum,

Assistant Secretary for Import Administration.

APPENDIX 1—ISSUES IN THE DECISION MEMORANDUM

1. Date of Sale
2. U.S. Sales Database
3. Affiliated Freight-Forwarder Expenses
4. U.S. Inventory Carrying Costs
5. Home Market Credit Expenses
6. Home Market Inland Freight Expenses
7. Home Market Rebate
8. Affiliated Inland Freight Carrier Expenses
9. Ugine France Service Commissions
10. Indirect Selling Expenses
11. Gross-to-Net Adjustment
12. Constructed Export Price Offset
13. Negative Dumping Margins
14. Home Market Warranty Expenses
15. Interest Expenses
16. Commission Expenses in Arm's-Length Test
17. Home Market Commissions

[FR Doc. E3–00547 Filed 12–11–03; 8:45 am]

BILLING CODE 3510–DS–S

DEPARTMENT OF COMMERCE

International Trade Administration

[A–475–824]

Stainless Steel Sheet and Strip in Coils from Italy: Final Results of Antidumping Administrative Review

AGENCY: Import Administration, International Trade Administration, U.S. Department of Commerce.

ACTION: Notice of Final Results in the Antidumping Duty Administrative Review of Stainless Steel Sheet and Strip in Coils from Italy.

SUMMARY: On August 7, 2003, the U.S. Department of Commerce (''Department'') published in the **Federal Register** the preliminary results of its administrative review of the antidumping duty order on stainless steel sheet and strip in coils from Italy. *See Preliminary Results of Antidumping Duty Administrative Review: Stainless Steel Sheet and Strip in Coils from Italy*, 68 FR 47032 (August 7, 2003) (''*Preliminary Results*''). This review covers imports of subject merchandise from ThyssenKrupp Acciai Speciali Terni S.p.A (''TKAST'') and ThyssenKrupp AST USA, Inc.(''TKAST USA''). The period of review (''POR'') is July 1, 2001, through June 30, 2002.

Based on our analysis of the comments received, we have made changes to our analysis from the preliminary results of review. Therefore, the final results differ from the preliminary results. The final weighted-average dumping margin for the reviewed firm is listed below in the section entitled ''Final Results of the Review.''

EFFECTIVE DATE: December 12, 2003.

FOR FURTHER INFORMATION CONTACT: Catherine Bertrand or Robert Bolling, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230; telephone: 202–482–3207 or 202–482–3434, respectively.

SUPPLEMENTARY INFORMATION:

Background

On August 7, 2003, the Department published in the Federal Register the preliminary results of its administrative review of the antidumping duty order on stainless steel sheet and strip in coils from Italy. **SEE PRELIMINARY RESULTS**. We invited parties to comment on our preliminary results of review. We received written comments on September 29, 2003, from petitioners[1] and respondents. On October 6, 2003, we received rebuttal comments from respondents and on October 7, 2003, we received rebuttal comments from petitioners.

[1] Petitioners in this case are Allegheny Ludlum Corporation, AK Steel Corporation, J&L Specialty Steel, Inc., North American Stainless, United Steelworkers of America, AFL-CIO/CLC, Butler Armco Independent Union and Zanesville Armco Independent Organization, Inc.

Scope of Review

For purposes of this administrative review, the products covered are certain stainless steel sheet and strip in coils. Stainless steel is an alloy steel containing, by weight, 1.2 percent or less of carbon and 10.5 percent or more of chromium, with or without other elements. The subject sheet and strip is a flat-rolled product in coils that is greater than 9.5 mm in width and less than 4.75 mm in thickness, and that is annealed or otherwise heat treated and pickled or otherwise descaled. The subject sheet and strip may also be further processed (*e.g.*, cold-rolled, polished, aluminized, coated, *etc.*) provided that it maintains the specific dimensions of sheet and strip following such processing.

The merchandise subject to this review is currently classifiable in the Harmonized Tariff Schedule of the United States (≥HTUS'') at subheadings: 7219.13.0031, 7219.13.0051, 7219.13.0071, 7219.1300.81,[2] 7219.14.0030, 7219.14.0065, 7219.14.0090, 7219.32.0005, 7219.32.0020, 7219.32.0025, 7219.32.0035, 7219.32.0036, 7219.32.0038, 7219.32.0042, 7219.32.0044, 7219.33.0005, 7219.33.0020, 7219.33.0025, 7219.33.0035, 7219.33.0036, 7219.33.0038, 7219.33.0042, 7219.33.0044, 7219.34.0005, 7219.34.0020, 7219.34.0025, 7219.34.0030, 7219.34.0035, 7219.35.0005, 7219.35.0015, 7219.35.0030, 7219.35.0035, 7219.90.0010, 7219.90.0020, 7219.90.0025, 7219.90.0060, 7219.90.0080, 7220.12.1000, 7220.12.5000, 7220.20.1010, 7220.20.1015, 7220.20.1060, 7220.20.1080, 7220.20.6005, 7220.20.6010, 7220.20.6015, 7220.20.6060, 7220.20.6080, 7220.20.7005, 7220.20.7010, 7220.20.7015, 7220.20.7060, 7220.20.7080, 7220.20.8000, 7220.20.9030, 7220.20.9060, 7220.90.0010, 7220.90.0015, 7220.90.0060, and 7220.90.0080. Although the HTUS subheadings are provided for convenience and Customs purposes, the Department's written description of the merchandise under review is dispositive.

Excluded from the scope of this review are the following: (1) sheet and strip that is not annealed or otherwise heat treated and pickled or otherwise descaled, (2) sheet and strip that is cut

[2] Due to changes to the HTUS numbers in 2001, 7219.13.0030, 7219.13.0050, 7219.13.0070, and 7219.13.0080 are now 7219.13.0031, 7219.13.0051, 7219.13.0071, and 7219.13.0081, respectively.

to length, (3) plate (*i.e.*, flat-rolled stainless steel products of a thickness of 4.75 mm or more), (4) flat wire (*i.e.*, cold-rolled sections, with a prepared edge, rectangular in shape, of a width of not more than 9.5 mm), and (5) razor blade steel. Razor blade steel is a flat-rolled product of stainless steel, not further worked than cold-rolled (cold-reduced), in coils, of a width of not more than 23 mm and a thickness of 0.266 mm or less, containing, by weight, 12.5 to 14.5 percent chromium, and certified at the time of entry to be used in the manufacture of razor blades. *See* chapter 72 of the HTUS, ''Additional U.S. Note'' 1(d).

Flapper valve steel is also excluded from the scope of this review. This product is defined as stainless steel strip in coils containing, by weight, between 0.37 and 0.43 percent carbon, between 1.15 and 1.35 percent molybdenum, and between 0.20 and 0.80 percent manganese. This steel also contains, by weight, phosphorus of 0.025 percent or less, silicon of between 0.20 and 0.50 percent, and sulfur of 0.020 percent or less. The product is manufactured by means of vacuum arc remelting, with inclusion controls for sulphide of no more than 0.04 percent and for oxide of no more than 0.05 percent. Flapper valve steel has a tensile strength of between 210 and 300 ksi, yield strength of between 170 and 270 ksi, plus or minus 8 ksi, and a hardness (Hv) of between 460 and 590. Flapper valve steel is most commonly used to produce specialty flapper valves in compressors.

Also excluded is a product referred to as suspension foil, a specialty steel product used in the manufacture of suspension assemblies for computer disk drives. Suspension foil is described as 302/304 grade or 202 grade stainless steel of a thickness between 14 and 127 microns, with a thickness tolerance of plus-or-minus 2.01 microns, and surface glossiness of 200 to 700 percent Gs. Suspension foil must be supplied in coil widths of not more than 407 mm, and with a mass of 225 kg or less. Roll marks may only be visible on one side, with no scratches of measurable depth. The material must exhibit residual stresses of 2 mm maximum deflection, and flatness of 1.6 mm over 685 mm length.

Certain stainless steel foil for automotive catalytic converters is also excluded from the scope of this review. This stainless steel strip in coils is a specialty foil with a thickness of between 20 and 110 microns used to produce a metallic substrate with a honeycomb structure for use in automotive catalytic converters. The steel contains, by weight, carbon of no more than 0.030 percent, silicon of no more than 1.0 percent, manganese of no more than 1.0 percent, chromium of between 19 and 22 percent, aluminum of no less than 5.0 percent, phosphorus of no more than 0.045 percent, sulfur of no more than 0.03 percent, lanthanum of less than 0.002 or greater than 0.05 percent, and total rare earth elements of more than 0.06 percent, with the balance iron.

Permanent magnet iron-chromium-cobalt alloy stainless strip is also excluded from the scope of this order. This ductile stainless steel strip contains, by weight, 26 to 30 percent chromium, and 7 to 10 percent cobalt, with the remainder of iron, in widths 228.6 mm or less, and a thickness between 0.127 and 1.270 mm. It exhibits magnetic remanence between 9,000 and 12,000 gauss, and a coercivity of between 50 and 300 oersteds. This product is most commonly used in electronic sensors and is currently available under proprietary trade names such as ''Arnokrome III.'' [3]

Certain electrical resistance alloy steel is also excluded from the scope of this review. This product is defined as a non-magnetic stainless steel manufactured to American Society of Testing and Materials (''ASTM'') specification B344 and containing, by weight, 36 percent nickel, 18 percent chromium, and 46 percent iron, and is most notable for its resistance to high temperature corrosion. It has a melting point of 1390 degrees Celsius and displays a creep rupture limit of 4 kilograms per square millimeter at 1000 degrees Celsius. This steel is most commonly used in the production of heating ribbons for circuit breakers and industrial furnaces, and in rheostats for railway locomotives. The product is currently available under proprietary trade names such as ''Gilphy 36.'' [4]

Certain martensitic precipitation-hardenable stainless steel is also excluded from the scope of this order. This high-strength, ductile stainless steel product is designated under the Unified Numbering System (''UNS'') as S45500-grade steel, and contains, by weight, 11 to 13 percent chromium, and 7 to 10 percent nickel. Carbon, manganese, silicon and molybdenum each comprise, by weight, 0.05 percent or less, with phosphorus and sulfur each comprising, by weight, 0.03 percent or less. This steel has copper, niobium, and titanium added to achieve aging, and will exhibit yield strengths as high as 1700 Mpa and ultimate tensile strengths as high as 1750 Mpa after aging, with elongation percentages of 3 percent or less in 50 mm. It is generally provided in thicknesses between 0.635 and 0.787 mm, and in widths of 25.4 mm. This product is most commonly used in the manufacture of television tubes and is currently available under proprietary trade names such as ''Durphynox 17.'' [5]

Also excluded are three specialty stainless steels typically used in certain industrial blades and surgical and medical instruments. These include stainless steel strip in coils used in the production of textile cutting tools (*e.g.*, carpet knives).[6] This steel is similar to AISI grade 420 but containing, by weight, 0.5 to 0.7 percent of molybdenum. The steel also contains, by weight, carbon of between 1.0 and 1.1 percent, sulfur of 0.020 percent or less, and includes between 0.20 and 0.30 percent copper and between 0.20 and 0.50 percent cobalt. This steel is sold under proprietary names such as ''GIN4 Mo.'' [7] The second excluded stainless steel strip in coils is similar to AISI 420-J2 and contains, by weight, carbon of between 0.62 and 0.70 percent, silicon of between 0.20 and 0.50 percent, manganese of between 0.45 and 0.80 percent, phosphorus of no more than 0.025 percent and sulfur of no more than 0.020 percent. This steel has a carbide density on average of 100 carbide particles per 100 square microns. An example of this product is ''GIN5'' [8] steel. The third specialty steel has a chemical composition similar to AISI 420 F, with carbon of between 0.37 and 0.43 percent, molybdenum of between 1.15 and 1.35 percent, but lower manganese of between 0.20 and 0.80 percent, phosphorus of no more than 0.025 percent, silicon of between 0.20 and 0.50 percent, and sulfur of no more than 0.020 percent. This product is supplied with a hardness of more than Hv 500 guaranteed after customer processing, and is supplied as, for example, ''GIN6.'' [9]

Analysis of Comments Received

All issues raised in the case and rebuttal briefs by parties to this administrative review are addressed in the ''Issues and Decision Memorandum'' (''*Decision Memorandum*'') from Joseph A. Spetrini, Deputy Assistant Secretary, Import Administration, to James J.

[3] ''Arnokrome III'' is a trademark of the Arnold Engineering Company.

[4] ''Gilphy 36'' is a trademark of Imphy, S.A.

[5] ''Durphynox 17'' is a trademark of Imphy, S.A.

[6] This list of uses is illustrative and provided for descriptive purposes only.

[7] ''GIN4 Mo'' is the proprietary grade of Hitachi Metals America, Ltd.

[8] ''GIN5'' is the proprietary grade of Hitachi Metals America, Ltd.

[9] ''GIN6'' is the proprietary grade of Hitachi Metals America, Ltd.

Jochum, Assistant Secretary for Import Administration, dated December 5, 2003, which is hereby adopted by this notice. A list of the issues which parties have raised and to which we have responded are attached to this notice as an Appendix. Parties can find a complete discussion of all issues raised in this review and the corresponding recommendations in the *Decision Memorandum* which is on file in the Central Records Unit, Room B-099 of the main Department building. In addition, a complete version of the *Decision Memorandum* can be accessed directly on the Web at *http://ia.ita.doc.gov/*. The paper copy and electronic version of the *Decision Memorandum* are identical in content.

Sales Below Cost

We disregarded sales below cost for TKAST during the course of this review.

Changes Since the Preliminary Results

Based on our analysis of comments received, we have made changes in the margin calculations for TKAST. *See Analysis for the Final Results of Review of Stainless Steel Sheet and Strip in Coils from Italy*, (''*Final Analysis Memorandum*''), dated December 5, 2003. The changes to the margin calculation include the following: (1) we recalculated inventory carrying costs for the U.S. market, *see* Comment 3 of the *Decision Memorandum*; (2) we removed bad debt from indirect U.S. selling expenses and reallocated it to direct U.S. selling expenses, see Comment 4 of the *Decision Memorandum*.

Final Results of Review

We determine that the following percentage margin exists for the period July 1, 2001, through June 30, 2002:

Producer/Manufacturer/ Exporter	Weighted-Average Margin
ThyssenKrupp Acciai Speciali Terni S.p.A.	1.62%

Assessment Rates

The Department will determine, and the U.S. Customs and Border Protection (''CBP'') shall assess, antidumping duties on all appropriate entries. In accordance with 19 CFR 351.212(b)(1), we have calculated an importer-specific assessment rate for merchandise subject to this review. The Department will issue appropriate assessment instructions directly to the CBP within 15 days of publication of these final results of review. We will direct the CBP to assess the resulting assessment rates against the entered customs values for the subject merchandise on each of the importer's entries during the review period. For duty assessment purposes, we will calculate importer-specific assessment rates by dividing the dumping margins calculated for each importer by the total entered value of sales for each importer during the POR.

Cash Deposit Requirements

The following deposit requirements will be effective upon publication of this notice of final results of administrative review for all shipments of stainless steel sheet and strip in coils from Italy entered, or withdrawn from warehouse, for consumption on or after the date of publication, as provided by section 751(a)(1) of the Act: (1) The cash deposit rate for TKAST will be the rate shown above; (2) for previously reviewed or investigated companies not listed above, the cash deposit rate will continue to be the company-specific rate published for the most recent period; (3) if the exporter is not a firm covered in this review, a prior review, or the original less-than-fair-value (LTFV) investigation, but the manufacturer is, the cash deposit rate will be the rate established for the most recent period for the manufacturer of the merchandise; and (4) if neither the exporter nor the manufacturer is a firm covered in these or any previous reviews conducted by the Department, the cash deposit rate will be the ''all others'' rate, which is 11.23 percent.

These deposit requirements shall remain in effect until publication of the final results of the next administrative review.

Notification of Interested Parties

This notice also serves as a final reminder to importers of their responsibility under 19 CFR 351.402(f)(2) to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during this review period. Failure to comply with this requirement could result in the Secretary's presumption that reimbursement of the antidumping duties or countervailing duties occurred and the subsequent assessment of double antidumping duties or countervailing duties.

This notice also serves as a reminder to parties subject to administrative protective orders (''APOs'') of their responsibility concerning the return or destruction of proprietary information disclosed under APO in accordance with 19 CFR 351.305, which continues to govern business proprietary information in this segment of the proceeding. Timely written notification of the return/destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to comply with the regulations and terms of an APO is a violation which is subject to sanction.

We are issuing and publishing this determination and notice in accordance with sections 751(a)(1) and 771(i) (1) of the Act.

Dated: December 5, 2003.

James J. Jochum,

Assistant Secretary for Import Administration.

APPENDIX—ISSUES IN THE DECISION MEMORANDUM

1. Whether the Department should Allow TKAST's Constructed Export Price Offset Adjustment
2. Whether the Department Properly Calculated Home Market Credit Expenses
3. Whether the Department should Correct TKAST's Understatement of the Inventory Holding Period for U.S. Sales
4. Whether the Department should Account for TKAST's Loss on its Unpaid U.S. Sales
5. Whether the Department should Set Negative Margins to Zero in Calculating the Aggregate Margin

[FR Doc. E3–00549 Filed 12–11–03; 8:45 am]

BILLING CODE 3510–DS–S

DEPARTMENT OF COMMERCE

International Trade Administration

C–122–841

Carbon and Certain Alloy Steel Wire Rod from Canada: Preliminary Results of Countervailing Duty Changed Circumstances Review and Intent to Revoke Order

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

ACTION: Notice of Preliminary Results of Changed Circumstances Review of the Countervailing Duty Order and Intent To Revoke Order, in Whole.

SUMMARY: On November 3, 2003, in response to a request by domestic producers of the subject merchandise, the Department of Commerce (''the Department'') published a notice of initiation of a changed circumstances review of the countervailing duty order on carbon and certain alloy steel wire rod, as described below. *See Carbon and Certain Alloy Steel Wire Rod from Canada: Initiation of Countervailing Duty Changed Circumstances Review*, 68 FR 62282 (November 3, 2003) (''*Initiation Notice*'').

In the *Initiation Notice*, we invited interested parties to comment on the Department's initiation and the proposed revocation of the countervailing duty order on carbon and certain alloy steel wire rod from Canada. We did not receive any comments. Absent any comments, we preliminarily conclude that producers accounting for substantially all of the production of the domestic like product to which this order pertains lack interest in the relief provided by the order. Unless the Department receives opposition from domestic producers whose production totals more than 15 percent of the domestic like product, the Department will revoke the order on carbon and certain alloy steel wire rod in the final results of this review. Therefore, we preliminarily revoke this order, in whole, with respect to products entered, or withdrawn from warehouse, for consumption on or after February 8, 2002, *i.e.*, the publication date of the Department's preliminary determination (*see Preliminary Affirmative Countervailing Duty Determination: Carbon and Certain Alloy Steel Wire Rod from Canada*, 67 FR 5984), because domestic parties have expressed no interest in the continuation of the order.

EFFECTIVE DATE: December 12, 2003.

FOR FURTHER INFORMATION CONTACT: S. Anthony Grasso, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230; telephone (202) 482–3853.

SUPPLEMENTARY INFORMATION:

Background

The Department published the countervailing duty (''CVD'') order on steel wire rod from Canada on October 22, 2002. *See Notice of Countervailing Duty Orders: Carbon and Certain Alloy Steel Wire Rod from Brazil and Canada*, 67 FR 64871 (October 22, 2002). On October 1, 2003, the Department received a request from Georgetown Steel Company (formerly GS Industries), Gerdau Ameristeel US Inc. (formerly Co-Steel Raritan), Keystone Consolidated Industries, Inc., and North Star Steel Texeas, Inc., the petitioners in the original investigation, that the Department initiate a changed circumstances review for purposes of revoking the CVD order. The basis for the petitioners' request is that they are no longer interested in maintaining the countervailing duty order or in the imposition of CVD duties on the subject merchandise.

On November 3, 2003, the Department published a notice of initiation of a changed circumstances review of the countervailing duty order on carbon and certain alloy steel wire rod products from Canada. *See Initiation Notice*, 68 FR 62282. In the *Initiation Notice*, we indicated interested parties could submit comments for consideration in the Department's preliminary results not later than 14 days after publication of the initiation of the review, and submit responses to those comments not later than 5 days following the submission of comments. No comments were received. On November 18, 2003, a respondent to the original proceeding, Ispat Sidbec, Inc. (''Ispat''), submitted a letter to the Department stating that ''all three parties wish to advise the Department that they agree to the outcome of the review and, further, request that, pursuant to 19 CFR § 351.216(e), the Department render its final results of review within 45 days of initiation of the review or sooner.'' Ispat claimed its letter represented the position of the only parties to the proceeding, namely, Ispat, the Government of Quebec, and the U.S. producers that filed the original petition.

Scope of the Order

The merchandise covered by this order is certain hot-rolled products of carbon steel and alloy steel, in coils, of approximately round cross section, 5.00 mm or more, but less than 19.00 mm, in solid cross-sectional diameter.[1]

Specifically excluded are steel products possessing the above-noted physical characteristics and meeting the *Harmonized Tariff Schedule of the United States* (''HTSUS'') definitions for (a) stainless steel; (b) tool steel; (c) high nickel steel; (d) ball bearing steel; and (e) concrete reinforcing bars and rods. Also excluded are (f) free machining steel products (*i.e.*, products that contain by weight one or more of the following elements: 0.03 percent or more of lead, 0.05 percent or more of bismuth, 0.08 percent or more of sulfur, more than 0.04 percent of phosphorus, more than 0.05 percent of selenium, or more than 0.01 percent of tellurium).

Also excluded from the scope are 1080 grade tire cord quality wire rod and 1080 grade tire bead quality wire rod. Grade 1080 tire cord quality rod is defined as: (i) Grade 1080 tire cord quality wire rod measuring 5.0 mm or more but not more than 6.0 mm in cross-sectional diameter; (ii) with an average partial decarburization of no more than 70 microns in depth (maximum individual 200 microns); (iii) having no inclusions greater than 20 microns; (iv) having a carbon segregation per heat average of 3.0 or better using European Method NFA 04–114; (v) having a surface quality with no surface defects of a length greater than 0.15 mm; (vi) capable of being drawn to a diameter of 0.30 mm or less with 3 or fewer breaks per ton, and (vii) containing by weight the following elements in the proportions shown: (1) 0.78 percent or more of carbon, (2) less than 0.01 percent of aluminum, (3) 0.040 percent or less, in the aggregate, of phosphorus and sulfur, (4) 0.006 percent or less of nitrogen, and (5) not more than 0.15 percent, in the aggregate, of copper, nickel and chromium.

Grade 1080 tire bead quality rod is defined as: (i) Grade 1080 tire bead quality wire rod measuring 5.5 mm or more but not more than 7.0 mm in cross-sectional diameter; (ii) with an average partial decarburization of no more than 70 microns in depth (maximum individual 200 microns); (iii) having no inclusions greater than 20 microns; (iv) having a carbon segregation per heat average of 3.0 or better using European Method NFA 04–114; (v) having a surface quality with no surface defects of a length greater than 0.2 mm; (vi) capable of being drawn to a diameter of 0.78 mm or larger with 0.5 or fewer breaks per ton; and (vii) containing by weight the following elements in the proportions shown: (1) 0.78 percent or more of carbon, (2) less than 0.01 percent of soluble aluminum, (3) 0.040 percent or less, in the aggregate, of phosphorus and sulfur, (4) 0.008 percent or less of nitrogen, and (5) either not more than 0.15 percent, in the aggregate, of copper, nickel and chromium (if chromium is not specified), or not more than 0.10 percent in the aggregate of copper and nickel and a chromium content of 0.24 to 0.30 percent (if chromium is specified).

The designation of the products as ''tire cord quality'' or ''tire bead quality'' indicates the acceptability of the product for use in the production of tire cord, tire bead, or wire for use in other rubber reinforcement applications such as hose wire. These quality designations are presumed to indicate that these products are being used in tire cord, tire

[1] On November 12, 2003, the Department published the final results of a changed circumstances review modifying the scope to exclude certain grade 1080 tire cord quality wire rod and grade 1080 tire bead quality wire rod. This modification is for all entries of subject merchandise entered, or withdrawn from warehouse, for consumption on or after July 24, 2003. We note that for the purposes of this changed circumstances review, the revocation of the order would be based on the original scope. *See Carbon and Certain Alloy Steel Wire Rod from Brazil, Canada, Indonesia, Mexico, Moldova, Trinidad and Tobago, and Ukraine: Final Results of Changed Circumstances Review*, 68 FR 64079 (November 12, 2003).

bead, and other rubber reinforcement applications, and such merchandise intended for the tire cord, tire bead, or other rubber reinforcement applications is not included in the scope. However, should petitioners or other interested parties provide a reasonable basis to believe or suspect that there exists a pattern of importation of such products for other than those applications, end-use certification for the importation of such products may be required. Under such circumstances, only the importers of record would normally be required to certify the end use of the imported merchandise.

All products meeting the physical description of subject merchandise that are not specifically excluded are included in this scope.

The products under investigation are currently classifiable under subheadings 7213.91.3010, 7213.91.3090, 7213.91.4510, 7213.91.4590, 7213.91.6010, 7213.91.6090, 7213.99.0031, 7213.99.0038, 7213.99.0090, 7227.20.0010, 7227.20.0020, 7227.20.0090, 7227.20.0095, 7227.90.6051, 7227.90.6053, 7227.90.6058, and 7227.90.6059 of the HTSUS. Although the HTSUS subheadings are provided for convenience and customs purposes, the written description of the scope of this proceeding is dispositive.

Preliminary Results of Review and Intent to Revoke in Whole the Countervailing Duty Order

Pursuant to section 751(d)(1) of the 1930 Tariff Act, as amended (''the Act''), and 19 CFR § 351.222(g), the Department may revoke an antidumping or countervailing duty order, in whole or in part, based on a review under section 751(b) of the Act (*i.e.*, a changed circumstances review). Section 751(b)(1) of the Act requires a changed circumstances review to be conducted upon receipt of a request which shows changed circumstances sufficient to warrant a review. Section 782(h)(1) of the Act gives the Department the authority to revoke an order if producers accounting for substantially all of the production of the domestic like product have expressed a lack of interest in the continuation of the order. Section 351.222(g) of the Department's regulations provides that the Department will conduct a changed circumstances administrative review under 19 CFR § 351.216, and may revoke an order (in whole or in part), if it concludes that (i) producers accounting for substantially all of the production of the domestic like product to which the order pertains have expressed a lack of interest in the relief provided by the order, in whole or in part, or (ii) if other changed circumstances sufficient to warrant revocation exist. The Department has interpreted ''substantially all'' production normally to mean at least 85 percent of domestic production of the like product. *See Certain Tin Mill Products From Japan: Final Results of Changed Circumstances Review*, 66 FR 52109 (October 12, 2001); see also, 19 CFR § 351.208(c).

As noted above and in the *Initiation Notice*, the petitioners requested this changed circumstances review on the basis that they are no longer interested in maintaining the countervailing duty order or in the imposition of CVD duties on the subject merchandise. Because the Department did not receive any comments during the comment period opposing initiation of this changed circumstances review, we preliminarily conclude that producers accounting for substantially all of the production of the domestic like product to which this order pertains lack interest in the relief provided by the order. In accordance with 19 CFR § 351.222(g), the Department preliminarily determines that there is a reasonable basis to believe that changed circumstances exist sufficient to warrant revocation of the order. Therefore, the Department is preliminarily revoking the order on carbon and certain alloy steel wire rod from Canada, in whole. Unless the Department receives opposition within the time limit set forth below from domestic producers whose production totals more than 15 percent of the domestic like product, the Department will revoke the order on carbon and certain alloy steel wire rod in its final results of review.

If, as a result of this review, we revoke the order, we intend to instruct U.S. Customs and Border Protection (''CBP'') to liquidate without regard to applicable countervailing duties, and refund any estimated countervailing duties collected on, all unliquidated entries of the merchandise subject to the order, as described above under the ''Scope of the Order'' section, entered, or withdrawn from warehouse, for consumption on or after February 8, 2002, *i.e.*, the publication date of the Department's preliminary determination (*see Preliminary Affirmative Countervailing Duty Determination: Carbon and Certain Alloy Steel Wire Rod from Canada*, 67 FR 5984). We will also instruct CBP to pay interest on such refunds with respect to the subject merchandise entered, or withdrawn from warehouse, for consumption on or after October 22, 2002, in accordance with section 778 of the Act. The current requirement for a cash deposit of estimated countervailing duties on the subject merchandise will continue unless, and until, we publish a final determination to revoke in whole.

Public Comment

Interested parties may submit case briefs not later than 14 days after the date of publication of this notice. *See* 19 CFR § 351.309(c)(ii). Rebuttal briefs, which must be limited to issues raised in such case briefs, may be filed not later than 19 days after the date of publication of this notice. *See* 19 CFR § 351.309(d). Parties who submit arguments are requested to submit with the argument (1) a statement of the issue, (2) a brief summary of the argument, and (3) a table of authorities. Any interested party may request a hearing within 14 days of publication of this notice. *See* 19 CFR § 351.310(c). Any hearing, if requested, may be held 22 days after the date of publication of this notice, or the first working day thereafter, as practicable.

Consistent with section 351.216(e) of the Department's regulations, we will issue the final results of this changed circumstances review not later than 270 days after the date on which this review was initiated.

This notice is published in accordance with section 751(b)(1) of the Act and sections 351.216 and 351.222 of the Department's regulations.

Dated: December 5, 2003.

James J. Jochum,

Assistant Secretary for Import Administration.

[FR Doc. E3–00546 Filed 12–11–03; 8:45 am]

BILLING CODE 3510–DS–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[I.D. 112003C]

Endangered and Threatened Species; Take of Anadromous Fish

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration, Commerce.

ACTION: Issuance of three scientific research permit modifications (1140, 1335, 1369).

SUMMARY: Between June 30, 2003 and September 24, 2003, NMFS' Northwest Region issued three permit modifications allowing endangered and threatened species of Pacific salmon and steelhead to be taken for scientific research purposes under the

Endangered Species Act of 1973 (ESA). The research actions and the species they affect are listed in the ''Supplementary Information'' section below.

ADDRESSES: The permits, permit applications, and related documents are available for review during business hours by appointment at NMFS' Protected Resources Division, 525 NE Oregon Street, Suite 500, Portland, OR 97232–2737 (phone: 503–230–5400, fascimile: 503–230–5435).

FOR FURTHER INFORMATION CONTACT: Garth Griffin, Portland, OR (phone: 503–231–2005, fascimile: 503–230–5435, e-mail: *Garth.Griffin@noaa.gov*).

SUPPLEMENTARY INFORMATION:

Authority

The ESA requires that permit modifications be issued based on findings that such actions: (1) Are applied for in good faith; (2) would not operate to the disadvantage of the listed species that are the subject of the actions; and (3) are consistent with the purposes and policies set forth in section 2 of the ESA. Authority to take listed species is subject to conditions set forth in the permits. Permits, modifications, and amendments are issued in accordance with, and are subject to, the ESA and NMFS' regulations governing listed fish and wildlife permits (50 CFR parts 222–226).

Species Covered in this Notice

The listed species/evolutionarily significant units (ESUs) covered by this notice are threatened Puget Sound (PS) chinook salmon (*Oncorhynchus tshawytscha*), threatened Snake River (SnR) chinook salmon, threatened Upper Willamette River (UWR) chinook salmon, threatened Lower Columbia River (LCR) chinook salmon, and threatened Oregon Coast (OC) Coho (*O. kisutch*).

Dated: December 8, 2003.

Phil Williams,

Chief, Endangered Species Division, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 03–30797 Filed 12–11–03; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[I.D.112003B]

Endangered and Threatened Species; Take of Anadromous Fish

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration, Commerce

ACTION: Notice of decision and availability of decision documents on the issuance of Permit 1347 for incidental takes of endangered species.

SUMMARY: Notice is hereby given that an artificial propagation permit to the Washington Department of Fish and Wildlife (WDFW), the Public Utility District No. 1 of Chelan County (Chelan PUD); and the Public Utility District No. 1 of Douglas County (Douglas PUD), pursuant to section 10(a)(1)(B) of the Endangered Species Act of 1973 (ESA), has been issued and that the decision documents are available upon request.

DATES: Permit 1347 was issued on October 22, 2003, subject to certain conditions set forth therein. Permit 1347 expires on October 22, 2013.

ADDRESSES: Requests for copies of the decision documents or any of the other associated documents should be directed to the Salmon Recovery Division, National Marine Fisheries Service, 525 NE Oregon Street, Suite 510, Portland, OR 97232.

FOR FURTHER INFORMATION CONTACT: Kristine Petersen, Portland, OR, at phone number: (503) 230–5409, e-mail: Kristine.Petersen@noaa.gov

SUPPLEMENTARY INFORMATION: This notice is relevant to the following Evolutionarily Significant Units (ESUs):

Steelhead (*Oncorhynchus mykiss*): endangered Upper Columbia River.

Chinook salmon (*O. tshawytscha*): endangered Upper Columbia River spring run.

Notice of receipt of application for the proposed actions was published on October 16, 2001 (66 FR 52567) relative to the WDFW Hatchery Genetic Management Plans, and on June 25, 2002 (67 FR 42755), relative to the three Habitat Conservation Plan agreements. The permit authorizes the WDFW, Chelan PUD, and Douglas PUD, to implement artificial propagation programs for summer chinook salmon, fall chinook salmon, and sockeye salmon. Permit 1347 authorizes activities to carry out the artificial propagation programs in the upper Columbia River. After evaluating the potential effects of this permit on listed salmon and steelhead in the Upper Columbia River ESUs and the environmental consequences, NMFS issued the permit with conditions authorizing incidental takes of the ESA-listed anadromous fish species. NMFS' conditions will ensure that the incidental takes of ESA-listed anadromous fish will not appreciably reduce the likelihood of the survival and recovery of the species in the wild. The permit expires on October 22, 2013.

Dated: December 8, 2003.

Phil Williams,

Chief, Endangered Species Division, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 03–30798 Filed 12–11–03; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[I.D. 112003A]

Endangered and Threatened Species; Take of Anadromous Fish

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration, Commerce

ACTION: Issuance of Endangered Species Enhancement Permits 1395, 1396, and 1412

SUMMARY: This notice advises the public that three enhancement permits pursuant to the Endangered Species Act of 1973 (ESA), have been issued and that the decision documents are available upon request. Permit 1395 was issued jointly to the Washington Department of Fish and Wildlife (WDFW),the Public Utility District No. 1 of Chelan County (Chelan PUD), and the Public Utility District No. 1 of Douglas County (Douglas PUD). Permit 1396 was issued to the U.S. Fish and Wildlife Service (USFWS). Permit 1412 was issued to the Confederated Tribes of the Colville Reservation (Colville Tribes).

DATES: Permits 1395, 1396, and 1412 were issued on October 2, 2003, subject to certain conditions set forth therein. Permit 1395 expires October 2, 2013, and permits 1396 and 1412 expire October 2, 2008.

ADDRESSES: Requests for copies of the decision documents or any of the other associated documents should be directed to the Salmon Recovery Division, NMFS, 525 NE Oregon Street, Suite 510, Portland, Oregon, 97232.

FOR FURTHER INFORMATION CONTACT: Kristine Petersen, Portland, OR, at phone number: (503) 230–5409, e-mail: Kristine.Petersen@noaa.gov

SUPPLEMENTARY INFORMATION: The following species and evolutionarily significant units (ESUs) are covered in the permit:

Steelhead (*Oncorhynchus mykiss*): endangered Upper Columbia River.

Chinook salmon (*O. tshawytscha*): endangered Upper Columbia River spring run.

Notice of the proposed actions addressed in permit 1395 was published on August 1, 2002 (67 FR 49906). A public meeting was held in Wenatchee, WA, on August 27, 2002. Permit 1395 authorizes the WDFW, the Chelan PUD, and the Douglas PUD to carry out artificial propagation programs for the enhancement of listed upper Columbia River steelhead. The enhancement programs authorized under permit 1395 are designed to supplement the natural spawning populations of upper Columbia River steelhead in the Wenatchee River, Methow River, and Okanogan River basins and compenstate for inundation and unavoidable fish passage losses at Rock Island, Rocky Reach and Wells dams on the mainstem Columbia River as provided in three Habitat Conservation Plans. Additionally, it authorizes the WDFW to manage adult hatchery steelhead returns that are surplus to recovery and broodstock needs. After evaluating the potential effects of issuing this permit on listed salmon and steelhead in the Upper Columbia River ESUs and the environmental consequences, NMFS issued the permit with conditions authorizing takes of the ESA-listed anadromous fish species. NMFS' conditions will ensure that the takes of ESA-listed anadromous fish will not appreciably reduce the likelihood of the survival and recovery of the species in the wild. The permit expires October 2, 2013.

Notice of the proposed actions addressed in permit 1396 was published on August 1, 2002 (67 FR 49906). A public meeting was held in Wenatchee, WA on August 27, 2002. Permit 1396 authorizes the USFWS to carry out artificial propagation programs for the enhancement of listed upper Columbia River steelhead in the Methow River basin. The enhancement program authorized under permit 1396 is intended to mitigate for fish losses due to Grand Coulee Dam construction and supplement the natural spawning population in the Methow River. After evaluating the potential effects of issuing this permit on listed salmon and steelhead in the Upper Columbia River ESUs and the environmental consequences, NMFS issued the permit with conditions authorizing takes of the ESA-listed anadromous fish species. NMFS' conditions will ensure that the takes of ESA-listed anadromous fish will not appreciably reduce the likelihood of the survival and recovery of the species in the wild. The permit expires October 2, 2008.

Notice of proposed actions addressed in permit 1412 was published on January 14, 2003 (68 FR 1826). Permit 1412 authorizes the Colville Tribes to carry out artificial propagation programs for the enhancement of listed upper Columbia River steelhead in the Okanogan River basin. The enhancement program authorized under permit 1412 is designed to supplement and restore natural spawning of steelhead in Omak Creek, in the Okanogan River basin. After evaluating the potential effects of issuing this permit on listed salmon and steelhead in the Upper Columbia River ESUs and the environmental consequences, NMFS issued the permit with conditions authorizing takes of the ESA-listed anadromous fish species. NMFS' conditions will ensure that the takes of ESA-listed anadromous fish will not appreciably reduce the likelihood of the survival and recovery of the species in the wild. The permit expires October 2, 2003.

Issuance of these permits, as required by the ESA, was based on a finding that the permits: (1) were applied for in good faith; (2) will not operate to the disadvantage of the listed species which are the subject of the permit; and (3) is consistent with the purposes and policies set forth in section 2 of the ESA. These permits were issued in accordance with, and are subject to, 50 CFR part 222, the NMFS regulations governing listed species permits.

Dated: December 8, 2003.

Phil Williams,

Chief, Endangered Species Division, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 03–30799 Filed 12–11–03; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[I.D. 120103E]

Endangered Species; File No. 1375

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Receipt of application for modification

SUMMARY: Notice is hereby given that Dr. Thomas J. Kwak, U.S. Geological Survey, North Carolina Cooperative Fish and Wildlife Research Unit, Box 7617, 201 David Clark Labs, North Carolina State University, Raleigh, North Carolina 27695–7617, has requested a modification to scientific research permit no. 1375.

DATES: Written or telefaxed comments must be received on or before January 12, 2004.

ADDRESSES: The modification request and related documents are available for review upon written request or by appointment in the following office(s):

Permits, Conservation and Education Division, Office of Protected Resources, NMFS, 1315 East-West Highway, Room 13705, Silver Spring, MD 20910; phone (301)713–2289; fax (301)713–0376; and

Southeast Region, NMFS, 9721 Executive Center Drive North, St. Petersburg, FL 33702–2432; phone (727)570–5301; fax (727)570–5320.

Written comments or requests for a public hearing on this request should be submitted to the Chief, Permits, Conservation and Education Division, F/PR1, Office of Protected Resources, NMFS, 1315 East-West Highway, Room 13705, Silver Spring, MD 20910. Those individuals requesting a hearing should set forth the specific reasons why a hearing on this particular modification request would be appropriate.

Comments may also be submitted by facsimile at (301)713–0376, provided the facsimile is confirmed by hard copy submitted by mail and postmarked no later than the closing date of the comment period.

FOR FURTHER INFORMATION CONTACT: Jennifer Jefferies or Ruth Johnson, (301) 713–2289.

SUPPLEMENTARY INFORMATION: The subject modification to Permit No. 1375, issued on March 27, 2003 (68 FR 16002) is requested under the authority of the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*) and the regulations governing the taking, importing, and exporting of endangered and threatened species (50 CFR parts 222–226).

Permit No. 1375 authorized the permit holder to deploy 1,000 hatchery-reared juvenile shortnose sturgeon (*Acipenser brevirostrum*) in cages at 10 test sites within the Roanoke/Albemarle River system for 28 days. The fish were then supposed to be euthanized and their tissue analyzed for contaminants.

The results of this study would have provided needed information to determine if water quality is a limiting factor of the ecological success of shortnose sturgeon in this river system. When the initial study was conducted, however, high water temperatures and low dissolved oxygen contributed to a shortened experiment time. Although the results obtained were useful, the permit holder wants to repeat the experiment and requests authorization to obtain an additional 1000 fish for that purpose.

Dated: December 8, 2003.

Stephen L. Leathery,

Chief, Permits, Conservation and Education Division, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 03–30800 Filed 12–11–03; 8:45 am]

BILLING CODE 3510–22–S

COMMODITY FUTURES TRADING COMMISSION

Sunshine Act, Meeting

FEDERAL REGISTER CITATION OF PREVIOUS ANNOUNCEMENT: 68 FR 68875.

PREVIOUSLY ANNOUNCED TIME AND DATE OF THE MEETING: 1 p.m., Wednesday, December 17, 2003.

CHANGES IN THE MEETING: The open hearing to receive testimony from industry participants relating to the Commission's consideration of the application of U.S. Futures Exchange, LLC, for contract market designation has been cancelled.

FOR FURTHER INFORMATION CONTACT: Jean A. Webb, (202) 418–5100.

Jean A. Webb,

Secretary of the Commission.

[FR Doc. 03–30915 Filed 12–10–03; 8:45 am]

BILLING CODE 6351–01–M

DEPARTMENT OF DEFENSE

Department of the Army

Performance Review Board Membership

AGENCY: Department of the Army, DoD.

ACTION: Notice.

SUMMARY: Notice is given of the names of members of a Performance Review Board for the Department of the Army.

EFFECTIVE DATE: December 8, 2003.

FOR FURTHER INFORMATION CONTACT: Marilyn Ervin, U.S. Army Senior Executive Service Office, Assistant Secretary of the Army, Manpower & Reserve Affairs, 111 Army Pentagon, Washington, DC 20310–0111.

SUPPLEMENTARY INFORMATION: Section 4314(c)(1) through (5) of Title 5, U.S.C., requires each agency to establish, in accordance with regulations, one or more Senior Executive Service performance review boards. The boards shall review and evaluate the initial appraisal of senior executives' performance by supervisors and make recommendations to the appointing authority or rating official relative to the performance of these executives.

The members of the Performance Review Board for the U.S. Army Aviation and Missile Command, U.S. Army Materiel Command are:

1. Ms. L. Marlene Cruze (Chair), Executive Director, Acquisition Center, U.S. Army Aviation and Missile Command.
2. Mr. Michael C. Schexnayder, Associate Director for Systems Missiles, Aviation and Missile Research, Development, and Engineering Center.
3. Mr. John R. Chapman, Executive Director, Integrated Materiel Management Center, U.S. Army Aviation and Missile Command.
4. Mr. Paul Bogosian, Deputy Program Executive Officer, Aviation, Army Acquisition Executive.
5. Mr. William C. Reeves, Jr., Director, Integration/Interoperability for Missile Defense and Assistant to the Deputy Commanding General for Research, Development and Acquisition, U.S. Army Space and Missile Defense Command.
6. Dr. Robin B. Buckelew (Alternate), Director, Missile Guidance. Directorate, Aviation and Missile Research, Development, and Engineering Center.

The members of the Performance Review Board for the U.S. Army Research Laboratory, U.S. Army Materiel Command are:

1. Mr. Michael C. Schexnayder (Chair), Associate Director for Systems Missiles, Aviation and Missile Research, Development, and Engineering Center.
2. Dr. Chine I. Chang, Director, Army Research Office.
3. Dr. Grace M. Bochenek, Vice President for Research, Tank-Automotive Research, Development and Engineering Center.
4. Dr. John A. Parmentola (Alternate), Director for Research and Laboratory Management, Office of the Assistant Secretary of the Army (Acquisition, Logistics and Technology).
5. Dr. James D. Gannt (Alternate), Deputy Director, Computational and Information Sciences Directorate, U.S. Army Research Laboratory.
6. Mrs. Barbara A. Leiby (Alternate), Deputy Chief of Staff for Resource Management, Headquarters, U.S. Army Materiel Command.

The members of the Performance Review Board for the U.S. Army Tank-automotive Command, U.S. Army Materiel Command are:

1. Dr. Richard E. McClelland (Chair), President/Director, U.S. Army Tank-Automotive Research, Development and Engineering Center.
2. Mr. John F. Hedderich, III, Associate Technical Director (Systems Concepts and Technology), Armament Research, Development and Engineering Center.
3. Mr. Michael C. Schexnayder, Associate Director for Systems Missiles, Aviation and Missile Research, Development, and Engineering Center.
4. Mr. Anthony B. Sconyers, Chief Counsel, Procurement and Readiness, U.S. Army Operations Support Command.

The members of the Performance Review Board for the North Atlantic Treaty Organization, Army element are:

1. Mr. Alfred G. Volkman, Director, International Cooperation, Office of the Under Secretary of Defense, Acquisition, Technology and Logistics.
2. Mr. Barry Pavel, Principal Director, Office of the Secretary of Defense.
3. Mr. James Q. Roberts, Principal Director, Special Operations and Combating Terrorism, Office of the Secretary of Defense.
4. Mr. James J. Townsend, Principal Director for European and North Atlantic Treaty Organization Policy.

Luz D. Ortiz,

Army Federal Register Liaison Officer.

[FR Doc. 03–30801 Filed 12–11–03; 8:45 am]

BILLING CODE 3710–08–M

DEPARTMENT OF DEFENSE

Department of the Army; Corps of Engineers

Intent To Prepare a Draft Environmental Impact Statement for a Proposed Reservoir Operating Plan in Conjunction With the Reservoir Operating Plan Evaluation Study for the Mississippi Headwaters

AGENCY: Department of the Army, U.S. Army Corps of Engineers, DoD.

ACTION: Notice of intent.

SUMMARY: The headwaters region of the Mississippi River, located in north-central Minnesota, contains a number of reservoirs operated by various private and public entities, including the Corps of Engineers (Corps) and the U.S. Forest Service (Forest Service). The current operating plans for the Corps and Forest Service reservoirs were developed over 40 years ago and are in need of revision

because of changes in environmental, social, and economic conditions in the region. It is unlikely that the current operating plans provide the greatest net benefit to the resources of the whole system. Furthermore, the operations of the non-Federal (State and privately owned) reservoirs are not coordinated with the Federal reservoir operations. This hinders system-wide objectives such as flood damage reduction for properties adjacent to and downstream of the reservoirs.

The proposed action is to develop a coordinated system-wide operational plan for implementation by the Corps and the Forest Service with recommendations for the operations of the non-Federal dams. The goal of this proposed action is to optimize the system benefits for all affected resources. Some resources may be adversely affected as a result of the proposed action. It is possible that other projects, such as dam modifications and habitat improvement projects, may be recommended under the Reservoir Operating Plan Evaluation (ROPE); however, the implementation of such projects may require additional planning and National Environmental Policy Act (NEPA) processes.

FOR FURTHER INFORMATION CONTACT: Questions about the proposed action and Draft Environmental Impact Statement (DEIS) can be directed to: Colonel Robert L. Ball, District Engineer, St. Paul District, Corps of Engineers, ATTN: Mr. Terry J. Birkenstock, Chief, Environmental and Economic Analysis Branch, 190 Fifth Street East, St. Paul, MN 55101–1638, telephone: (651) 290–5264.

SUPPLEMENTARY INFORMATION: The ROPE Study focuses on the Mississippi River between St. Paul and Bemidji, Minnesota. The headwaters region of the Mississippi River, located in north-central Minnesota, contains a number of reservoirs operated by various public and private entities. For example, the Corps operates dams on the following waterbodies: Leech Lake, Lake Winnibigoshish, Big Sandy Lake, Pine River (Whitefish Lake Chain), Pokegama Lake, and Gull Lake. Knutson Dam on Cass Lake is operated by the Forest Service. The Stump Lake Dam controls the Lake Bemidji lake chain and is operated by Ottertail Power Company. Similarly, Minnesota Power operates a power dam on the Prairie River upstream of Aitkin, Minnesota. Mud Lake Dam, located downstream from Leech Lake, is operated by the Minnesota Department of Natural Resources, primarily for fish and wildlife purposes.

The original authorized purpose for the Corps dams was to provide low flow augmentation for navigation on the Mississippi River as far south as the Twin Cities of St. Paul and Minneapolis. However, flood control, recreation, hydropower, water supply, and enhanced fish and wildlife production have subsequently been added as authorized project purposes. Knutson Dam is operated by the Forest Service primarily to maintain lake levels for recreational navigation and environmental purposes.

The ROPE Study and its associated NEPA documentation will be prepared by the Corps and the Forest Service. The Corps will act as the lead agency and the Forest Service will act as a cooperating agency. The primary focus of the ROPE Study will be the operation of the Federal dams in the study area; however, system-wide planning and coordination with the operators of the non-Federal dams will be included as a part of the study effort to the extent that cooperation and resources permit.

A number of general operational changes have been identified that, individually or in combination, will be considered study alternatives. These include changes to current reservoir levels, minimum flow requirements, outflow rates-of-change (ramping), and the timing of and need for reservoir drawdowns. This study will evaluate an alternative plan for dam operation to more closely mimic natural hydrology, and a no-action alternative with no changes to the current operating plans.

Significant resources and issues to be addressed in the DEIS will be determined through coordination with Federal agencies, State agencies, tribal governments, local governments, the general public, interested private organizations, and industry. Anyone who has an interest in participating in the development of the DEIS is invited to contact the St. Paul District, Corps of Engineers.

To date, the following areas of discussion have been identified for inclusion in the DEIS:

1. Navigation (to the extent it is still a Federal project purpose for the headwaters reservoirs).

2. Treaty rights, tribal trust resources, and other areas of special tribal interest such as wild ricing, fishing, and hunting.

3. Flood damage reduction (around the lakes and along the receiving rivers).

4. Fish and wildlife (with an emphasis on enhancement, restoration, and preservation of lake, river, and floodplain habitats).

5. Recreation and related tourism.

6. Water quality (contaminants, nutrients, dissolved oxygen, *etc.*) and water quantity (including low flow augmentation, drought reduction, waste assimilation, and water supply).

7. Erosion and sedimentation (lake and riverine damage).

8. Hydropower.

9. Archeological, cultural, and historic resources.

Additional areas of interest may be identified through the scoping process, which will include public and agency meetings. A notice of these meetings will be provided to interested parties and to local news media.

The Corps has determined that the selection of a combined operating plan for the federally operated headwaters reservoirs has the potential to significantly affect the quality of the human environment. Therefore, the Corps and the Forest Service have jointly determined that the preparation of an Environmental Impact Statement is appropriate.

An environmental review will be conducted under the NEPA of 1969 and other applicable laws and regulations. It is anticipated that the DEIS will be available for public review in the winter of 2004–2005.

Dated: September 8, 2003.

Robert L. Ball,

Colonel, Corps of Engineers, District Engineer.

[FR Doc. 03–30802 Filed 12–11–03; 8:45 am]

BILLING CODE 3710–CY–M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP99–301–100]

ANR Pipeline Company; Notice of Negotiated Rate Filing

December 5, 2003.

Take notice that on December 2, 2003, ANR Pipeline Company (ANR) tendered for filing and approval two amendments to an existing negotiated rate service agreement between ANR and Madison Gas & Electric Company.

ANR requests that the Commission accept and approve the two subject negotiated rate agreement amendments to be effective on November 1, 2003 and December 1, 2003, respectively.

Any person desiring to be heard or to protest said filing should file a motion to intervene or a protest with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, in accordance with sections 385.214 or 385.211 of the Commission's Rules and Regulations. All such motions

or protests must be filed 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. This filing is available for review at the Commission in the Public Reference Room or may be viewed on the Commission's Web site at *http://www.ferc.gov* using the eLibrary. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll-free at (866) 208–3676, or TTY, contact (202) 502–8659. The Commission strongly encourages electronic filings. *See*, 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site under the e-Filing link.

Magalie R. Salas,

Secretary.

[FR Doc. E3–00533 Filed 12–11–03; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP99–301–098]

ANR Pipeline Company; Notice of Negotiated Rate Filing

December 5, 2003.

Take notice that, on December 1, 2003, ANR Pipeline Company (ANR) tendered for filing and approval three (3) amendments to existing negotiated rate service agreements between ANR and NJR Energy Services Company.

ANR requests that the Commission accept and approve the subject negotiated rate agreement amendments to be effective December 1, 2003.

Any person desiring to be heard or to protest said filing should file a motion to intervene or a protest with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, in accordance with § 385.214 or § 385.211 of the Commission's Rules and Regulations. All such motions or protests must be filed in accordance with § 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. This filing is available for review at the Commission in the Public Reference Room or may be viewed on the Commission's Web site at *http://www.ferc.gov* using the eLibrary link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll-free at (866) 208–3676, or TTY, contact (202) 502–8659. The Commission strongly encourages electronic filings. *See* 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site under the e-Filing link.

Magalie R. Salas,

Secretary.

[FR Doc. E3–00544 Filed 12–11–03; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP04–92–000]

Georgia Public Service Commission; Notice of Declaratory Order

December 5, 2003.

Take notice that on November 19, 2003, Georgia Public Service Commission (GPSC) tendered for filing a petition for a Declaratory Order in Docket No. RP04–92–000, requesting that the Commission declare:

Whether the FERC would preempt the Georgia Commission if the Georgia Commission adopted a plan that provided for the permanent assignment of the interstate capacity assets currently held by Atlanta Gas Light Company to certificated natural gas marketers and placed conditions upon that assignment of the interstate capacity assets.

Any person desiring to be heard or to protest said filing should file a motion to intervene or a protest with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, in accordance with Sections 385.214 or 385.211 of the Commission's Rules and Regulations. All such motions or protests must be filed on or before the date as indicated below. 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. This filing is available for review at the Commission in the Public Reference Room or may be viewed on the Commission's Web site at *http://www.ferc.gov* using the eLibrary. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll-free at (866) 208–3676, or TTY, contact (202) 502–8659. The Commission strongly encourages electronic filings. *See*, 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site under the e-Filing link.

Comment Date: December 26, 2003.

Magalie R. Salas,

Secretary .

[FR Doc. E3-00541 Filed 12-11-03; 8:45 am]

BILLING CODE 6717-01-P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP04–102–000]

Pinnacle Pipeline Company; Notice of Tariff Filing

December 5, 2003.

Take notice that on December 3, 2003, Pinnacle Pipeline Company (Pinnacle) tendered for filing as part its proposed FERC Gas Tariff, Original Volume 1, the tariff sheets in Appendix A to the filing.

Pinnacle states that its proposed tariff sheets are being submitted in compliance with the October 8, 2003 Certificate Order issued by the Commission in Docket No. CP03-323-000, *et al.*, which authorized Pinnacle to operate and expand an existing pipeline lateral facility in the State of New Mexico, known as the Hobbs Lateral.

Any person desiring to be heard or to protest said filing should file a motion to intervene or a protest with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, in accordance with sections 385.214 or 385.211 of the Commission's rules and regulations. All such motions or protests must be filed 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. This filing is available for review at the Commission in the Public Reference Room or may be viewed on the Commission's Web site at *http://www.ferc.gov* using the eLibrary. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll-

free at (866) 208-3676, or TTY, contact (202) 502-8659. The Commission strongly encourages electronic filings. *See*, 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site under the e-Filing link.

Magalie R. Salas,

Secretary.

[FR Doc. E3-00540 Filed 12-11-03; 8:45 am]

BILLING CODE 6717-01-P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP04–100–000]

Puget Sound Energy, Inc.; Notice of Tariff Filing

December 5, 2003.

Take notice that on December 3, 2003, Puget Sound Energy, Inc. (Puget) tendered for filing as part of its FERC Gas Tariff, Original Volume No. 1, the following tariff sheets, to be effective January 3, 2004:

Second Revised Sheet No. 1
Original Sheet Nos. 95 through 111

Puget states that the purpose of this filing is to incorporate amendments dated May 31, 2002, February 28, 2003 and July 23, 2003 to the Jackson Prairie Gas Storage Project Agreement dated January 15, 1998, in order to reflect the administrative and operational procedures pertaining to implementation of the phased storage capacity expansion of Jackson Prairie Gas Storage Project approved in Docket No. CP02–384–000 and to reflect the interim storage capacity and storage service rights resulting from the completion of the first phase of the authorized storage capacity expansion.

Any person desiring to be heard or to protest said filing should file a motion to intervene or a protest with the Federal Energy Regulatory Commission, 888 First Street, NE, Washington, DC 20426, in accordance with sections 385.214 or 385.211 of the Commission's Rules and Regulations. All such motions or protests must be filed 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. This filing is available for review at the Commission in the Public Reference Room or may be viewed on the Commission's Web site at *http://www.ferc.gov* using the ''eLibrary''. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll-free at (866) 208–3676, or TTY, contact (202) 502–8659. The Commission strongly encourages electronic filings. *See*, 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site under the ''e-Filing'' link.

Magalie R. Salas,

Secretary.

[FR Doc. E3–00538 Filed 12–11–03; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP96–312–133]

Tennessee Gas Pipeline Company; Notice of Negotiated Rate

December 5, 2003.

Take notice that on December 2, 2003, Tennessee Gas Pipeline Company (Tennessee), tendered for filing its Negotiated Rates and Nonconforming Agreements Tariff Filing.

Tennessee's filing requests that the Commission approve a negotiated rate arrangement between Tennessee and Magnum Hunter Production Inc. and Tennessee and Remington Oil and Gas Company. Tennessee requests that the Commission grant such approval effective December 2, 2003.

Any person desiring to be heard or to protest said filing should file a motion to intervene or a protest with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, in accordance with § 385.214 or § 385.211 of the Commission's Rules and Regulations. All such motions or protests must be filed in accordance with § 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. This filing is available for review at the Commission in the Public Reference Room or may be viewed on the Commission's Web site at *http://www.ferc.gov* using the eLibrary. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll-free at (866) 208–3676, or TTY, contact (202) 502–8659. The Commission strongly encourages electronic filings. *See* 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site under the e-Filing link.

Magalie R. Salas,

Secretary.

[FR Doc. E3–00543 Filed 12–11–03; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP04–101–000]

Transcontinental Gas Pipe Line Corporation; Notice of Tariff Filing

December 5, 2003.

Take notice that on December 3, 2003, Transcontinental Gas Pipe Line Corporation (Transco) tendered for filing to its FERC Gas Tariff, Third Revised Volume No.1, TwentyFourth Revised Sheet No, 28, with an effective date of December 1, 2003.

Transco states that the purpose of the instant filing is to track rate changes attributable to storage service purchased from Texas Eastern Transmission Corporation (TETCO) under its Rate Schedule X-28, the costs of which are included in the rates and charges payable under Transco's Rate Schedule S-2.

Transco states that this filing is being made pursuant to tracking provisions under section 26 of the General Terms and Conditions of Transco's Third revised Volume No. 1 Tariff. Transco further states that included in Appendix A attached to the filing is the explanation of the rate changes and details regarding the computation of the revised S-2 rates.

Transco states that copies of the filing are being mailed to affected customers and interested State Commissions.

Any person desiring to be heard or to protest said filing should file a motion to intervene or a protest with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, in accordance with sections 385.214 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. This filing is available for review at the

Commission in the Public Reference Room or may be viewed on the Commission's Web site at *http://www.ferc.gov* using the eLibrary. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll-free at (866) 208-3676, or TTY, contact (202) 502-8659. The Commission strongly encourages electronic filings. *See*, 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site under the e-Filing link.

Magalie R. Salas,

Secretary.

[FR Doc. E3–00539 Filed 12–11–03; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 2659–016]

PacifiCorp, Oregon; Notice of Availability of Environmental Assessment

December 5, 2003.

In accordance with the National Environmental Policy Act of 1969 and the Federal Energy Regulatory Commission's (Commission) regulations, 18 CFR part 380 (Order No. 486, 52 FR 47897), the Office of Energy Projects has reviewed the application for surrender of license for the Powerdale Hydroelectric Project. The project is located on the Hood River, in Hood River County, Oregon. There are no federal lands within the project boundary although the lower half of the bypassed reach and the powerhouse are located within the Columbia River Gorge National Scenic Area. The Commission staff has prepared an Environmental Assessment (EA) on the license surrender.

The EA contains the staff's analysis of the potential environmental impacts of decommissioning the project and removing most of the project facilities. In the EA, staff concludes that surrendering the license, with appropriate environmental protection measures, would not constitute a major federal action that would significantly affect the quality of the human environment.

A copy of the EA is available for review at the Commission in the Public Reference Room or may be viewed on the Commission's website at http://www.ferc.gov using the ''eLibrary'' link. Enter the docket number, excluding the last three digits in the docket number field, to access the document. For assistance, contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll-free at 1–866–208–3676, or for TTY, (202) 502–8659.

You may also register online at *http://www.ferc.gov/esubscribenow.htm* to be notified via email of new filings and issuances related to this or other pending projects. For assistance, contact FERC Online Support.

Please file any comments (an original and 8 copies) within 45 days from the date of this notice. The comments should be addressed to Magalie R. Salas, Secretary, Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426. Please affix the Project No. 2659-016 to all comments. Comments may be filed electronically via the internet in lieu of paper (see 18 CFR 385.2001(a)(1)(iii)). Instructions for electronic filing are available on the Commission's Web site at *http://www.ferc.gov* under the ''e-filing'' link. The Commission strongly encourages electronic filings.

For Further Information Contact: Bob Easton at (202) 502–6045.

Magalie R. Salas,

Secretary.

[FR Doc. E3–00537 Filed 12–11–03; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Notice of Application for Amendment of License and Soliciting Comments, Motions To Intervene, and Protests and Adoption of Environmental Impact Statement

December 5, 2003.

Take notice that the following applications have been filed with the Commission and are available for public inspection:

a. *Application Type:* (1) Application for Approval of the Rock Island Anadromous Fish Agreement and Habitat Conservation Plan and Adoption as an Amendment of License; (2) Application for Approval of the Rocky Reach Anadromous Fish Agreement and Habitat Conservation Plan as an Offer of Settlement and Adoption as an Amendment of License; and (3) Application for Approval of the Wells Anadromous Fish Agreement and Habitat Conservation Plan and Adoption as an Amendment of License.

In accordance with the Commission's procedures for complying with the National Environmental Policy Act (NEPA), and consistent with the regulations of the Council on Environmental Quality (CEQ) for implementing NEPA at 40 CFR1506.3, the Commission, as a cooperating agency, has decided to adopt an environmental impact statement (EIS) produced by the U.S. Department of Commerce, National Oceanic and Atmospheric Administration's National Marine Fisheries Service. The EIS is titled: ''Anadromous Fish Agreements and Habitat Conservation Plans, Final Environmental Impact Statement for the Wells, Rocky Reach, and Rock Island Hydroelectric Projects.'' The FERC staff has independently reviewed the EIS, and agrees with its analyses and conclusions. The staff, therefore, finds that the EIS meets the standards for an adequate environmental analysis under NEPA, and can be adopted.

b. *Project Numbers*: P–2149–106, P–2145–057, and P–943–083.

c. *Date Filed*: November 24, 2003.

d. *Applicants*: Public Utility District No. 1 of Chelan County, Washington (P–943 and P–2145) and Public Utility District No. 1 of Douglas County, Washington (P–2149).

e. *Name of Projects*: Wells Project (FERC No. P–2149), Rocky Reach Project (FERC No. P–2145), and Rock Island Project (FERC No. P–943).

f. *Location*: The projects are located on the main stem Columbia River.

g. *Filed Pursuant to*: Federal Power Act, 16 U.S.C. 791 (a) 825(r) and 799 and 801.

h. *Applicant Contacts*: Tracy Yount, Public Utility District No. 1 of Chelan County, Washington, P.O. Box 1231, Wenatchee, WA 98807–1231, phone: (509) 663–8121.

Robert W. Clubb, Public Utility District No. 1 of Douglas County, Washington, 1151 Valley Mall Parkway, East Wenatchee, WA 98802–4497, phone: (509) 884–7191.

i. *FERC Contact*: Any questions on this notice should be addressed to Mr. Robert Fletcher at (202) 502–8901, or e-mail address: *robert.fletcher@ferc.gov*.

j. *Deadline for filing comments and or motions*: January 9, 2004.

k. *Description of Request*: The licensees for each of these three projects request Commission approval of their Anadromous Fish Agreements and project-specific Habitat Conservation Plans. The objectives of these agreements and plans are to achieve no net impact for each anadromous fish species and their habitat affected by each project. Further, the licensees request the Commission to amend the license of each project to incorporate the

plans into the respective licenses with articles that read as follows:

Article X. The licensee will carry out its obligations set forth in the Anadromous Fish Agreement and Habitat Conservation Plan for the specified project (HCP Agreement). Further, the licensee will file with the Commission: (1) The final annual and comprehensive progress reports developed pursuant to the HCP Agreement; and (2) the final results of all studies and testing pursuant to the HCP Agreement.

Article Y. The licensee will file design drawings prior to implementation of any substantial modification or addition to project works that is necessary to implement the HCP Agreement. The licensee will file such design drawings for Commission approval at least 90 days prior to the start of construction or modification. The licensee will file as-built drawings with the Commission within 6 months after completion of construction or modification.

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) 502–8371. This filing may also be viewed on the Commission's Web site at *http://www.ferc.gov* using the ''eLibrary'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. You may also register online at *http://www.ferc.gov/docs-filing/esubscription.asp* to be notified via email of new filings and issuances related to this or other pending projects. For assistance, call 1–866–208–3676 or e-mail *FERCOnlineSupport@ferc.gov*, for TTY, call (202) 502–8659. A copy is also available for inspection and reproduction at the address in item (h) above.

m. Individuals desiring to be included on the Commission's mailing list should so indicate by writing to the Secretary of the Commission.

n. Comments, Protests, or Motions to Intervene—Anyone may submit comments, a protest, or a motion to intervene in accordance with the requirements of Rules of Practice and Procedure, 18 CFR 385.210, .211, .214. In determining the appropriate action to take, the Commission will consider all protests or other comments filed, but only those who file a motion to intervene in accordance with the Commission's Rules may become a party to the proceeding. Any comments, protests, or motions to intervene must be received on or before the specified comment date for the particular application.

o. Filing and Service of Responsive Documents—Any filings must bear in all capital letters the title ''COMMENTS'', ''RECOMMENDATIONS FOR TERMS AND CONDITIONS'', ''PROTEST'', OR ''MOTION TO INTERVENE'', as applicable, and the Project Number of the particular application to which the filing refers (p–2149–106, p–2145–057, and/or p–943–083). All documents (original and eight copies) should be filed with: Magalie R. Salas, Secretary, Federal Energy Regulatory Commission, 888 First Street NE., Washington DC 20426. A copy of any motion to intervene must also be served upon each representative of the Applicant specified in the particular application.

p. 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.

q. Comments, protests and interventions may be filed electronically via the Internet in lieu of paper. *See*, 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site at *http://www.ferc.gov* under the ''e-Filing'' link.

Magalie R. Salas,

Secretary.

[FR Doc. E3–00535 Filed 12–11–03; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Notice of Application Accepted for Filing, and Soliciting Comments, Motions To Intervene, and Protests

December 5, 2003.

Take notice that the following hydroelectric application has been filed with the Commission and is available for public inspection:

a. *Type of Application*: License amendment for non-project use of project lands and waters.

b. *Project No.*: 1951–114.

c. *Date Filed*: September 3, 2003.

d. *Applicant*: Georgia Power.

e. *Name of Project*: Sinclair Project.

f. *Location*: Sinclair Project reservoir on the Oconee River, in Baldwin and Putnam Counties, Georgia.

g. *Filed Pursuant to*: Federal Power Act, 16 U.S.C. 791(a)–825(r).

h. *Applicant Contact*: Mr. Scott Hendricks, Georgia Power, 241 Ralph McGill Blvd., Atlanta, GA 30308–3374, (404) 506–2392.

i. *FERC Contact*: Ms. Monica Maynard, (202) 502–6013.

j. *Deadline for filing motions to intervene, protests and comments*: January 5, 2004. The Commission's Rules of Practice and Procedure require all interveners filing documents with the Commission to serve a copy of that document on each person in the official service list for the project. Further, if an intervener 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 Proposed Action*: The Applicant seeks to allow the Amherst County Service Agency (ACSA) withdraw up to 2 MGD from the James River within the Reusens Project boundary during drought emergencies. The Applicant would allow the ACSA to temporarily install a pump and screened intake pipe to move water from the project reservoir into pipe leading to its water drinking water supply system during drought emergency conditions.

l. The filings are available for review at the Commission in the Public Reference Room or may be viewed on the Commission's Web site at *http://www.ferc.gov* using the ''FERRIS'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, call toll-free 1–866–208–3676 or e-mail *FERCOnlineSupport@ferc.gov*. For TTY, call (202) 502–8659. A copy is also available for inspection and reproduction at the addresses in item h.

m. Individuals desiring to be included on the Commission's mailing list should so indicate by writing to the Secretary of the Commission.

n. Comments, Protests, or Motions to Intervene—Anyone may submit comments, a protest, or a motion to intervene in accordance with the requirements of Rules of Practice and Procedure, 18 CFR 385.210, .211, .214. In determining the appropriate action to take, the Commission will consider all protests or other comments filed, but only those who file a motion to intervene in accordance with the Commission's Rules may become a party to the proceeding. Any comments, protests, or motions to intervene must be received on or before the specified

comment date for the particular application.

o. Filing and Service of Responsive Documents—Any filings must bear in all capital letters the title ''COMMENTS'', ''RECOMMENDATIONS FOR TERMS AND CONDITIONS'', ''PROTEST'', OR ''MOTION TO INTERVENE'', as applicable, and the Project Number of the particular application to which the filing refers. Any of the above-named documents must be filed by providing the original and the number of copies provided by the Commission's regulations to: The Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426. A copy of any motion to intervene must also be served upon each representative of the Applicant specified in the particular application.

p. Agency Comments—Federal, State, and local agencies are invited to file comments on the described applications. A copy of the applications 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.

q. Comments, protests, and interventions may be filed electronically in the Internet in lieu of paper. The Commission strongly encourages electronic filings. *See* CFR 18 385.2001(a)(l)(iii) and the instructions on the Commission's Web site, *http://ferc.gov* under the ''e-filing'' link.

Magalie R. Salas,

Secretary.

[FR Doc. E3–00534 Filed 12–11–03; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Notice of Application for Modification of Project Recreation Plan and Soliciting Comments, Motions To Intervene, and Protests

December 5, 2003.

Take notice that the following application has been filed with the Commission and is available for public inspection:

a. *Type of Application:* Request to modify the recreation plan to afford more public access at Moran Road while protecting threatened species.

b. *Project No:* 2246–046.

c. *Date Filed:* June 11, 2003, and supplemented November 12, 2003.

d. *Applicant:* Yuba County Water Agency.

e. *Name of Project:* Yuba River Project.

f. *Location:* Moran Road on west side of New Bullards Bar Reservoir near Little Oregon Creek in Yuba County, California (about 25 miles northeast of Marysville, CA).

g. *Filed Pursuant to:* 18 CFR 4.200.

h. *Applicant Contact:* Curt Aikens, General Manager, YCWA, 1402 D St., Marysville, CA 95901–4226.

i. *FERC Contact:* Antonia Lattin, *antonia.lattin@ferc.gov,* (415)–369–3334

j. *Deadline for Filing Comments, Motions to Intervene and Protest:* January 9, 2004.

The Commission's rules of practice and procedure require all interveners filing documents with the Commission to serve a copy of that document on each person in the official service list for the project. Further, if an intervener 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 Application:* The licensee is requesting a modification of the approved project recreation plan to allow seasonal access at the Moran Road area of New Bullards Bar Reservoir. The existing recreation plan filed February 26, 1993, approved August 19, 1993, and amended July 18, 2003, and September 30, 2003, specifies reconstruction of ½ mile of the unpaved Moran Road, enlarging a turnaround area to accommodate about six cars, and closing Moran Road beyond the turnaround. The proposed modification as supplemented in the November 12, 2003, filing proposes that the Moran Road gate be closed from October 15 to May 1 to protect the federally threatened California red-legged frog (Rana aurora draytonii), the federally threatened bald eagle (Haliaeetus leucocephalus), and to assure public safety. The gate would remain open for the summer recreation season from May 2 to October 14.

The licensee consulted with the Tahoe National Forest and the U.S. Fish and Wildlife Service. The U.S. Fish and Wildlife Service concurred with the Forest Service finding that the action is not likely to adversely affect the threatened species as long as the mitigation measures listed in the Forest Service Decision Memo dated August 26, 2003, are implemented. The licensee has also held meetings with members of the public and tried to accommodate the request for as much public access as possible at the Moran Road site.

l. The filings are available for review at the Commission in the Public Reference Room or may be viewed on the Commission's Web site at *http://www.ferc.gov* using the ''eLibrary'' link. Select ''General Search'' and enter a ''P-'' plus the docket number excluding the last three digits to access the document. Click on ''Image'' when the listing appears to view the text of the filing. For assistance, call toll-free 1–866–208–3676 or e-mail *FERCOnlineSupport@ferc.gov*. For TTY, call (202) 502–8659. A copy is also available for inspection and reproduction at the addresses in item h.

m. Individuals desiring to be included on the Commission's mailing list should so indicate by writing to the Secretary of the Commission.

n. *Comments, Protests, or Motions to Intervene*— Anyone may submit comments, a protest, or a motion to intervene in accordance with the requirements of rules of practice and procedure, 18 CFR 385.210, .211, .214. In determining the appropriate action to take, the Commission will consider all protests or other comments filed, but only those who file a motion to intervene in accordance with the Commission's rules may become a party to the proceeding. Any comments, protests, or motions to intervene must be received on or before the specified comment date for the particular application.

o. *Filing and Service of Responsive Documents*—Any filings must bear in all capital letters the title ''COMMENTS'', ''RECOMMENDATIONS FOR TERMS AND CONDITIONS'', ''PROTEST'', OR ''MOTION TO INTERVENE'', as applicable, and the Project Number of the particular application to which the filing refers. Any of the above-named documents must be filed by providing an original and eight copies to: The Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426. A copy of any motion to intervene must also be served upon each representative of the Applicant specified in the particular application.

Comments, protests and interventions may be filed electronically via the Internet in lieu of paper; *see* 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site under the ''e-Filing'' link. The Commission strongly encourages electronic filings.

p. *Agency Comments*— Federal, State, and local agencies are invited to file comments on the described applications. A copy of the applications

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.

Magalie R. Salas,

Secretary.

[FR Doc. E3–00536 Filed 12–11–03; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Notice of Application Accepted for Filing and Soliciting Comments, Motions to Intervene, and Protests

December 5, 2003.

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:* 12472–000.

c. *Date Filed:* September 25, 2003.

d. *Applicant:* Eastern Kentucky Hydro.

e. *Name of Project:* Cave Run Lake Project.

f. *Location:* The proposed project would be located at the U.S. Army Corps of Engineers' (Corps) existing Cave Run Lake Dam on the Licking River in Bath and Rowan County, Kentucky.

g. *Filed Pursuant to:* Federal Power Act, 16 U.S.C. 791a–825r.

h. *Applicant Contact:* Mr. David Brown Kinloch, Eastern Kentucky Hydro, 414 S. Wenzel Street, Louisville, KY 40204, (502) 589–0975.

i. *FERC Contact:* Any questions on this notice should be addressed to Mr. Lynn R. Miles, Sr. at (202) 502–8763.

j. *Deadline for filing motions to intervene, protests and comments:* 60 days from the issuance date of this notice.

The Commission's Rules of Practice and Procedure require all interveners filing documents with the Commission to serve a copy of that document on each person in the official service list for the project. Further, if an intervener 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 Project:* The proposed run-of-river project using the existing Corps dam would consist of: (1) Five 4-foot-diameter, 1200-foot-long steel penstocks, (2) a proposed containing 15 new axial flow propeller turbines, each directly connected to a 330 kilowatt induction generator, having a total installed capacity of 4.95 megawatts, (3) an existing three-phase transmission line and (4) appurtenant facilities. The project would have an annual generation of 18 gigawatt-hours.

l. *Locations of Applications:* A copy of the application is available for inspection and reproduction at the Commission in the Public Reference Room, located at 888 First Street NE, Room 2A, Washington DC 20426, or by calling (202) 502–8371. This filing may also be viewed on the Commission's Web site at *http://www.ferc.gov* using the ''eLibrary'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, call toll-free 1–866–208–3676 or e-mail *FERCOnlineSupport@ferc.gov*. For TTY, call (202) 502–8659. A copy is also available for inspection and reproduction at the address in item h. above.

m. Individuals desiring to be included on the Commission(s mailing list should so indicate by writing to the Secretary of the Commission.

n. *Competing 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 competing preliminary permit application must conform with 18 CFR 4.30(b) and 4.36.

o. *Competing Development Application:* 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.

p. *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.

q. *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 economic analysis, preparation of preliminary engineering 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.

r. *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, 385.211, 385.214. In determining the appropriate action to take, the Commission will consider all protests or other comments filed, but only those who file a motion to intervene in accordance with the Commission's Rules may become a party to the proceeding. Any comments, protests, or motions to intervene must be received on or before the specified comment date for the particular application.

s. *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'', or ''MOTION TO INTERVENE'', as applicable, and the Project Number of the particular application to which the filing refers. Any of the above-named documents must be filed by providing the original and the number of copies provided by the Commission's regulations to: The Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426. An additional copy must be sent to Director, Division of Hydropower Administration and Compliance, 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.

Comments, protests and interventions may be filed electronically via the Internet in lieu of paper; see 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's web site under the ''e-Filing'' link. The Commission strongly encourages electronic filings.

t. *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.

Magalie R. Salas,

Secretary.

[FR Doc. E3–00545 Filed 12–11–03; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket Nos. RP96–200–092, RP96–200–097, RP96–200–101, RP96–200–102, RP96–200–103, RP96–200–104, RP96–200–105, RP96–200–106, RP96–200–107, RP96–200–108, RP96–200–110, RP96–200–111, RP96–200–113, and RP96–200–114]

CenterPoint Energy Gas Transmission Company; Notice of Technical Conference

December 5, 2003.

The Commission staff will hold a technical conference in the captioned subdockets on December 12, 2003, beginning at 9 a.m. at the Commission's headquarters at 888 First St. NE., Washington, DC, in a room to be established. The technical conference will further discuss issues raised by the September 15, 2003 Order in Docket Nos. RP96–200–092, *et al.*, (104 FERC ¶ 61,280), which directed CenterPoint Energy Transmission Company (CEGT) to file certain tariff provisions and to modify certain non-conforming gas transportation agreements.

The issues in the enumerated Docket No. RP96–200 subdockets are closely related. Therefore, Commission staff believes that the discussion of these issues at a public technical conference, which would be open only to Commission staff and interested parties that have intervened in these subdockets, will assist in an efficient resolution of these matters. Interested parties desiring further information should contact John M. Robinson of the advisory staff at 202–502–6808.

Magalie R. Salas,

Secretary.

[FR Doc. E3–00542 Filed 12–11–03; 8:45 am]

BILLING CODE 6717–01–P

ENVIRONMENTAL PROTECTION AGENCY

[SFUND–2000–0009, FRL–7598–9]

Agency Information Collection Activities: Proposed Collection; Comment Request; Notification of Episodic Releases of Oil and Hazardous Substances, EPA ICR Number 1049.10, OMB Control Number 2050–0046

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*), this document announces that EPA is planning to submit a continuing Information Collection Request (ICR) to the Office of Management and Budget (OMB). This is a request to renew an existing approved collection. This ICR is scheduled to expire on April 30, 2004. Before submitting the ICR to OMB for review and approval, EPA is soliciting comments on specific aspects of the proposed information collection as described below.

DATES: Comments must be submitted on or before February 10, 2004.

ADDRESSES: Submit your comments, referencing docket ID number SFUND–2000–0009, to EPA online using EDOCKET (our preferred method), by email to *superfund.docket@epa.gov*, or by mail to: EPA Docket Center, Environmental Protection Agency, Superfund Docket Office, Mail Code 5202T, 1200 Pennsylvania Ave., NW., Washington, DC 20460.

FOR FURTHER INFORMATION CONTACT: Lynn M. Beasley, Office of Solid Waste and Emergency Response, Office of Emergency Prevention, Preparedness, and Response, Emergency Response Staff, 5204G, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460; telephone number: (703) 603–9086; fax number: (703) 603–9104; e-mail address: *beasley.lynn@epa.gov*.

SUPPLEMENTARY INFORMATION: EPA has established a public docket for this ICR under Docket ID number SFUND–2000–0009, which is available for public viewing at the Superfund Docket in the EPA Docket Center (EPA/DC), EPA West, Room B102, 1301 Constitution Ave., NW, Washington, DC. The EPA Docket Center Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Reading Room is (202) 566–1744, and the telephone number for the Superfund Docket is (202) 566–0276. An electronic version of the public docket is available through EPA Dockets (EDOCKET) at *http://www.epa.gov/edocket*. Use EDOCKET to obtain a copy of the draft collection of information, submit or view public comments, access the index listing of the contents of the public docket, and to access those documents in the public docket that are available electronically. Once in the system, select ''search,'' then key in the docket ID number identified above.

Any comments related to this ICR should be submitted to EPA within 60 days of this notice. EPA's policy is that public comments, whether submitted electronically or in paper, will be made available for public viewing in EDOCKET as EPA receives them and without change, unless the comment contains copyrighted material, CBI, or other information whose public disclosure is restricted by statute. When EPA identifies a comment containing copyrighted material, EPA will provide a reference to that material in the version of the comment that is placed in EDOCKET. The entire printed comment, including the copyrighted material, will be available in the public docket. Although identified as an item in the official docket, information claimed as CBI, or whose disclosure is otherwise restricted by statute, is not included in the official public docket, and will not be available for public viewing in EDOCKET. For further information about the electronic docket, see EPA's **Federal Register** notice describing the electronic docket at 67 FR 38102 (May 31, 2002), or go to *http://www.epa.gov./edocket*.

Affected entities: Entities potentially affected by this action are facilities or vessels that manufacture, process, transport, or otherwise use certain specified hazardous substances and oil.

Title: Notification of Episodic Releases of Oil and Hazardous Substances.

Abstract: Section 103(a) of CERCLA, as amended, requires the person in charge of a facility or vessel to immediately notify the National Response Center (NRC) of a hazardous substance release into the environment if the amount of the release equals or exceeds the substance's reportable quantity (RQ) limit. The RQ of every

hazardous substance can be found in Table 302.4 of 40 CFR 302.4.

Section 311 of the CWA, as amended, requires the person in charge of a vessel to immediately notify the NRC of an oil spill into U.S. navigable waters if the spill causes a sheen, violates applicable water quality standards, or causes a sludge or emulsion to be deposited beneath the surface of the water or upon adjoining shorelines.

The reporting of a hazardous substance release that is above the substance's RQ allows the Federal Government to determine whether a Federal response action is required to control or mitigate any potential adverse effects to public health or welfare or the environment. Likewise, the reporting of oil spills allows the Federal government to determine whether cleaning up the oil spill is necessary to mitigate or prevent damage to public health or welfare or the environment.

The hazardous substance and oil release information collected under CERCLA section 103(a) and CWA section 311 also is available to EPA program offices and other Federal agencies who use the information to evaluate the potential need for additional regulations, new permitting requirements for specific substances or sources, or improved emergency response planning. Release notification information, which is stored in the national Emergency Response Notification System (ERNS) data base, is available to State and local government authorities as well as the general public. State and local government authorities and the regulated community use release information for purposes of local emergency response planning. Members of the general public, who have access to release information through the Freedom of Information Act, may request release information for purposes of maintaining an awareness of what types of releases are occurring in different localities and what actions, if any, are being taken to protect public health and welfare and the environment. ERNS fact sheets, which provide summary and statistical information about hazardous substance and oil release notifications, also are available to the public. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. The OMB control numbers for EPA's regulations in 40 CFR are listed in 40 CFR part 9.

The EPA would like to solicit comments to:

(i) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the Agency, including whether the information will have practical utility;

(ii) Evaluate the accuracy of the Agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

(iii) Enhance the quality, utility, and clarity of the information to be collected; and

(iv) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.*, permitting electronic submission of responses.

Burden Statement:

Estimated total number of reportable releases of hazardous substances and oil per year: 24,082.

Frequency of response: When a reportable release occurs.

Estimated total annual burden hours: 98,736 hours.

Estimated total annual burden costs: $7,230,537.

Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency. This includes the time needed to review instructions; develop, acquire, install, and utilize technology and systems for the purposes of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements; train personnel to be able to respond to a collection of information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the information.

Dated: November 10, 2003.

Deborah Y. Dietrich,

Director, Office of Emergency Prevention, Preparedness, and Response.

[FR Doc. 03–30776 Filed 12–11–03; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[OPP–2003–0383; FRL–7337–2]

Pesticide Program Dialogue Committee Notice of Charter Renewal

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: As required by the Federal Advisory Committee Act, EPA's Office of Pesticide Programs (OPP) is giving notice of the renewal of the Pesticide Program Dialogue Committee (PPDC) and its Charter.

DATES: The PPDC Charter, which was filed with Congress on November 7, 2003, will be in effect for 2 years, until November 7, 2005.

FOR FURTHER INFORMATION CONTACT: Margie Fehrenbach, Designated Federal Officer for PPDC, Office of Pesticide Programs, 7501C, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460; telephone number: 703–308–4775; fax number: 703–308–4776; e-mail address: *Fehrenbach.Margie@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this Action Apply to Me?

This action is directed to the public in general; however, persons may be interested who work in agricultural settings or persons who are concerned about implementation of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA); the Federal Food, Drug, and Cosmetic Act (FFDCA); and the amendments to both of these major pesticide laws by the Food Quality Protection Act (FQPA), (Public Law 104–170) of 1996. Since other entities may also be interested, the Agency has not attempted to describe all the specific entities that may be affected by this action. If you have any questions regarding the applicability of this action to a particular entity, consult the person listed under **FOR FURTHER INFORMATION CONTACT**.

B. How Can I Get Copies of this Document and Other Related Information?

1. *Docket.* EPA has established an official public docket for this action under docket identification (ID) number OPP–2003–0383. The official public docket consists of the documents specifically referenced in this action, any public comments received, and other information related to this action. Although a part of the official docket, the public docket does not include Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. The official public docket is the collection of materials that is available for public viewing at the Public Information and Records Integrity Branch (PIRIB), Rm. 119, Crystal Mall #2, 1921 Jefferson Davis Hwy., Arlington, VA. This docket facility is open from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal

holidays. The docket telephone number is (703) 305–5805.

2. *Electronic access.* You may access this **Federal Register** document electronically through the EPA Internet under the **Federal Register** listings at *http://www.epa.gov/fedrgstr/*.

An electronic version of the public docket is available through EPA's electronic public docket and comment system, EPA Dockets. You may use EPA Dockets at *http://www.epa.gov/edocket/* to view public comments, access the index listing of the contents of the official public docket, and to access those documents in the public docket that are available electronically. Although not all docket materials may be available electronically, you may still access any of the publicly available docket materials through the docket facility identified in Unit I.B.1. Once in the system, select ''search,'' then key in the appropriate docket ID number.

II. Background

The Office of Pesticide Programs is entrusted with the responsibility of ensuring the safety of the American food supply, the protection and education of those who apply or are exposed to pesticides occupationally or through use of products from unreasonable risk, and general protection of the environment and special ecosystems from potential risks posed by pesticides.

The Pesticide Program Dialogue Committee (PPDC) was established under the Federal Advisory Committee Act (FACA), Public Law 92–463 in September 1995, for a 2–year term and renewed every 2 years since that time. EPA has renewed the PPDC Charter for another 2–year term, from November 7, 2003 to November 7, 2005. PPDC provides advice and recommendations to the Office of Pesticide Programs on a broad range of pesticide regulatory, policy and program implementation issues that are associated with evaluating and reducing risks from use of pesticides. The following sectors are represented on the PPDC: Pesticide industry and trade associations; environmental/public interest and consumer groups; farm worker organizations; pesticide user, grower, and commodity groups; Federal and State/local/Tribal governments; the general public; academia; and public health organizations. It is determined that PPDC is in the public interest in connection with the performance of duties imposed on the Agency by law.

Copies of the PPDC charter are filed with appropriate committees of Congress and the Library of Congress and are available upon request.

List of Subjects

Environmental protection, Agriculture, Agricultural workers, Chemicals, Pesticides, Pests, Public health, Risk assessment, Tolerance reassessment.

Dated: December 2, 2003.

James Jones,

Director, Office of Pesticide Programs.

[FR Doc. 03–30778 Filed 12–11–03; 8:45 am]

BILLING CODE 6560–50–S

ENVIRONMENTAL PROTECTION AGENCY

[ER–FRL–6646–5]

Environmental Impact Statements and Regulations; Availability of EPA Comments

Availability of EPA comments prepared pursuant to the Environmental Review Process (ERP), under section 309 of the Clean Air Act and section 102(2)(c) of the National Environmental Policy Act as amended. Requests for copies of EPA comments can be directed to the Office of Federal Activities at (202) 564–7146. An explanation of the ratings assigned to draft environmental impact statements (EISs) was published in FR dated April 04, 2003 (68 FR 16511).

Draft EISs

ERP No. D–AFS–K65260–AZ Rating EC2, Rodeo-Chediski Fire Salvage Project, Timber Harvest of Merchantable Dead Trees as Sawtimber and Products other than Lumber (POL), Implementation, Apache-Sitgreaves and Tonto National Forest, Apache, Coconino and Navajo Counties, AZ.

Summary: EPA expressed environmental concerns with potential adverse impacts to water quality and wildlife. The preferred alternative requires harvesting on steep slopes with highly erosive soils which may further impact 303(d) listed streams, aquatic resources and habitat for the Western Spotted Owl.

ERP No. D–AFS–L65428–ID Rating NS, Twin Creek Timber Sale Project, Proposal to Cut and Remove Lodgepole Pine Sawtimber and Road Construction/Reconstruction, Montpelier Ranger District, Caribou National Forest, U.S. Army Corps of Engineers Permit, Bear Lake County, ID.

Summary: Region 10 has used a screening tool to conduct a limited review of this action. Based upon this screen, EPA does not foresee having any environmental objections to the proposed project.

ERP No. D–AFS–L65435–ID Rating EC2, Mission Brush Project, Proposes Vegetation, Wildlife Habitat, Recreation and Aquatic Improvement Treatments, Idaho Panhandle National Forests, Bonners Ferry Ranger District, Bounty County, ID.

Summary: EPA expressed environmental concerns regarding potential adverse impacts to water quality, invasive species, biodiversity, and cumulative impacts.

ERP No. D–HHS–D81034–MD Rating EC2, Integrated Research Facility (IRF) at Fort Detrick Construction and Operation, Adjacent to Existing U.S. Army Medical Research Institute of Infectious Diseases Facilities, City of Frederick, Frederick County, MD.

Summary: EPA expressed concerns regarding the Laboratory Sewer System's (LSS) possible contamination from biological warfare liquid wastes and radioactive materials to the proposed integrated Research Facility (IRF). EPA requested the FEIS specify the degree of contamination and remedial efforts to mitigate contamination from the LSS and indicate the U.S. Army's commitment to provide follow-up studies on post IRF activities.

ERP No. DA–FTA–K40237–CA Rating LO, Orange County Centerline Project, Transportation Improvements, Updated Information concerning Four New Alternatives and Re-examining an Updated New No Build Alternative, City of Santa Ana through the City of Casta Mesa to the City of Irvine, Funding, Orange County, CA.

Summary: EPA has no objections regarding the environmental impacts of the proposed project.

Final EISs

ERP No. F–AFS–E65087–AL Forest Health and Restoration Project, Proposal to Determine the Desired Future Conditions of all Existing Loblolly Pine Stands, National Forests in Alabama, Bankhead National Forest, Winston, Lawrence and Franklin Counties, AL.

Summary: EPA has no objections to this project, provided mitigation measures and monitoring programs described in the final EIS are implemented.

ERP No. F–AFS–L65409–AK, Licking Creek Timber Sale, Timber Harvest, Implementation, Tongass National Forest, Ketchikan Misty Fiords Ranger District, Revillagigedo Island, Ketchikan, AK.

Summary: No formal comment letter was sent to the preparing agency.

ERP No. F–AFS–L65419–ID, Upper and Lower East Fork Cattle and Horse Allotment Management Plans, Updating

the Allotment Plans to Allow Permitted Livestock Grazing, National Forest System Lands, Sawthooth and Challis National Forests, Custer County, ID.

Summary: No formal comment letter was sent to the preparing agency.

ERP No. F–AFS–L65424–ID, North End Sheep Allotment Management Plan (AMP) Revision, Proposal to Authorize Continued Livestock Use, Caribou-Targhee National Forest, Soda Springs Ranger District, Caribou and Bonneville Counties, ID.

Summary: No formal comment letter was sent to the preparing agency.

ERP No. F–FHW–L40202–WA, I–5 Toutle Park Road to Maytown Transportation Improvements, Funding, U.S. Army COE section 404 Permit, U.S. Coast Guard Permit and NPDES Permit Issuance, Cowlitz, Lewis and Thurston Counties, WA.

Summary: EPA has environmental concerns with the proposed project regarding the cumulative affects analyses in that many of the conclusions were either not presented clearly or did not appear to be supported by technical information. EPA recommends the use of the information in the cumulative effects analyses be augmented, as appropriate, in the further development and evaluation of projects that would tier from this EIS.

ERP No. F–FTA–G40170–TX, Northwest Corridor Light Rail Transit (LRT) Line to Farmers Branch and Carrollton, Construction and Operation, NPDES and U.S. Army COE section 404 Permits Issuance, Dallas Area Rapid Transit, Dallas and Denton Counties, TX.

Summary: No formal comment letter was sent to the preparing agency.

ERP No. F–FTA–G54006–TX, Southeast Corridor Light Rail Transit Project, Construction and Operation, Funding, NPDES Permit and U.S. Army COE section 404 Permit Issuance and, Mobility 2025 Plan Update, Dallas Area Rapid Transit (DART), City of Dallas, Dallas County, TX.

Summary: No formal comment letter was sent to the preparing agency.

ERP No. F–SFW–K99032–CA, Western Riverside County Multiple Species Habitat Conservation Plan (MSHCP), Implementation, Incidental Take Permits Issuance, Riverside and Orange County, CA.

Summary: EPA has continuing environmental concerns and recommended that the following issues be addressed in the Record of Decision: (1) Once the Section 7 evaluation is concluded, the findings should be incorporated to verify which species will be covered within the MSHCP; (2) The ROD should include a timeline for executing legal agreements with public/quasi-public land owners; and (3) U.S. Fish and Wildlife Service should provide criteria to prioritize land acquisitions to ensure key areas are incorporated into the Reserve.

ERP No. FS–FHW–L50009–WA, Elliott Bridge No. 3166 Replacement, Updated and Reevaluated Information concerning Replacement of the 149th Avenue SE Crossing over the Cedar River, Funding, U.S. CGD Bridge Permit and U.S. Army COE section 404 Permit Issuance, City of Renton, King County, WA.

Summary: No formal comment letter was sent to the preparing agency.

Dated: December 9, 2003.

B. Katherine Biggs,

Director, NEPA Compliance Division, Office of Federal Activities.

[FR Doc. 03–30779 Filed 12–11–03; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[6646–4]

Environmental Impact Statements; Notice of Availability

Responsible Agency: Office of Federal Activities, General Information (202) 564–7167 or *http://www.epa.gov/compliance/nepa/*

Weekly receipt of Environmental Impact Statements

Filed December 1, 2003 Through December 5, 2003

Pursuant to 40 CFR 1506.9.

EIS No. 030546, Draft EIS, AFS, PA, Sugar Run Project Area (SRPA), To Achieve and Maintain the Desired Conditions as stated in Forest Plan, Allegheny National Forest, Bradford Ranger District, McKean County, PA, Due: January 26, 2004, Contact: Heather Whittier (814) 362–4713.

EIS No. 030547, Final EIS, COE, AK, King Cove Access Project, Provision of a Transportation System between the City of King Cove and the Cold Bay Airport, U.S. Army COE Section 10 and 404 Permits Issuance, Aleutians East Borough (AEB), Alaska Peninsula, AK, Due: January 12, 2004, Contact: G. Leroy Phillips (907) 753–2712. This document is available on the Internet at: *http://www.kingcoveaccesseis.com.*

EIS No. 030548, Final EIS, BLM, AZ, Dos Pobres/San Juan Mining Plan and Land Exchange, Implementation of two Open Pit Copper Mines and one Central Ore Facility, NPDES and COE Section 404 Permits, Graham County, AZ, Due: January 12, 2004, Contact: Scott Evans (928) 348–4400.

EIS No. 030549, Draft EIS, NRC, IL, Dresden Nuclear Power Staten, Unit 2 and 3, Supplement 17, NUREG 1437, Renewal of a Nuclear Power Plant Operating License, Grundy County, IL, Due: February 24, 2004, Contact: Louis L. Wheeler (301) 415–1444. This document is available on the Internet at: *http://www.nrc.gov/reading-rm.htm/*

EIS No. 030550, Draft EIS, COE, MS, Enhanced Evaluation of Cumulative Effects Associated with U.S. Army Corps of Engineers Permitting Activity for Large-Scale Development in Coastal Mississippi, Mississippi, Hancock, Harrison and Jackson Counties, MS, Due: February 14, 2004, Contact: Dr. Susan I. Rees (251) 694–4141.

EIS No. 030551, Draft EIS, FHW, NC, U.S. 74 Improvements Corridor, between U.S. 601, North of Monroein Union County and I–485 (Charlotte Outer Loop), U.S. Army COE Section 404 Permit, Mecklenburg and Union Counties, NC, Due: January 26, 2004, Contact: Clarence Coleman (919) 856–4350.

EIS No. 030552, Final EIS, AFS, NM, Magdalena Ridge Observatory Project, Construct and Operate an Observatory in the Magdalena Mountains, Cibola National Forest, Magdalena Ranger District, Socorro County, NM, Due: January 12, 2004, Contact: Laura Hudnell (505) 854–2281.

EIS No. 030553, Final EIS, AFS, MT, Programmatic EIS—Winter Motorized Recreation Amendment 24, Proposal to Change the Flathead National Land and Resource Management Plan, Flathead National Forest, Flathead, Lake and Lincoln Counties, MT, Due: January 12, 2004, Contact: Kimberly Smolt (406) 758–5332. This document is available on the Internet at: *http://www.fs.fed.us/r1/flathead/*

Dated: December 9, 2003.

B. Katherine Biggs,

Associate Director, NEPA Compliance Division, Office of Federal Activities.

[FR Doc. 03–30780 Filed 12–11–03; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[OPP–2003–0322; FRL–7328–2]

Intent to Suspend Certain Pesticide Registrations

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of issuance of notice of intent to suspend.

SUMMARY: This Notice, pursuant to section 6(f)(2) of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 7 U.S.C. 136 *et seq.*, announces that EPA issued Notices of Intent to Suspend pursuant to section 3(c)(2)(B) of FIFRA. The Notices of Intent to Suspend were issued following issuance of Data Call-In Notices (DCI). The DCIs required registrants of products containing captan and DCPA used as an active ingredient to develop and submit certain data. These data were determined to be necessary to maintain the continued registration of affected products. Failure to comply with the data requirements of a DCI is a basis for suspension under section 3(c)(2)(B) of FIFRA. This Notice includes the text of the Notices of Intent to Suspend issued to Riverdale Chemical Company and Voluntary Purchasing Group. As required by section 6(f)(2), the Notices of Intent to Suspend were sent by certified mail, return receipt requested to each affected registrant at its address of record.

FOR FURTHER INFORMATION CONTACT: Harold Day, Agriculture Division, 2225A, Office of Enforcement and Compliance Assurance, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: 202–564–4133; fax number: 202–564–0029; e–mail address: *day.harold@epa.gov*.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this Action Apply to Me?

You may be potentially affected by this action if you hold EPA registrations for products that contain captan or DCPA. Potentially affected entities may include, but are not limited to, pesticide registrants. Other types of entities not listed in this unit could also be affected. To determine whether you or your business may be affected by this action, you should carefully examine the applicability provisions in the above-mentioned Data Call–Ins and FIFRA, specifically section 3(c)(2)(B). If you have any questions regarding the applicability of this action to a particular entity, consult the person listed under **FOR FURTHER INFORMATION CONTACT**.

B. How Can I Get Copies of this Document and Other Related Information?

1. *Docket*. EPA has established an official public docket for this action under docket identification (ID) number OPP–2003–0322. The official public docket consists of the documents specifically referenced in this action, any public comments received, and other information related to this action. Although a part of the official docket, the public docket does not include Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. The official public docket is the collection of materials that is available for public viewing at the Public Information and Records Integrity Branch (PIRIB), Rm. 119, Crystal Mall #2, 1921 Jefferson Davis Hwy., Arlington, VA. This docket facility is open from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The docket telephone number is (703) 305–5805.

2. *Electronic access*. You may access this **Federal Register** document electronically through the EPA Internet under the ''**Federal Register**'' listings at *http://www.epa.gov/fedrgstr/*.

An electronic version of the public docket is available through EPA's electronic public docket and comment system, EPA Dockets. You may use EPA Dockets at *http://www.epa.gov/edocket/* to view public comments, access the index listing of the contents of the official public docket, and to access those documents in the public docket that are available electronically. Although not all docket materials may be available electronically, you may still access any of the publicly available docket materials through the docket facility identified in Unit I.B.1. Once in the system, select ''search,'' then key in the appropriate docket ID number.

II. What Action is the Agency Taking?

This Notice, pursuant to section 6(f)(2) of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 7 U.S.C. 136 *et seq.*, announces that EPA issued Notices of Intent to Suspend pursuant to section 3(c)(2)(B) of FIFRA to Riverdale Chemical Company and Voluntary Purchasing Group. The Notices of Intent to Suspend were issued on September 25, 2003.

III. Text of the Notice to Suspend

The text of the Notices of Intent to Suspend absent specific chemical, product, or factual information issued to Riverdale Chemical Company and Voluntary Purchasing Group follows:

United States Environmental Protection Agency
Office of Prevention, Pesticides and Toxic Substances
Washington, DC 20460

September 25, 2003

Certified Mail
Return Receipt Requested

SUBJECT: Suspension of Registration of Pesticide Product(s) Containing _____ for Failure to Comply with the _____ Section 4 Phase 5 Reregistration Eligibility Document Data Call-In Notice Issued _____

Dear Sir/Madam:

This letter gives you notice that the pesticide product registration(s) listed in Attachment I will be suspended 30 days from your receipt of this letter unless you take steps within that time to prevent this Notice from automatically becoming a final and effective order of suspension. The Agency's authority for suspending the registrations of your products is section 3(c)(2)(B) of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA). Upon becoming a final and effective order of suspension, any violation of the order will be an unlawful act under section 12(a)(2)(J) of FIFRA.

You are receiving this Notice of Intent to Suspend because you have failed to comply with the terms of the 3(c)(2)(B) Data Call–In Notice. The specific basis for issuance of this Notice is stated in the Explanatory Appendix (Attachment III) to this Notice. The affected product(s) and the requirement(s) which you failed to satisfy are listed and described in the following three attachments:

Attachment I Suspension Report – Product List

Attachment II Suspension Report – Requirement List

Attachment III Suspension Report – Explanatory Appendix

The suspension of the registration of each product listed in Attachment I will become final unless at least one of the following actions is completed.

1. You may avoid suspension under this Notice if you or another person adversely affected by this Notice properly request a hearing within 30 days of your receipt of this Notice. If you request a hearing, it will be conducted in accordance with the requirements of section 6(d) of FIFRA and the Agency's Procedural Regulations in 40 CFR part 164.

Section 3(c)(2)(B), however, provides that the only allowable issues which may be addressed at the hearing are whether you have failed to take the actions which are the bases of this Notice and whether the Agency's decision regarding the disposition of existing stocks is consistent with FIFRA. Therefore, no substantive allegation or legal argument concerning other issues, including but not limited to the Agency's original decision to require the submission of data or other information, the need for or utility of any of the required data or other information or deadlines imposed, any allegations of errors or unfairness in any proceedings before an arbitrator, and the risks and benefits associated with continued registration of the affected product, may be considered in the proceeding. The Administrative Law Judge shall by order dismiss any objections which have no bearing on the allowable issues which may be considered in the proceeding.

Section 3(c)(2)(B)(iv) of FIFRA provides that any hearing must be held and a determination issued within 75 days after receipt of a hearing request. This 75–day period may not be extended unless all parties in the proceeding stipulate to such an extension. If a hearing is properly requested, the Agency will issue a final order at the

conclusion of the hearing governing the suspension of your product(s).

A request for a hearing pursuant to this Notice must: (1) include specific objections which pertain to the allowable issues which may be heard at the hearing, (2) identify the registrations for which a hearing is requested, and (3) set forth all necessary supporting facts pertaining to any of the objections which you have identified in your request for a hearing. If a hearing is requested by any person other than the registrant, that person must also state specifically why he asserts that he would be adversely affected by the suspension action described in this Notice. Three copies of the request must be submitted to:

Hearing Clerk, 1900
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, DC 20460

An additional copy should be sent to the signatory listed below. The request must be received by the Hearing Clerk by the 30th day from your receipt of this Notice in order to be legally effective. The 30–day time limit is established by FIFRA and cannot be extended for any reason. Failure to meet the 30–day time limit will result in automatic suspension of your registration(s) by operation of law and, under such circumstances, the suspension of the registration for your affected product(s) will be final and effective at the close of business 30 days after your receipt of this Notice and will not be subject to further administrative review.

The Agency's Rules of Practice at 40 CFR 164.7 forbid anyone who may take part in deciding this case, at any stage of the proceeding, from discussing the merits of the proceeding ex parte with any party or with any person who has been connected with the preparation or presentation of the proceeding as an advocate or in any investigative or expert capacity, or with any of their representatives. Accordingly, the following EPA offices, and the staffs thereof, are designated as judicial staff to perform the judicial function of EPA in any administrative hearings on this Notice of Intent to Suspend: the Office of the Administrative Law Judges, the Office of the Environmental Appeals Board, the Administrator, the Deputy Administrator, and the members of the staff in the immediate offices of the Administrator and Deputy Administrator. None of the persons designated as the judicial staff shall have any ex parte communication with trial staff or any other interested person not employed by EPA on the merits of any of the issues involved in this proceeding, without fully complying with the applicable regulations.

2. You may also avoid suspension if, within 30 days of your receipt of this Notice, the Agency determines that you have taken appropriate steps to comply with the section 3(c)(2)(B) Data Call–In Notice. In order to avoid suspension under this option, you must satisfactorily comply with Attachment II, Requirement List, for each product by submitting all required supporting data/information described in Attachment II and in the Explanatory Appendix (Attachment III) to the following address (preferably by certified mail):

Office of Compliance (2225A)
Agriculture Division
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, DC 20460

For you to avoid automatic suspension under this Notice, the Agency must also determine within the applicable 30–day period that you have satisfied the requirements that are the bases of this Notice and so notify you in writing. You should submit the necessary data/information as quickly as possible for there to be any chance the Agency will be able to make the necessary determination in time to avoid suspension of your product(s).

The suspension of the registration(s) of your company's product(s) pursuant to this Notice will be rescinded when the Agency determines you have complied fully with the requirements which were the bases of this Notice. Such compliance may only be achieved by submission of the data/information described in the attachments to the signatory below.

Your product will remain suspended, however, until the Agency determines you are in compliance with the requirements which are the bases of this Notice and so informs you in writing.

After the suspension becomes final and effective, the registrant subject to this Notice, including all supplemental registrants of product(s) listed in Attachment I, may not legally distribute, sell, use, offer for sale, hold for sale, ship, deliver for shipment, or receive and (having so received) deliver or offer to deliver, to any person, the product(s) listed in Attachment I.

Persons other than the registrant subject to this Notice, as defined in the preceding sentence, may continue to distribute, sell, use, offer for sale, hold for sale, ship, deliver for shipment, or receive and (having so received) deliver or offer to deliver, to any person, the product(s) listed in Attachment I.

Nothing in this Notice authorizes any person to distribute, sell, use, offer for sale, hold for sale, ship, deliver for shipment, or receive and (having so received) deliver or offer to deliver, to any person, the product(s) listed in Attachment I in any manner which would have been unlawful prior to the suspension.

If the registration(s) for your product(s) listed in Attachment I are currently suspended as a result of failure to comply with another section 3(c)(2)(B) Data Call–In Notice or Section 4 Data Requirements Notice, this Notice, when it becomes a final and effective order of suspension, will be in addition to any existing suspension, i.e., all requirements which are the bases of the suspension must be satisfied before the registration will be reinstated.

You are reminded that it is your responsibility as the basic registrant to notify all supplementary registered distributors of your basic registered product that this suspension action also applies to their supplementary registered products and that you may be held liable for violations committed by your distributors.

If you have any questions about the requirements and procedures set forth in this suspension notice or in the subject section 3(c)(2)(B) Data Call–In Notice, please contact Frances Liem at (202) 564–2365.

Sincerely yours,

Director, Agriculture Division, Office of Compliance.

Attachment I Suspension Report – Product List
Attachment II Suspension Report – Requirement List
Attachment III Suspension Report – Explanatory Appendix

IV. Registrants Receiving and Affected by the Notices of Intent to Suspend

The following is a list of products for which a Notice of Intent to Suspend been sent:

TABLE A.—PRODUCT LIST

Registrant Affected	EPA Registration Number	Active Ingredient	Product Name	Date DCI Issued
Riverdale Chemical Company	228–99	DCPA	Riversale 10% Dacthal Granules	11/25/98
	228–157	DCPA	Riverdale Crabgrass Control and Fertilizer	11/25/98
	228–222	DCPA	Riverdale 25% Dacthal Dust	11/25/98
Voluntary Purchasing Group	7401–438	Captan	Ferti-Lome Liquid Fruit Tree Spray	11/2/99

V. Basis for Issuance of Notice of Intent; Requirement List

The following companies failed to submit the following required data or information:

TABLE B.—REQUIREMENT LIST

Company	Active Ingredient	Guideline Reference Number	Requirement Name	Due Date
Riverdale Chemical Company	DCPA	---	30–Day response	7/12/01
		---	4–Month response	10/12/01
		61–1	Product identity and composition	10/12/01
		61–2(a)	Description of starting materials	10/12/01
		61–2(b)	Discussion of impurity formation	10/12/01
		62–1	Preliminary analysis	10/12/01
		62–2	Certification of limits	10/12/01
		62–3	Analytical method	10/12/01
		63–2	Color	10/12/01
		63–3	Physical state	10/12/01
		63–4	Odor	10/12/01
		63–7	Density	10/12/01
		63–12	pH	10/12/01
		63–14	Oxidation/reduction	10/12/01
		63–15	Flammability	10/12/01
		63–16	Explodability	10/12/01
		63–17	Storage Stability	10/12/01
		63–18	Viscosity	10/12/01
		63–19	Miscibility	10/12/01
		63–20	Corrosion characteristics	10/12/01
		81–1	Acute oral toxicity	10/12/01
		81–2	Acute dermal toxicity	10/12/01
		81–3	Acute inhalation toxicity	10/12/01
		81–4	Primary eye irritation	10/12/01
		81–5	Primary dermal irritation	10/12/01
		81–6	Skin sensitization	10/12/01
Voluntary Purchasing Group	Captan	830.1750	Certification of limits	04/12/03
		830.1800	Enforcement analytical method	04/12/03
		830.6317	Storage stability	04/12/03
		830.6320	Corrosion characteristics	04/12/03
		---	Revised Confidential Statements of Formula	04/12/03

VI. Attachment III Suspension Report–Explanatory Appendix

The Explanatory Appendix provides a discussion of the basis for the Notice of Intent to Suspend issued herewith.

A. Captan

On November 2, 1999, the Agency issued the Phase 5 Reregistration Eligibility Document Data Call-In Notice pursuant to sections 4(g)(2)(B) and 3(c)(2)(B) of FIFRA which required the registrants of products containing captan used as an active ingredient to develop and submit certain data. These data/information were determined to be necessary to satisfy reregistration requirements of section 4(g). Failure to comply with the requirements of a Phase 5 Reregistration Eligibility Document Data Call-In Notice is a basis for suspension under section 3(c)(2)(B) of FIFRA.

Voluntary Purchasing Group, Inc. received the Captan Reregistration Eligibility Document (RED) on November 20, 1999, as evidenced by a U.S. Postal Service domestic return receipt card. Therefore, the 90–day response was due on February 20, 2000, and the 8–month response was due on July 20, 2000. The company's 90–day response, dated April 18, 2000 was received by the Agency on April 18, 2000. The company agreed to satisfy the data requirements by developing and submitting the data to the Agency. It stated that the studies would be initiated within 2 weeks and it estimated that the studies would take approximately 5 months to complete.

By a letter dated February 8, 2001, the Agency informed Mr. Michael Jackson (Brazos Associates, Inc., Agent for Voluntary Purchasing Group) that Voluntary Purchasing Group's 8–month response was overdue. In a letter dated March 7, 2001, Brazos Associates, Inc. requested a time extension of an additional 4 months for submission of the product chemistry and acute toxicity studies. Additionally, the registrant asked for more time to submit the storage stability/corrosion data. The rationale for the time extension requests was based on problems that Brazos stated were being encountered with the test material and analytical procedures employed by Stillmeadow, Inc. (Laboratory). Brazos stated that these problems had delayed the development of studies, particularly the storage stability and corrosion characteristics studies. The Agency agreed to place these latter two studies on hold until Stillmeadow resolved problems with the analytical procedures. The registrant agreed to provide quarterly progress reports. The 4–month time extension was granted in an Agency letter dated March 21, 2001.

The Agency received the 8–month response on November 16, 2001. Product specific data purporting to address product chemistry and acute toxicity guidelines were received. In the transmittal letter dated November 14, 2001, Brazos Associates noted that Stillmeadow was still experiencing problems with the test material for storage stability, corrosion characteristics, and enforcement analytical method studies. Therefore, Brazos Associates initiated a second set of these studies with Product Safety Labs to determine if it was a laboratory/company problem or actual problem with the analytical methods being utilized.

On January 31, 2003, the Agency completed the review of the product chemistry data submitted to support the reregistration of Voluntary Purchasing Group's captan product and found remaining deficiencies in the data that prevented the requirements from being satisfied. An Agency letter to Brazos Associates dated March 12, 2003 outlined the product chemistry deficiencies. Voluntary Purchasing Group was required to submit revised Confidential Statements of Formula, and product chemistry data for Guidelines 830.1750 Certified Limits, and 830.1800 Enforcement Analytical Method. Additionally, Voluntary Purchasing Group was also required to notify the Agency within 30 days of their receipt of the letter whether the storage stability and corrosion characteristics studies have been initiated and their expected completion dates. Brazos received the letter on behalf of Voluntary Purchasing Group on March 17, 2003.

On July 8, 2003, Ms. Karen Jones contacted Brazos Associates to determine if Voluntary Purchasing Group planned to submit the outstanding product chemistry data. Mr. Jackson of Brazos Associates indicated that Voluntary Purchasing Group did not plan to submit a response or data. Ms. Jones informed Mr. Jackson that the Agency would issue a Notice of Intent to Suspend (NOIS) for Voluntary Purchasing Group's failure to respond to the Agency's letter dated March 12, 2003 and to adequately satisfy the data requirements imposed by the Captan RED DCI.

To date, the Agency has not received required product chemistry data for Certification of Limits, Enforcement Analytical Method, or a Revised Confidential Statement of Formula. Additionally, the Agency has not received the required Storage Stability and Corrosion Characteristics product chemistry data, nor required progress reports.

Because the registrant has not supplied the required data to support its captan product registration, this Notice of Intent to Suspend is being issued.

B. DCPA

On November 25, 1998, the Agency issued the Phase 5 Reregistration Eligibility Document (RED) Data Call-In Notice pursuant to sections 4(g)(2)(B) and 3(c)(2)(B) of FIFRA which required the registrants of products containing DCPA used as an active ingredient to develop and submit certain data. These data/information were determined to be necessary to satisfy reregistration requirements of section 4(g). Failure to comply with the requirements of a Phase 5 Reregistration Eligibility Document Data Call-In Notice (DCI) is a basis for suspension under section 3(c)(2)(B) of FIFRA.

An Agency letter dated June 4, 2001, was sent to all DCPA registrants. The letter modified the DCI and established new time frames for submitting the generic and product specific data required in the DCPA RED. Riverdale Chemical Company received the letter modifying the deadlines imposed by the DCPA RED on June 12, 2001, as evidenced by a U.S. Postal Service Domestic return receipt card. Therefore, Riverdale's 30–day response was due on July 12, 2001, and the 4–month response was due on October 12, 2001.

On August 15, 2001, Ms. Venus Eagle on behalf of the Agency contacted Mr. Sawyer, the Regulatory Affairs Manager at Riverdale Chemical Company, to inquire why Riverdale had not responded to the June 4, 2001 letter which Riverdale received on June 12, 2001. Riverdale was required to respond 30 days after its receipt of the letter, that is, by July 12, 2001. Mr. Sawyer stated that his colleagues had not decided whether they wanted to support the DCPA end-use products or not. Ms. Eagle stated he had in effect already had 30 additional days since the deadline of July 12, 2001 to inform the Agency of its decision. Mr. Sawyer then responded that the Agency could issue a NOIS in lieu of waiting for Riverdale's answer.

On September 7, 2001, three letters (dated September 6, 2001) were received (for EPA Registration Nos. 228–99, 228–157, and 228–222) stating that Riverdale planned to ''respond positively to the reregistration'' of the subject products and that it ''will be sending in the necessary documentation to continue'' the registrations. However, by the deadline of October 12, 2001, no product specific data had been

submitted for any of Riverdale's affected products. On March 11, 2002, Ms. Eagle spoke with Mr. Sawyer about the overdue product specific data. Mr. Sawyer responded that the samples got lost in December 2001, and they were just starting the data. Ms. Eagle told him that the Agency would have to issue a NOIS. Mr. Sawyer stated ''go ahead then.''

Since the required product chemistry and acute toxicity data have not been submitted for EPA Registration Nos. 228–99, 228–157, and 228–222, this Notice of Intent to Suspend is being issued.

V. What is the Agency's Authority for Taking this Action?

The Agency's authority for taking this action is section 6(f)(2) of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 7 U.S.C. 136 *et seq.*

List of Subjects

Environmental protection.

Dated: November 6, 2003.

Richard Colbert,

Director, Agriculture Division, Office of Compliance, Office of Enforcement and Compliance Assurance.

[FR Doc. 03–30777 Filed 12–11–03; 8:45 am]

BILLING CODE 6560–50–S

EXPORT-IMPORT BANK OF THE UNITED STATES

Sunshine Act Meeting

ACTION: Notice of a partially open meeting of the Board of Directors of the Export-Import Bank of the United States.

TIME AND PLACE: Wednesday, December 17, 2003 at 9:30 a.m. The meeting will be held at Ex-Im Bank in Room 1143, 811 Vermont Avenue, NW., Washington, DC 20571.

OPEN AGENDA ITEM: Ex-Im Bank Advisory Committee Members for 2004.

PUBLIC PARTICIPATION: The meeting will be open to public participation for Item No. 1 only. Attendees that are not employees of the Executive Branch will be required to sign in prior to the meeting.

FOR FURTHER INFORMATION CONTACT: Office of the Secretary, 811 Vermont Avenue, NW., Washington, DC 20571 (Telephone No. (202) 565–3957).

Peter B. Saba,

General Counsel.

[FR Doc. 03–30883 Filed 12–10–03; 12:19 pm]

BILLING CODE 6690–01–M

FEDERAL HOUSING FINANCE BOARD

[No. 2003–N–09]

Proposed Collection; Comment Request

AGENCY: Federal Housing Finance Board.

ACTION: Notice.

SUMMARY: In accordance with the requirements of the Paperwork Reduction Act of 1995, the Federal Housing Finance Board (Finance Board) hereby gives notice that it is seeking public comments concerning a three-year extension by the Office of Management and Budget (OMB) of the information collection entitled ''Federal Home Loan Bank Acquired Member Assets, Core Mission Activities, Investments and Advances.''

DATES: Interested persons may submit comments on or before February 10, 2004.

ADDRESSES: Send comments by electronic mail to *comments@fhfb.gov,* by facsimile to 202/408–2580, or by regular mail to the Federal Housing Finance Board, 1777 F Street, NW., Washington, DC 20006 ATTN: Public Comments.

FOR FURTHER INFORMATION CONTACT: David Roderer, Financial Analyst, Office of Supervision, by electronic mail at *rodererd@fhfb.gov,* by telephone at 202/408–2540, or by regular mail at the Federal Housing Finance Board, 1777 F Street, NW., Washington, DC 20006.

SUPPLEMENTARY INFORMATION:

A. Need For and Use of the Information Collection

The Finance Board has authorized the Federal Home Loan Banks (FHLBanks) to acquire mortgage loans and other assets from their members or housing associates under certain circumstances. 12 CFR part 955. The regulation refers to these assets as acquired member assets or AMA. As part of this regulatory authorization, each FHLBank that acquires residential mortgage loans must provide to the Finance Board certain loan-level data elements on a quarterly basis. While the FHLBanks provide this data directly to the Finance Board, each FHLBank initially must collect the information from the private-sector member or housing associate from which the FHLBank acquires the mortgage loan.

FHLBank members and housing associates already collect the vast majority of the data elements the Finance Board rule requires as part of their customary and usual business practices. They must collect this data in order to do business with the Federal National Mortgage Association (Fannie Mae) and the Federal Home Loan Mortgage Corporation (Freddie Mac) under regulatory requirements issued by the Department of Housing and Urban Development (HUD) and pursuant to the information collection requirements under the Home Mortgage Disclosure Act (HMDA). Thus, this information collection imposes only a minor incremental additional burden on FHLBank members and housing associates.

The primary duty of the Finance Board is to ensure that the FHLBanks operate in a safe and sound manner. 12 U.S.C. 1422a(a)(3)(A). To the extent consistent with the safety and soundness charge, the Finance Board also ensures that the FHLBanks carry out their housing finance mission. 12 U.S.C. 1422a(a)(3)(B). The Finance Board believes that the information collection is essential in order to monitor the safety and soundness of the FHLBanks. The Finance Board also believes that the information collection is necessary to monitor the extent to which the FHLBanks are fulfilling their statutory housing finance mission through their acquired member asset programs.

The OMB number for the information collection is 3069–0058. The OMB clearance for the information collection expires on February 29, 2004.

The likely respondents are institutions that sell acquired member assets to the FHLBanks.

B. Burden Estimate

The Finance Board estimates the total annual average number of respondents at 600, with 12 responses per respondent. The estimate for the average hours per response is 8 hours. The estimate for the total annual hour burden is 57,600 hours (600 respondents × 12 responses per respondent × 8 hours).

C. Comment Request

The Finance Board requests written comments on the following: (1) Whether the collection of information is necessary for the proper performance of Finance Board functions, including whether the information has practical utility; (2) the accuracy of the Finance

Board's estimates of the burdens of the collection of information; (3) ways to enhance the quality, utility and clarity of the information collected; and (4) 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.

Dated: December 8, 2003.

By the Federal Housing Finance Board.

Donald Demitros,

Chief Information Officer.

[FR Doc. 03–30743 Filed 12–11–03; 8:45 am]

BILLING CODE 6725–01–P

FEDERAL RESERVE SYSTEM

Formations of, Acquisitions by, and Mergers of Bank Holding Companies

The companies listed in this notice have applied to the Board for approval, pursuant to the Bank Holding Company Act of 1956 (12 U.S.C. 1841 *et seq.*) (BHC Act), Regulation Y (12 CFR Part 225), and all other applicable statutes and regulations to become a bank holding company and/or to acquire the assets or the ownership of, control of, or the power to vote shares of a bank or bank holding company and all of the banks and nonbanking companies owned by the bank holding company, including the companies listed below.

The applications listed below, as well as other related filings required by the Board, are available for immediate inspection at the Federal Reserve Bank indicated. The application also will be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing on the standards enumerated in the BHC Act (12 U.S.C. 1842(c)). If the proposal also involves the acquisition of a nonbanking company, the review also includes whether the acquisition of the nonbanking company complies with the standards in section 4 of the BHC Act (12 U.S.C. 1843). Unless otherwise noted, nonbanking activities will be conducted throughout the United States. Additional information on all bank holding companies may be obtained from the National Information Center Web site at *http://www.ffiec.gov/nic/*.

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 January 5, 2004.

A. Federal Reserve Bank of Kansas City (James Hunter, Assistant Vice President) 925 Grand Avenue, Kansas City, Missouri 64198-0001:

1. UBT Bancshares, Inc., Marysville, Kansas; to become a bank holding company by acquiring 100 percent of the voting shares of United Bank & Trust, Marysville, Kansas (currently State Bank of Axtell, Axtell, Kansas).

B. Federal Reserve Bank of San Francisco (Tracy Basinger, Director, Regional and Community Bank Group) 101 Market Street, San Francisco, California 94105-1579:

1. First Commerce Bancorp, Encino, California; to become a bank holding company by acquiring 100 percent of First Commerce Bank, Encino, California.

Board of Governors of the Federal Reserve System, December 8, 2003.

Robert deV. Frierson,

Deputy Secretary of the Board.

[FR Doc. E3–00532 Filed 12–11–03; 8:45 am]

BILLING CODE 6210–01–S

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. Additional information on all bank holding companies may be obtained from the National Information Center Web site at *http://www.ffiec.gov/nic/*.

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 26, 2003.

A. Federal Reserve Bank of Boston (Richard Walker, Community Affairs Officer) 600 Atlantic Avenue, Boston, Massachusetts 02106-2204:

1. Boston Private Financial Holdings, Inc., Boston, Massachusetts; to acquire 80 percent of the voting shares of Dalton, Greiner, Hartman, Maher & Co., LLC and thereby indirectly acquire DGHM Management LLC, both of New York, New York, and thereby engage in investment advisory services pursuant to section 225.28(b)(6)(i) of Regulation Y.

Board of Governors of the Federal Reserve System, December 8, 2003.

Robert deV. Frierson,

Deputy Secretary of the Board.

[FR Doc. E3–00531 Filed 12–11–03; 8:45 am]

BILLING CODE 6210–01–S

GENERAL ACCOUNTING OFFICE

Opportunity to ''Ride'' Printing Order for Volume I of GAO's Principles of Federal Appropriations Law

AGENCY: General Accounting Office.

ACTION: Advance notice of publication.

SUMMARY: The third edition of Volume I of GAO's *Principles of Federal Appropriations Law* is being prepared for publication by the Government Printing Office (GPO). Government departments, agencies, and other federal organizations that normally require more than one copy must request them through their agencies' account representatives in order to receive the pre-publication rate.

DATES: Rider orders must be received by GPO no later than January 7, 2004.

FOR FURTHER INFORMATION CONTACT: Lydia Koeller, (202) 512–4498.

SUPPLEMENTARY INFORMATION: The General Accounting Office (GAO) will shortly publish Volume I of *Principles of Federal Appropriations Law,* third edition—also know as ''The Red Book.'' This publication is part of a multi-volume set intended to present a basic reference work covering those areas of law in which the Comptroller General renders decisions. Our approach is to lay a foundation with text discussion, using specific legal authorities to illustrate the principles discussed, their application, and exceptions. These authorities include GAO decisions and opinions, judicial decisions, statutory provisions, and other relevant sources.

GAO will provide copies of this volume to the heads of federal agencies. Agencies may place advance (rider) orders for additional copies of this volume with their account representatives at the Government Printing Office (GPO).

This notice is not intended to solicit orders from the general public for single copies or small orders of this volume. This publication will be available for purchase from the Superintendent of Documents, United States Printing Office, Washington, DC 20402, at a later time.

Rider orders for Volume I should be placed on Standard Form #1 and should specify GAO Requisition No. 4–00051. Agency orders for Volume I must be received by GPO no later than January 7, 2004. GPO will not accept rider requisitions for Volume I after this date, and agencies will have to purchase additional copies from the Superintendent of Documents. All rider requisitions must be submitted to GPO through each agency's Washington, D.C. headquarters printing procurement office. In compiling an agency's total order, GAO suggests that the needs of legal offices, finance and accounting offices, contracting offices, law libraries, federal depositories, Inspector General and Chief Financial Officer offices, field and regional offices, and any other elements of an agency that might use this publication be considered.

As with the second edition of Principles, we are publishing the third edition in loose-leaf format. We plan four volumes with annual updates. The updates will only be published electronically. Users should retain copies of their five volumes of the second edition until each volume is revised. We will not revise Volume III of the second edition, which we issued in November 1994. Volume III addresses functions that the GAO Act of 1996 transferred to the Executive Branch.

(Authority: 31 U.S.C. 712, 717, 719, 3511, 3526–29.)

Susan Poling,

Associate General Counsel, General Accounting Office.

[FR Doc. 03–30794 Filed 12–11–03; 8:45 am]

BILLING CODE 1610–02–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Office of the Secretary

[Document Identifier: OS–0937–0200/0S–0990–0220]

Agency Information Collection Activities: Submission for OMB Review; Comment Request

AGENCY: Office of the Secretary, HHS.

In compliance with the requirement of section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995, the Office of the Secretary, 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 agencys 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 Currently Approved Collection;

Title of Information Collection: HHS Payment Management forms;

Form/OMB No.: OS–0937–0200;

Use: The PSC–270 is used to request advance or reimbursement payments to grantees. It serves in place of the SF–270. The PSC–272 is used to monitor cash advances made to grantees and the collect disbursement data. It serves in place of the SF–272.

Frequency: On occasion and quarterly;

Affected Public: State, local, or tribal governments, business or other for profit, non for profit institutions;

Annual Number of Respondents: 18,490;

Total Annual Responses: 73,560;

Average Burden Per Response: 15 minutes to 3 hours;

Total Annual Hours: 220,980.

#2 Type of Information Collection Request: Extension of a currently approved collection;

Title of Information Collection: Voluntary Industry Partner Surveys to Implement E.O. 12862;

Form/OMB No.: OS–0990–0220;

Use: DHHS will survey its partners and stakeholders to learn how they feel about departmental services. The information will be used to identify ways to improve the efficiency, quality, timeliness, and cost effective ways to provide services to the public.

Frequency: On occasion;

Affected Public: Business or other for profit, not for profit institutions, State, local, or tribal government;

Annual Number of Respondents: 4,680;

Total Annual Responses: 4680;

Average Burden Per Response: 15 hours;

Total Annual Hours: 902.

To obtain copies of the supporting statement and any related forms for the proposed paperwork collections referenced above, or E-mail your request, including your address, phone number, OS document identifier, to *Naomi Cook@hhs.gov,* or call the Reports Clearance Office on (202) 690–5522. Written comments and recommendations for the proposed information collections must be mailed within 30 days of this notice directly to the OMB desk officer: OMB Human Resources and Housing Branch, Attention: (OMB #0937–0200/OS–0990–0220), New Executive Office Building, Room 10235, Washington, DC 20503.

Dated: December 9, 2003.

John P. Burke, III,

Paperwork Reduction Act Reports Clearance Officer, Office of the Secretary, Department of Health and Human Services.

[FR Doc. 03–30771 Filed 12–11–03; 8:45 am]

BILLING CODE 4150–34–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Office of the Secretary

[Document Identifier: OS–0990–0150]

Agency Information Collection Activities: Proposed Collection; Comment Request

AGENCY: Office of the Secretary, HHS.

In compliance with the requirement of section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995, the Office of the Secretary (OS), 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: Uniform Relocation and Real Property Acquisition Under Federal and Federally Assisted Programs.

Form/OMB No.: OS–0990–0150;

Use: HHS has adopted standard government-wide regulations on acquisition of real property and

relocation of persons thereby displaced. Federal agencies and State and local government must maintain records of their displacement activities sufficient to demonstrate compliance.

Frequency: One time;

Affected Public: State, local, or tribal governments;

Annual Number of Respondents: 1;

Total Annual Responses: 1;

Average Burden Per Response: 1 hours;

Total Annual Hours: 1.

To obtain copies of the supporting statement and any related forms for the proposed paperwork collections referenced above, access the HHS Web site address at: *http://www.hhs.gov/oirm/infocollect/pending/* or e-mail your request, including your address, phone number, OMB number, and OS document identifier, to *Naomi.Cook@hhs.gov,* or call the Reports Clearance Office on (202) 690–5522. Written comments and recommendations for the proposed information collections must be mailed within 60 days of this notice directly to the OS.

Paperwork Clearance Officer designated at the following address: Department of Health and Human Services, Office of the Secretary, Assistant Secretary for Budget, Technology, and Finance, Office of Information and Resource Management, Attention: Naomi Cook (0990–0150), Room 531–H, 200 Independence Avenue, SW., Washington DC 20201.

Dated: December 9, 2003.

John P. Burke, III,

Office of the Secretary, Paperwork Reduction Act Reports Clearance Officer.

[FR Doc. 03–30772 Filed 12–11–03; 8:45 am]

BILLING CODE 4168–17–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Committee on Vital and Health Statistics: Meeting

Pursuant to the Federal Advisory Committee Act, the Department of Health and Human Services (HHS) announces the following advisory committee meeting.

Name: National Committee on Vital and Health Statistics (NCVHS), Workgroup on the National Health Information Infrastructure (NHII).

Time and Date: 9 a.m.–3 p.m., December 19, 2003.

Place: Hubert H. Humphrey Building, 200 Independence Avenue, SW., Room 705A, Washington, DC 20201.

Status: Open.

Purpose: The Workgroup will hear a status report on NHII activities from HHS and from the Department of Veterans Affairs. There will be an update on the Healthcare Information and Management Systems Society's NHII survey. The Workgroup will also discuss its plans and priorities for the future.

Contact Person for More Information: Substantive program information as well as summaries of meetings and a roster of committee members may be obtained from Mary Jo Deering, Lead Staff Person for the NCVHS Workgroup on the National Health Information Infrastructure, Office of the Assistant Secretary for Public Health and Science, DHHS, Room 738G, Humphrey Building, 200 Independence Avenue, SW., Washington, DC 20201, telephone (202) 260–2652, or Majorie S. Greenberg, Executive Secretary, NCVHS, National Center for Health Statistics, Centers for Disease Control and Prevention, 3311 Toledo Road, Room 2402, Hyattsville, Maryland 20782, telephone (301) 458–4245. Information also is available on the NCVHS home page of the HHS Web site: *http://www.ncvhs.hhs.gov/*, where an agenda for the meeting will be posted when available.

Should you require reasonable accommodation, please contact the CDC Office of Equal Employment Opportunity on (301) 458–3EEO (4336) as soon as possible.

Dated: December 4, 2003.

James Scanlon,

Acting Deputy Assistant Secretary for Science and Data Policy, Office of the Assistant Secretary for Planning and Evaluation.

[FR Doc. 03–30746 Filed 12–11–03; 8:45 am]

BILLING CODE 4151–04–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket Nos. 2002N–0276 and 2002N–0278]

Small Entity Compliance Guides on Registration of Food Facilities and Prior Notice of Imported Food; Availability

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing the availability of small entity compliance guides (SECGs) for the interim final rules on Registration of Food Facilities and Prior Notice of Imported Food issued under the Public Health Security and Bioterrorism Preparedness and Response Act of 2002 (the Bioterrorism Act). Both interim final rules published in the **Federal Register** of October 10, 2003. These SECGs are intended to help small businesses better understand the registration and prior notice regulations.

DATES: Submit written or electronic comments on the SECGs at any time.

ADDRESSES: Submit written comments concerning these SECGs to the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852. Submit electronic comments on the SECGs to *http://www.fda.gov/dockets/ecomments*.

Submit requests for single copies of one or both SECGs to the Prior Notice help desk by telephone at 1–800–216–7331 (within the United States) or 301–575–0156 (outside the United States), by FAX: 301–210–0247, or by e-mail: *furls@fda.gov*. See the **SUPPLEMENTARY INFORMATION** section for electronic access to these SECGs.

FOR FURTHER INFORMATION CONTACT: Deborah Ralston, Office of Regulatory Affairs, Office of Regional Operations, Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301–443–6230.

SUPPLEMENTARY INFORMATION:

I. Background

In the **Federal Register** of October 10, 2003 (68 FR 58894 and 68 FR 58974), FDA issued two interim final rules to implement sections 305 (Registration of Food Facilities) and 307 (Prior Notice of Imported Food) of the Bioterrorism Act. The registration interim final rule requires domestic and foreign facilities that manufacture/process, pack, or hold food for human or animal consumption in the United States to register with FDA by December 12, 2003. The prior notice interim final rule requires the submission to FDA of prior notice of food, including animal feed, that is imported or offered for import into the United States beginning on December 12, 2003.

We examined the economic implications of these interim rules as required by the Regulatory Flexibility Act (5 U.S.C. 601–612) and determined that they would have a significant economic impact on a substantial number of small entities.

In compliance with section 212 of the Small Business Regulatory Enforcement Fairness Act (Public Law 104–121), we are making available these SECGs that explain the requirements of these regulations.

FDA is issuing these SECGs as level 2 guidance consistent with FDA's good guidance practices regulation (21 CFR 10.115(c)(2)). These SECGs restate, in simplified format and language, FDA's current requirements for Registration of Food Facilities and Prior Notice of Imported Food. As guidance, these documents are not binding on either FDA or the public. FDA notes, however, that the regulations that serve as the

basis for these guidance documents establish requirements for all covered activities. For this reason, FDA strongly recommends that affected parties consult the regulations at 21 CFR part 1, subparts H and I, in addition to reading these SECGs.

II. Comments

Interested persons may submit to the Division of Dockets Management (see **ADDRESSES**) written or electronic comments regarding these SECGs. Submit a single copy of electronic comments or two paper copies of any mailed comments, except that individuals may submit one paper copy. Comments are to be identified with the applicable docket number(s) found in brackets in the heading of this document. Received comments may be seen in the Division of Dockets Management between 9 a.m. and 4 p.m., Monday through Friday.

III. Electronic Access

Persons with access to the Internet may obtain these SECGs at *http://www/cfsan.fda.gov/guidance.html*.

Dated: December 3, 2003.

Jeffrey Shuren,

Assistant Commissioner for Policy.

[FR Doc. 03–30738 Filed 12–11–03; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Cancer Institute; Notice of Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. appendix 2), notice is hereby given of a meeting of the President's Cancer Panel.

The meeting will be open to the public as indicated below, with attendance limited to space available. Individuals who plan to attend and need special assistance, such as sign language interpretation or other reasonable accommodations, should notify the Contact Person listed below in advance of the meeting.

The meeting will be closed to the public in accordance with the provisions set forth in section 552b(c)(9)(B), Title 5 U.S.C., as amended because the premature disclosure of other and the discussions would likely to significantly frustrate implementation of recommendations.

Name of Committee: President's Cancer Panel.

Date: January 5–6, 2004.

Open: January 5, 2004, 8 a.m. to 3:15 p.m.

Agenda: Living Beyond Cancer: Survivorship Issues and Challenges Among Older Adult Cancer Survivors.

Place: Lowes Philadelphia Hotel, 1200 Market Street, Philadelphia, PA 19107.

Open: January 5, 2004, 7 p.m. to 9 p.m.

Agenda: Town Hall Meeting.

Place: Lowes Philadelphia Hotel, 1200 Market Street, Philadelphia, PA 19107.

Closed: January 6, 2004, 9 a.m. to 12 p.m.

Agenda: To review and evaluate the Panel will supplement its public hearings with discussion of prepublication manuscripts on adult cancer survivorship.

Place: Lowes Philadelphia Hotel, 1200 Market Street, Philadelphia, PA 19107.

Contact Person: Maureen O. Wilson, PhD, Executive Secretary, National Cancer Institute, National Institutes of Health, 31 Center Drive, Building 31, Room 3A18, Bethesda, MD 20892, 301/496–1148.

Any interested person may file written comments with the committee by forwarding the statement to the Contact Person listed on this notice. The statement should include the name, address, telephone number and when applicable, the business or professional affiliation of the interested person.

Information is also available on the Institute's/Center's home page: *http://www.deainfo.nci.nih.gov/advisory/pcp/pcp.htm*, where an agenda and any additional information for the meeting will be posted when available.

(Catalogue of Federal Domestic Assistance Program Nos. 93.392, Cancer Construction; 93.393, Cancer Cause and Prevention Research; 93.394, Cancer Detection and Diagnosis Research; 93.395, Cancer Treatment Research; 93.396, Cancer Biology Research; 93.397, Cancer Centers Support; 93.398, Cancer Research Manpower; 93.399, Cancer Control, National Institutes of Health, HHS)

Dated: December 8, 2003.

Anna P. Snouffer,

Acting Director, Office of Federal Advisory Committee Policy.

[FR Doc. 03–30818 Filed 12–11–03; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Heart, Lung, and Blood Institute; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. appendix 2), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Heart, Lung, and Blood Initial Review Group, Clinical Trials Review Committee.

Date: February 23, 2004.

Time: 8 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Ritz-Carlton Hotel at Pentagon City, 1250 South Hayes Street, Arlington, VA 22202.

Contact Person: Valerie L Prenger, PhD, MPH, Scientific Review Administrator, Review Branch, Room 7194, Division of Extramural Affairs, National Heart, Lung, and Blood Institute, National Institutes of Health, 6701 Rockledge Drive, MSC 7924, Bethesda, MD 20892–7924, (301) 435–0288.

(Catalogue of Federal Domestic Assistance Program Nos. 93.233, National Center for Sleep Disorders Research; 93.837, Heart and Vascular Diseases Research; 93.838, Lung Diseases Research; 93.839, Blood Diseases and Resources Research, National Institutes of Health, HHS)

Dated: December 8, 2003.

LaVerne Y. Stringfield,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 03–30816 Filed 12–11–03; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute on Aging; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552(b)(c)(6), title 5 U.S.C., as amended. The contract proposals and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the contract proposals, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute on Aging Special Emphasis Panel, RD2 Success.

Date: December 16, 2003.

Time: 9 a.m. to 12 p.m.

Agenda: To review and evaluate contract proposals.

Place: National Institute on Aging, Gateway Bldg., Room 2C212, 7201 Wisconsin Avenue, Bethesda, MD 20892.

Contact Person: Mary Nekola, PHD, Chief of the Scientific Review Office, National Institute on Aging, Gateway Building, Room 2C212, 7201 Wisconsin Avenue, Bethesda, MD 20814–9692, 301–496–9666.

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review funding cycle.

(Catalogue of Federal Domestic Assistance Program Nos. 93.866, Aging Research, National Institutes of Health, HHS.)

Dated: December 8, 2003.

LaVerne Y. Stringfield,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 03–30814 Filed 12–11–03; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute on Aging; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. appendix 2), notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute on Aging Special Emphasis Panel, Nursing Homes.

Date: January 15, 2004.

Time: 11 a.m. to 2 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institute on Aging, Gateway Building, 7201 Wisconsin Avenue, 2C212, Bethesda, MD 20814, (Telephone Conference Call).

Contact Person: Alicja L. Markowska, PhD, DSC, Health Scientist Administrator, Scientific Review Office, National Institute on Aging, National Institutes of Health, Room 2C212, 7201 Wisconsin Avenue, Bethesda, MD 20814, 301–402–7703, *markowsa@nia.nih.gov.*

Name of Committee: National Institute on Aging Special Emphasis Panel, Aging and Oxidative Damage.

Date: March 3, 2004.

Time: 11 a.m. to 2 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institute on Aging, Gateway Building, 7201 Wisconsin Avenue, 2C212, Bethesda, MD 20814, (Telephone Conference Call).

Contact Person: Alicja L. Markowska, PhD, DSC, Health Scientist Administrator, Scientific Review Office, National Institute on Aging, National Institutes of Health, Room 2C212, 7201 Wisconsin Avenue, Bethesda, MD 20814, 301–402–7703, *markowsa@nia.nih.gov.*

Name of Committee: National Institute on Aging Special Emphasis Panel, Calcium in Brain Aging

Date: March 4–5, 2004.

Time: 5 p.m. to 7 p.m.

Agenda: To review and evaluate grant applications.

Place: Hyatt Regency Bethesda, One Bethesda Metro Center, 7400 Wisconsin Avenue, Bethesda, MD 20814.

Contact Person: Louise L. Hsu, PhD, The Bethesda Gateway Building, 7201 Wisconsin Avenue/Suite 2C212, Bethesda, MD 20892, 301–496–7705.

(Catalogue of Federal Domestic Assistance Program Nos. 93.866, Aging Research, National Institutes of Health, HHS)

Dated: December 8, 2003.

LaVerne Y. Stringfield,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 03–30815 Filed 12–11–03; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Library of Medicine; Notice of Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. appendix 2), notice is hereby given of meetings of the Board of Regents of the National Library of Medicine.

The meetings will be open to the public as indicated below, with attendance limited to space available. Individuals who plan to attend and need special assistance, such as sign language interpretation or other reasonable accommodations, should notify the Contact Person listed below in advance of the meeting.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Board of Regents of the National Library of Medicine, Extramural Programs Subcommittee.

Date: February 9, 2004.

Closed: 4 p.m. to 6 p.m.

Agenda: To review and evaluate grant applications.

Place: National Library of Medicine, Building 38A, HPCC B1N30, 8600 Rockville Pike, Bethesda, MD 20892.

Contact Person: Donald A.B. Lindberg, MD, Director, National Library of Medicine, National Institutes of Health, PHS, DHHS, Bldg 38, Room 2E17B, Bethesda, MD 20894.

Name of Committee: Board of Regents of the National Library of Medicine, Subcommittee on Outreach and Public Information.

Date: February 10, 2004.

Closed: 7:30 a.m. to 8:45 a.m.

Agenda: Outreach Activities for the National Library of Medicine.

Place: National Institutes of Health, Building 38, Conference Room B, 2nd Floor, 8600 Rockville Pike, Bethesda, MD 20892.

Contact Person: Donald A.B. Lindberg, MD, Director, National Library of Medicine, National Institutes of Health, PHS, DHHS, Bldg 38, Room 2E17B, Bethesda, MD 20894.

Name of Committee: Board of Regents of the National Library of Medicine.

Date: February 10–11, 2004.

Opened: February 10, 2004, 9 a.m. to 4:30 p.m.

Agenda: Administrative Reports and Program Discussion.

Place: National Library of Medicine, Building 38, Board Room, 2nd Floor, 8600 Rockville Pike, Bethesda, MD 20892.

Closed: February 10, 2004, 4:30 p.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: National Library of Medicine, Building 38, Board Room, 2nd Floor, 8600 Rockville Pike, Bethesda, MD 20892.

Opened: February 11, 2004, 9 a.m. to 12 p.m.

Agenda: Administrative Reports and Program Discussion.

Place: National Library of Medicine, Building 38, Board Room, 2nd Floor, 8600 Rockville Pike, Bethesda, MD 20892.

Contact Person: Donald A.B. Lindberg, MD, Director, National Library of Medicine, National Institutes of Health, PHS, DHHS, Bldg 38, Room 2E17B, Bethesda, MD 20894.

Any interested person may file written comments with the committee by forwarding the statement to the Contact Person listed on this notice. The statement should include the name, address, telephone number and when applicable, the business or professional affiliation of the interested person.

In the interest of security, NIH has instituted stringent procedures for entrance into the building by non-government employees. Persons without a government I.D. will need to show a photo I.D. and sign-in at the security desk upon entering the building.

Information is also available on the Institute's/Center's home page: *www.nlm.gov/od/bor/bor.html,* where an agenda and any additional information for the meeting will be posted when available.

(Catalogue of Federal Domestic Assistance Program Nos. 93.879, Medical Library Assistance, National Institutes of Health, HHS)

Dated: December 8, 2003.

LaVerne Y. Stringfield,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 03–30817 Filed 12–11–03; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Office of the Secretary

Office of the Assistant Secretary for Administration and Management, Program Support Center; Statement of Organization, Functions, and Delegations of Authority

Part A, Office of the Secretary (OS) of the Statement of Organization, Functions, and Delegations of Authority, Chapter (A), Office of the Assistant Secretary for Administration Management, for the Department of Health and Human Services, at Part P, Program Support Center, as last amended at 68 FR 8040, dated February 19, 2003, is being amended to reflect a realignment of its functions. The changes are as follows:

I. Under chapter PA, Office of the Deputy Assistant Secretary for Program Support, make the following changes:
   A. Delete the ''Office of Budget and Management (PAB),'' in its entirety.
   B. Delete the ''Office of Information Technology (PAE),'' in its entirety.

II. Under Chapter PE, Administrative Operations Service, make the following changes:
   A. Delete the ''Division of Acquisitions Management (PEB),'' and the ''Division of Supply Management (PEG) in their entirety.
   B. Add the following components:
   1. *Division of PSC Business Operations (PEH)*—The Division of PSC Business Operations (DPBO) performs overall business and financial management activities for the PSC. DPBO (1) provides strategic and business planning; (2) conducts business process engineering; (3) manages costs and price reviews to keep PSC services competitive; (4) provides customer relations services; (5) prepares the PSC budget for presentation to and approval by the Board of Directors to the HHS Service and Supply fund; (6) executes approved PSC budgets, issuing allowances as approved by the Director, PSC, and consistent with funding levels approved by the Board; (7) coordinates arrangements of inter- and intra-agency funding for projects and functions; (8) develops, coordinates, and implements policies, standards, and procedures governing the establishment and maintenance of effective organizational structures and functional alignments within the PSC; and (9) coordinates the implementation of the Government Performance and Results Act within the PSC.
   2. *Division of Freedom of Information Act Operations (PEJ)*—This Division responds to all Freedom of Information Act (FOIA) requests for records generated by, and in the custody and control of, all components of the Office of Public Health and Science (OPHS), and the Program Support Center (PSC): (1) Responds to all requests for records that involve more than one of the PHS components and the PSC; (2) responds to all administrative appeals; (3) coordinates with the Office of the General Counsel (OGC) and the assigned AUSA to resolve the administrative appeals which result in litigation; and (4) provides FOIA training and consultation.

III. Establish a new Chapter PF, titled ''Strategic Acquisitions Service,'' as follows:
   A. *Strategic Acquisitions Service (PF)*—This service is responsible for providing leadership, policy, guidance and supervision to the procurement operations of the Program Support Center. The service provides to HHS components and other Departments nationwide administrative and technical services which include: acquisition services; claims services for PHS components nationwide under specific statutory authorities; and pharmaceutical, medical, and dental supplies to Federal agencies and other related non-Federal customers.
   B. *Division of Strategic Sourcing (PFA)*—The Division of strategic Sourcing is responsible for the department-wide initiatives to: (1) Consolidate purchases of expendable commodities within one contract office, *i.e.,* Center of Procurement Excellence; (2) decrease duplicative contract offices within the Department and move common work into the Center of Procurement Excellence; and (3) investigates innovative government and industry procurement practices and brings these innovations into strategic planning, design and implementation phases as part of business delivery.
   C. *Acquisitions Management Division (PFB)*—The Acquisitions Management Division (AMD) provides acquisition services to HHS and other customers, and also (1) provides contracting services for ADP, program, and administrative requirements including information processing and telecommunications resources; (2) purchases supplies, equipment, and services from mandatory sources (Federal Supply Schedules and other Government agencies), open market, or by contract; (3) provides contract audit and financial review services; (4) provides acquisition policy development, oversight, procurement performance measurement and is responsible for the Department's Acquisition Supplement to the Federal Acquisition Regulation; (5) makes studies of procurement problems requiring creation of new policies or revision of existing policies; (6) provides analysis and evaluation services, develops procedures and recommends policy for administration of the acquisition program and works with the many Federal organizations to insure all laws and regulations are properly interpreted and implemented; and (7) carries out the authorities of the DHHS Claims Officer under the Federal Claims Collection Act, the Federal Tort Claims Act, and the Military Personnel and Civilian Employees' Claims Act.
   D. *Division of Supply Service Center (PFC)*—This Division operates the Supply Service Center at Perry Point, Maryland to support HHS health facilities and other organizations world-wide by providing pharmaceutical, medical, and dental supplies to Federal Agencies and other related customers: (1) Manages financial responsibilities associated with operating a large medical warehouse as authorized by the Federal Securities Appropriations Act of 1945 (Pub. L. 790–124); (2) oversees the Center's stock and the quality control of the manufacturing and repacking of pharmaceuticals under a license agreement with the Food and Drug Administration; and

(3) ensures that all internal controls are in place and oversees the security of all controlled substances under a license from the Drug Enforcement Administration.

IV. Under Chapter PG, Federal Occupational Health Service (FOHS), add the following new component:

Business Technology Support Division (PGF)—The Business Technology Support Division (BTSD): (1) develops, tests, installs, and operates business applications and related applications needed to support the provision of FOHS services under agreements with its customer federal agencies; and (2) develops content and updates the FOHS.

V. *Delegation of Authority:* All delegations and redelegations of authority made by officials and employees of affected organizational components will continue in them or their successors pending further redelegation, provided they are consistent with this reorganization.

Dated: December 4, 2003.

Ed Sontag,

Assistant Secretary for Administration and Management.

[FR Doc. 03–30747 Filed 12–11–03; 8:45 am]

BILLING CODE 4168–17–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Substance Abuse and Mental Health Services Administration

Agency Information Collection Activities Under Emergency Review by the Office of Management and Budget

The Substance Abuse and Mental Health Services Administration (SAMHSA) has submitted the following request (see below) for emergency OMB review under the Paperwork Reduction Act (44 U.S.C. Chapter 35). OMB approval has been requested by December 26, 2003. A copy of the information collection plans may be obtained by calling the SAMHSA Reports Clearance Officer on (301) 443–7978.

Title: SAMHSA Application for Peer Grant Reviewers.

OMB Number: 0930-New.

Frequency: On-occasion.

Affected public: Individuals or households.

Section 501(h) of the Public Health Service (PHS) Act [42 U.S.C. 290aa] directs the Administrator of the Substance Abuse and Mental Health Services Administration (SAMHSA) to establish such peer review groups as are needed to carry out the requirements of Title V of the PHS Act. SAMHSA administers a large discretionary grants program under authorization of Title V, and for many years SAMHSA has funded grants to provide prevention and treatment services related to substance abuse and mental health.

SAMHSA efforts to make improvements in the grants process have been shown by the restructuring of discretionary award announcements. In support of these efforts, SAMHSA desires to expand the types of reviewers it uses on these grant review committees. To accomplish that end, SAMHSA has determined that it is important to proactively seek the inclusion of new and qualified representatives on its peer review groups, and accordingly SAMHSA has developed an application form for use by individuals who wish to apply to serve as peer reviewers.

The application form has been developed to capture the essential information about the individual applicants. Although consideration was given to requesting a resume from interested individuals, it is essential to have specific information from all applicants about their qualifications; the most consistent method to accomplish this is completion of a standard form by all interested persons. SAMHSA will use the information about knowledge, education and experience provided on the applications to identify appropriate peer grant reviewers. Depending on their experience and qualifications, applicants may be invited to serve as either grant reviewers or review group chairpersons.

The following table shows the response burden estimated for the first year.

Number of respondents	Responses/respondent	Burden/Response, (hrs)	Total burden hours
500	1	1.5	750

Emergency approval is being requested because of the importance of including representatives of faith-based and community organizations as peer reviewers of grant applications at the earliest possible time in the FY 2004 review cycle. Upon receipt of OMB approval for this submission, SAMHSA will place this form on its Web site at *http://www.samhsa.gov* and will widely publicize its availability.

Written comments and recommendations concerning the proposed information collection should be sent within two weeks of this notice to: Lauren Wittenberg, Human Resources and Housing Branch, Office of Management and Budget, New Executive Office Building, Room 10235, Washington, DC 20503; due to potential delays in OMB's receipt and processing of mail sent through the U.S. Postal Service, respondents are encouraged to submit comments by fax to: 202–395–6974.

Dated: December 8, 2003.

Anna Marsh,

Acting Executive Officer, SAMHSA.

[FR Doc. 03–30784 Filed 12–11–03; 8:45 am]

BILLING CODE 4162–20–P

DEPARTMENT OF HOMELAND SECURITY

[DHS/ICE–CBP–001]

Privacy Act of 1974; System of Records

AGENCY: Department of Homeland Security (DHS).

ACTION: Notice of Privacy Act System of Records.

SUMMARY: This notice addresses the previously established ADIS system, a portion of which is the U.S. Visitor and Immigrant Status Indicator Technology (US–VISIT) program. This notice allows the ADIS system to collect biometric and biographic data for US–VISIT. US–VISIT has created a new business process that integrates and enhances the capabilities of existing systems, including the ADIS system.

DATES: Written comments must be submitted on or before January 12, 2004.

ADDRESSES: Please address your comments to the Privacy Office, U.S. Department of Homeland Security, Washington, DC 20528. You must identify the Docket Number DHS/ICE–CBP–001 at the beginning of your comments, and you should submit two copies of the comments. You may also submit comments via e-mail at

privacy@dhs.gov. Please reference the Docket Number shown above in the subject line of the e-mail. If you wish to receive confirmation that DHS has received your comments, please include a self-addressed, stamped postcard with your request. DHS will make comments received available online at *http://www.dhs.gov.*

FOR FURTHER INFORMATION CONTACT: If you have any questions about this notice, please call Nuala O'Connor Kelly, Chief Privacy Officer, U.S. Department of Homeland Security, Washington, DC 20528, Phone: 202–282–8000; Fax 202–772–5036.

SUPPLEMENTARY INFORMATION: In accordance with the Privacy Act of 1974, as amended, 5 U.S.C. 552a, the DHS is publishing this notice regarding an existing system of records, known as the Arrival and Departure Information System (ADIS). This system is intended to provide biometric and biographic information for US–VISIT. The purpose of the amended system is to support US–VISIT to record information pertinent to the arrival and departure of immigrants and nonimmigrants to and from the United States.

The DHS intends to compile and maintain these records in a secure electronic database serviced and maintained by Federal agency and or contractor personnel who will be bound by the restrictions of the Privacy Act. The records will ultimately be under the general supervision of components of the DHS, with technical support from the DHS's Office of the Chief Information Officer.

System records will be subject to appropriate safeguards to prevent unauthorized disclosure or tampering.

DHS/ICE CBP–001–03

SYSTEM NAME:

Arrival and Departure Information System (ADIS).

SYSTEM LOCATION:

Department of Homeland Security (DHS) field offices for the U.S. Immigration and Customs Enforcement (ICE), Bureau of Customs and Border Protection (CBP), and the U.S. Citizenship and Immigration Services (USCIS); Service Centers; Border Patrol Sectors (including all offices under their jurisdiction); Ports of Entry; Asylum offices and other offices as detailed in DHS–DS–999, last published in the **Federal Register** on October 17, 2002 (67 FR 64136) and on the web page of each bureau (*i.e.*, *http://www.bice.immigration.gov, http://www.bcbp.gov,* and *http://www.uscis.immigration.gov*); Office of National Risk Assessment (ONRA).

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

The ADIS database contains arrival/departure, biographic and biometric indicator information on immigrants and nonimmigrants entering and departing the United States. The ADIS database contains biographic arrival/departure information on legal permanent residents. Although this system primarily consists of immigrants, nonimmigrants and Lawful Permanent Residents, some of them may change status and become Lawful Permanent Residents and U.S. citizens. For the purposes of the U.S. Visitor Immigrant Status Indicator Technology (US–VISIT) program, non-U.S. citizens who present themselves for entry into and/or exit from the United States including individuals subject to the requirements and processes of US–VISIT are included in ADIS. Individuals covered under US–VISIT include those who are not U.S. citizens or Lawful Permanent Residents at the time of entry or exit or are U.S. citizens or Lawful Permanent Residents who have not identified themselves as such at the time of entry or exit.

CATEGORIES OF RECORDS IN THE SYSTEM:

The ADIS database is a centralized application designed to create, update and report immigrants' and nonimmigrants' arrivals and departures to and from the United States. The system also contains biographic, biometric indicator and address information.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

8 U.S.C. 1365a.

PURPOSE(S):

This system of records is established and maintained to enable DHS to carry out its assigned national security, law enforcement, immigration control, national security and other mission-related functions and to provide associated management reporting, planning and analysis. Specifically, the ADIS database is a system of records tracking immigrants, nonimmigrants and Lawful Permanent Residents arriving in and departing from the United States. It enables the Secretary of Homeland Security to identify, through on-line searching procedures, lawfully admitted nonimmigrants who remain in the United States beyond the period of authorized stay, and to analyze information gathered for the purpose of this and other DHS programs. In addition to arrival and departure information, each record also provides complete name, date of birth, nationality, gender, passport number and country of issuance, country of residence, U.S. visa number including date and place of issuance if applicable, alien registration number if applicable, immigration status, complete address while in the United States, and Fingerprint Identification Number System (FINS) number. The system assists the DHS in supporting immigration inspection at POEs by providing quick retrieval of biographic and biometric indicator data on individuals who may be inadmissible to the United States. Furthermore, the system interfaces with the Student and Exchange Visitor Information System (SEVIS), the Computer Linked Applications Information Management System (CLAIMS), the Passenger Processing Component of the Treasury Enforcement Communications System (TECS) and the Automated Fingerprint Identification System (IDENT). It facilitates the investigation process of individuals who may have violated their immigration status.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM INCLUDING CATEGORIES OF USERS AND PURPOSE OF SUCH USES:

Relevant information contained in this system of records may be disclosed as follows:

A. To appropriate government agencies or organizations(regardless of whether they are Federal, State, local, foreign, or tribal), lawfully engaged in collecting law enforcement intelligence information (whether civil or criminal) and/or charged with investigating, prosecuting, enforcing or implementing civil and/or criminal laws, related rules, regulations or orders, to enable these entities to carry out their law enforcement responsibilities.

B. To an attorney or representative who is acting on behalf of an individual covered by this system of records as defined in 8 CFR 1.1(j) in any proceeding before the Executive Office for Immigration Review.

C. In a proceeding before a court, grand jury, or adjudicative body when records are determined by the Department of Homeland Security to be arguably relevant to the proceeding where any of the following is a party: (1) The DHS, or any DHS component, or subdivision thereof; (2) any DHS employee in his or her official capacity; (3) any DHS employee in his or her individual capacity when the DHS has agreed to represent the employee or has authorized a private attorney to represent him or her; and (4) the United States, where the DHS or its components are likely to be affected.

D. To a member of Congress or staff acting on the Member's behalf when the Member or staff requests the information on behalf of and at the request of the individual who is the subject of the record.

E. To the General Service Administration and the National Archives and Records Administration (NARA) in records management inspections conducted under the authority of 44 U.S.C. 2904 and 2906.

F. To the news media and the public when there exists a legitimate public interest in the disclosure of the information or when disclosure is necessary to preserve confidence in the integrity of the Department or is necessary to demonstrate the accountability of the Department's officers, employees, or individuals covered by the system, except to the extent it is determined that release of the specific information in the context of a particular case would constitute an unwarranted invasion of personal privacy.

G. To contractors, grantees, experts, consultants, students, and others performing or working on a contract, service, grant, cooperative agreement, or other assignment for the Federal government, when necessary to accomplish an agency function related to this system of records.

H. To a former employee of the Department for purposes of responding to an official inquiry by a Federal, State, or local government entity or professional licensing authority in accordance with applicable Department regulations, or facilitating communications with a former employee that may be necessary for personnel-related or other official purposes where the Department requires information and/or consultation assistance from the former employee regarding a matter within that person's former area of responsibility.

I. To a Federal, State, tribal, local or foreign government agency in response to its request, in connection with the hiring or retention by such agency of an employee, the issuance of a security clearance, the reporting of an investigation of such an employee, the letting of a contract, or the issuance of a license, grant, loan or other benefit by the requesting agency, to the extent that the information is relevant and necessary to the requesting agency's decision on the matter.

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM

STORAGE:

These records are stored in a central computer database.

RETRIEVABILITY:

These records may be searched on a variety of data elements including name, place and date of entry or departure, country of citizenship, admission number, and FINS number used to track the particular fingerprints.

SAFEGUARDS:

The system is protected through a multi-layer security approach. The protective strategies are physical, technical, administrative and environmental in nature and provide access control to sensitive data, physical access control to DHS facilities, confidentiality of communications, authentication of sending parties, and personnel screening to ensure that all personnel with access to data are screened through background investigations commensurate with the level of access required to perform their duties.

RETENTION AND DISPOSAL:

Records will be retained for 100 years. This policy proposal for retention and disposal of records in the ADIS database is pending approval by the NARA.

SYSTEM MANAGER(S) AND ADDRESS:

Program Manager, ADIS Program Management Office, 1616 North Fort Myer Drive, Arlington, VA 22209.

NOTIFICATION PROCEDURE:

Address inquiries to the system manager identified above.

RECORDS ACCESS PROCEDURE:

Since the Privacy Act applies to only U.S. citizens and legal permanent residents, this notice covers only U.S. citizens and Lawful Permanent Residents whose information is contained in this system. Make all requests for access in writing and by mail to the system manager noted above. The envelope and letter shall be clearly marked Privacy Access Request. Include a description of the general subject matter, the related file number if known, and any other identifying information which may be of assistance in locating the record. To identify a record, the requester should provide his or her full name, date and place of birth, verification of identity in accordance with 8 CFR 103.21(b). The requester shall also provide a return address for transmitting the records to be released.

CONTESTING RECORDS PROCEDURES:

The following procedures cover only U.S. citizens and Lawful Permanent Residents whose information is contained in this system. U.S. citizens and Lawful Permanent Residents who wish to contest or seek amendment of their records should direct a written request to the system manager. The request should include the requestor's full name, current address and date of birth, a copy of the record in question, and a detailed explanation of the change sought. If the matter cannot be resolved by the system manager, further appeal for resolution may be made to the DHS Privacy Office.

RECORD SOURCE CATEGORIES:

Basic information is obtained from individuals, the individuals' attorney or representative, DHS and DOS officials, and other Federal, State, and local officials.

SYSTEMS EXEMPTED FROM CERTAIN PROVISIONS OF THE ACT:

The Secretary of Homeland Security 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 Secretary of Homeland Security has exempted portions of this system from subsections (c)(3), (d), (e)(1), (e)(4)(G) and (H) of the Privacy Act pursuant to 5 U.S.C. 552a(k)(2). These exemptions apply only to the extent that records in the system are subject to exemption pursuant to 5 U.S.C. 552a(j)(2) and (k)(2).

Dated: December 8, 2003.

Nuala O'Connor Kelly,

Chief Privacy Officer.

[FR Doc. 03–30761 Filed 12–9–03; 12:02 pm]

BILLING CODE 4410–10–P

DEPARTMENT OF HOMELAND SECURITY

[DHS/ICE–CBP–CIS–001]

Privacy Act of 1974; System of Records

AGENCY: Department of Homeland Security (DHS).

ACTION: Notice of privacy act system of records.

SUMMARY: This notice addresses the previously established ENFORCE/IDENT system, a portion of which is the U S. Visitor and Immigrant Status Indicator Technology (US–VISIT) program. This notice allows the ENFORCE/IDENT system to collect biometric and biographic data for US–

VISIT, in addition to the data collected for DHS national security, law enforcement and other mission-related functions. US–VISIT has created a new business process that integrates and enhances the capabilities of existing systems including the ENFORCE/IDENT system.

DATES: Written comments must be submitted on or before January 12, 2004.

ADDRESSES: Please address your comments to the Privacy Office, U.S. Department of Homeland Security, Washington, DC 20528. You must identify the Docket Number DHS/ICE–CBP–CIS–001 at the beginning of your comments, and you should submit two copies of the comments. You may also submit comments via e-mail at *privacy@dhs.gov.* Please reference the Docket Number shown above in the subject line of the e-mail. If you wish to receive confirmation that DHS has received your comments, please include a self-addressed, stamped postcard with your request. DHS will make comments received available online at *http://www.dhs.gov.*

FOR FURTHER INFORMATION CONTACT: If you have any questions about this notice, please call Nuala O'Connor Kelly, Chief Privacy Officer, U.S. Department of Homeland Security, Washington, DC 20528, Phone: 202–282–8000; Fax 202–772–5036.

SUPPLEMENTARY INFORMATION: In accordance with the Privacy Act of 1974, 5 U.S.C. 552a, the DHS is publishing this notice regarding an existing system of records known as Enforcement Operational Immigration Records (ENFORCE/IDENT). This notice allows ENFORCE/IDENT to collect biometric and biographic data in support of US–VISIT. The purpose of the amended system is to support US–VISIT to record information pertinent to the arrival and departure of immigrants and nonimmigrants to and from the United States, in addition to the data collected for DHS national security, law enforcement and other mission-related functions.

DHS/ICE–CBP–CIS–001–03

SYSTEM NAME:

Enforcement Operational Immigration Records (ENFORCE/IDENT).

SYSTEM LOCATIONS:

Department of Homeland Security (DHS) field offices for the U.S. Immigration and Customs Enforcement (ICE), Bureau of Customs and Border Protection (CBP), and the U.S. Citizenship and Immigration Services (USCIS); Service Centers; Border Patrol Sectors (including all offices under their jurisdiction); Ports of Entry; Asylum offices and other offices as detailed in DHS–DS–999, last published in the **Federal Register** on October 17, 2002 (67 FR 64136) and on the Web page of each bureau (*i.e., www.bice.immigration.gov, www.bcbp.gov,* and *www.uscis.immigration.gov);* Office of National Risk Assessment (ONRA).

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Categories of individuals covered by this notice may include:

A. Individuals or entities who relate in any manner to investigations, inspections, apprehensions, detentions, patrols, removals, examinations, naturalizations, intelligence production, legal proceedings or other operations that implement and enforce the Immigration and Nationality Act (INA) (8 U.S.C. 1101 *et seq.*) and related treaties, statutes, orders and regulations. Individuals who are respondents, representatives, or witnesses in administrative, civil penalty, or forfeiture proceedings, or defendants, representatives or witnesses in criminal prosecution or extradition proceedings.

B. Individuals who are obligors or representatives of obligors of bonds posted.

C. Individuals in distress who are located during search and rescue operations, and other immigration operations.

D. Individuals wanted by other law enforcement agencies, including Federal, State, local, tribal, foreign and international or individuals who are the subject of inquiries, lookouts, or notices by another agency or a foreign government.

E. Individuals who apply for immigration benefits.

F. Non-U.S. citizens and Non-Lawful Permanent Residents who present themselves for entry into and/or exit from the United States including individuals subject to the requirements and processes of US–VISIT. Individuals covered under US–VISIT include those who are not U.S. citizens or Lawful Permanent Residents at the time of entry or exit or who are U.S. citizens or Lawful Permanent Residents who have not identified themselves as such at the time of entry or exit.

G. Nationals of countries that threaten to wage war, or are or were at war with the United States, and individuals required to register as agents of foreign governments in the United States.

CATEGORIES OF RECORDS IN THE SYSTEM:

These records may be paper, electronic and/or other record material (*e.g.*, video or audio tapes) and includes biographical data, including but not limited to name, aliases, date of birth, phone numbers, addresses, nationality; personal descriptive data; biometric identifiers, including but not limited to fingerprints and photographs; any materials, information or data related to the subject individual's case, including but not limited to immigration history, alien registration and other identification or record numbers, criminal history, employment history, leads, witness statements, identity documents, evidence, seized property and contraband; investigative and operational reports, and intelligence summaries.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

8 U.S.C. 1103; 8 U.S.C. 1225(d)(3); 8 U.S.C. 1324(b)(3); 8 U.S.C. 1357(a); and 8 U.S.C. 1360(b).

PURPOSE(S):

This system of records is established and maintained to enable DHS to carry out its assigned national security, law enforcement, immigration control, and other mission-related functions and to provide associated management reporting, planning and analysis. Specifically, this system of records assists in identifying, investigating, apprehending, and/or removing aliens unlawfully entering or present in the United States; preventing the entry of inadmissible aliens into the United States; facilitating the legal entry of individuals into the United States; recording the departure of individuals leaving the United States; maintaining immigration control; preventing aliens from obtaining benefits to which they are not entitled; analyzing information gathered for the purpose of this and other DHS programs; or identifying, investigating, apprehending and prosecuting, or imposing sanctions, fines or civil penalties against individuals or entities who are in violation of the Immigration and Nationality Act (INA), or other governing orders, treaties or regulations and assisting other Federal agencies to protect national security and carry out other Federal missions.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

Relevant information contained in this system of records may be disclosed, within established confidentiality guidelines (*e.g.*, asylum) as follows:

A. To the appropriate agency/organization/task force, regardless of whether it is Federal, State, local, foreign, or tribal, charged with the

enforcement (*e.g.*, investigation and prosecution) of a law (criminal or civil), regulation, or treaty, of any record contained in this system of records which indicates either on its face, or in conjunction with other information, a violation or potential violation of that law, regulation, or treaty.

B. To other Federal, State, tribal, and local government law enforcement and regulatory agencies and foreign governments, and individuals and organizations during the course of an investigation or the processing of a matter, or during a proceeding within the purview of the immigration and nationality laws, to elicit information required by DHS to carry out its functions and statutory mandates.

C. To an appropriate Federal, State, local, tribal, international government agency in response to its request, in connection with the hiring or retention by such an agency of an employee, the issuance of a security clearance, the reporting of an investigation of such an employee, the letting a contract, or the issuance of a license, grant, loan, or other benefit by the requesting agency, to the extent that the information is relevant and necessary to the requesting agency's decision in the matter.

D. To an actual or potential party or to his or her attorney for the purpose of negotiation or discussion on such matters as settlement of the case or matter, or discovery proceedings.

E. To a Federal, State, tribal or local government agency to assist such agencies in collecting the repayment or recovery of loans, benefits, grants, fines, bonds, civil penalties, judgments or other debts owed to them or to the United States Government, and/or to obtain information that may assist DHS in collecting debts owed to the United States government.

F. To the news media and the public when there exists a legitimate public interest in the disclosure of the information or when disclosure is necessary to preserve confidence in the integrity of the Department or is necessary to demonstrate the accountability of the Department's officers, employees, or individuals covered by the system, except to the extent it is determined that release of the specific information in the context of a particular case would constitute an unwarranted invasion of personal privacy.

G. To a Member of Congress, or staff acting upon the Member's behalf when the Member or staff requests the information on behalf of and at the request of the individual who is the subject of the record.

H. To the General Services Administration (GSA) and National Archives and Records Administration (NARA) in records management inspections conducted under the authority of 44 U.S.C. 2904 and 2906.

I. To contractors, grantees, experts, consultants, students, and others performing or working on a contract, service, grant, cooperative agreement, or other assignment for the Federal Government, when necessary to accomplish an agency function related to this system of records.

J. To a former employee of the Department for purposes of: responding to an official inquiry by a federal, state, or local government entity or professional licensing authority, in accordance with applicable department regulations; or facilitating communications with a former employee that may be necessary for personnel-related or other official purposes where the Department requires information and/or consultation assistance from the former employee regarding a matter within that person's former area of responsibility.

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:

STORAGE:

Information can be stored in case file folders, cabinets, safes, or a variety of electronic or computer databases and storage media.

RETRIEVABILITY:

Records may be retrieved by name; identification numbers (including but not limited to alien number, fingerprint identification number, etc.); case related data and/or combination of other personal identifiers such as date of birth, nationality, etc.

SAFEGUARDS:

The system is protected through multi-layer security mechanisms. The protective strategies are physical, technical, administrative and environmental in nature and provide access control to sensitive data, physical access control to DHS facilities, confidentiality of communications, authentication of sending parties, and personnel screening to ensure that all personnel with access to data are screened through background investigations commensurate with the level of access required to perform their duties.

RETENTION AND DISPOSAL:

The following proposal for retention and disposal is pending approval with NARA:

Records that are stored in an individual's file will be purged according to the retention and disposition guidelines that relate to the individuals file (DHS/ICE/BCIS–001A). Electronic records for which the statute of limitations has expired for all criminal violations and that are older than 75 years will be purged. Fingerprint cards, created for the purpose of entering records in the database, will be destroyed after data entry. The I–877, and copies of supporting documentation, which are created for the purpose of special alien registration back-up procedures, will be destroyed after data entry. Work Measurement Reports and Statistical Reports will be maintained within the guidelines set forth in NCI–95–78–5/2 and NCI–85–78–1/2 respectively. Finally, user manuals are retained for the life of the system or until changes are made to the system, which ever comes first, and then destroyed.

SYSTEM MANAGER AND ADDRESS:

Program Manager, ENFORCE/IDENT Program Management Office, 1616 North Fort Myer Drive, Arlington, VA 22209.

NOTIFICATION PROCEDURE:

Inquiries should be addressed to the FOIA/PA officer at the office where the record is maintained or to the Chief, Information Disclosure Mission Support, Office of Investigations at 425 I Street, NW, Washington, DC 20536.

COMMENT TO DEPARTMENT'S PRIVACY OFFICE PROCEDURE:

Comments to the Department's Privacy Office should include the notice number as the subject line of email or letter and be addressed to *privacy@dhs.gov* or Privacy Office, DHS, Washington, DC 20528.

RECORD ACCESS PROCEDURE:

The major part of this system is exempted from this requirement pursuant to 5 U.S.C. 552a (j)(2) and (k)(2). To the extent that this system of records is not subject to exemption, it is subject to access. A determination as to the granting or denial of access shall be made at the time a request is received. Requests for access to records in this system must be in writing, and should be addressed to the System Manager noted above or to the appropriate FOIA/PA Officer. Such request may be submitted either by mail or in person. The envelope and letter shall be clearly marked ''Privacy Access Request.'' To identify a record, the record subject should provide his or her full name, date and place of birth; if appropriate, the date and place of entry into or

departure from the United States; verification of identity (in accordance with 8 CFR 103.21(b) and/or pursuant to 28 U.S.C. 1746, make a dated statement under penalty of perjury as a substitute for notarization), and any other identifying information that may be of assistance in locating the record. He or she shall also provide a return address for transmitting the records to be released.

CONTESTING RECORD PROCEDURES:

The major part of this system is exempted from this requirement pursuant to 5 U.S.C. 552a (j)(2) and (k)(2). To the extent that this system of records is not subject to exemption, it is subject to access and contest. A determination as to the granting or denial of a request shall be made at the time a request is received. An individual desiring to request amendment of records maintained in this system should direct his or her request to the System Manager of the appropriate office that maintains the record or (if unknown) to the appropriate FOIA/PA Officer at each bureau. The request should state clearly what information is being contested, the reasons for contesting it, and the proposed amendment to the information.

RECORD SOURCE CATEGORIES:

Basic information contained in this system is supplied by individuals covered by this system, and other Federal, state, local, tribal, or foreign governments; private citizens, public and private organizations.

SYSTEMS EXEMPTED FROM CERTAIN PROVISIONS OF THE ACT:

The Secretary of Homeland Security 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 Secretary of Homeland Security has exempted portions of this system from subsections (c)(3), (d), (e)(1), (e)(4)(G) and (H) of the Privacy Act pursuant to 5 U.S.C. 552a (k)(2). These exemptions apply only to the extent that records in the system are subject to exemption pursuant to 5 U.S.C. 552a (j)(2) and (k)(2).

Dated: December 8, 2003.

Nuala O'Connor Kelly,

Chief Privacy Officer.

[FR Doc. 03–30762 Filed 12–9–03; 12:02 pm]

BILLING CODE 4410–10–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

Agency Information Collection Activities: Submission for OMB Review; Comment Request

AGENCY: Federal Emergency Management Agency, Emergency Preparedness and Response Directorate, U.S. Department of Homeland Security.

ACTION: Notice and request for comments.

SUMMARY: The Federal Emergency Management Agency has submitted the following proposed information collection to the Office of Management and Budget for review and clearance in accordance with the requirements of the Paperwork Reduction Act of 1995 (44 U.S.C. 3507).

Title: Hazard Mitigation Grant Program Application and Reporting.

Type of Information Collection: Extension of a currently approved collection.

OMB Number: 1660–0076.

Abstract: Grantees administer the Hazard Mitigation Grant Program, which is a post-disaster program that contributes funds toward the cost of hazard mitigation activities in order to reduce the risk of future damage, hardship, loss or suffering in any area affected by a major disaster. FEMA uses applications to provide financial assistance in the form of grant awards and, through grantee quarterly reporting, monitors grantee project activities and expenditure of funds.

Affected Public: State, local, tribal governments, and not-for-profit institutions.

Number of Respondents: 1,815.

Estimated Total Annual Burden Hours: 52,199.

Estimated Cost: $1,246,503.00. The total annual estimated costs to States and Indian tribal governments for information collections associated with the HMGP are $1,246,503. This calculation is based on the number of burden hours for the information collections and the estimated wage rates for those individuals responsible for collecting the information or completing the forms. States may use existing systems for submitting grant applications and reporting.

Frequency of Response: One-time.

Comments: Interested persons are invited to submit written comments on the proposed information collection to the OMB Desk Officer for the Federal Emergency Management Agency at e-mail address *Edward_H._Clarke@omb.eop.gov.* or facsimile number (202) 395–7285 within 30 days of the date of this notice.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the information collection should be made to Muriel B. Anderson, Chief, Records Management Branch, Information Resources Management Division, Information Technology Services Directorate, Federal Emergency Management Agency, Emergency Preparedness and Response Directorate, Department of Homeland Security, 500 C Street, SW., Room 316, Washington, DC 20472, or facsimile number (202) 646–3347, or e-mail address *InformationCollections@fema.gov.*

Edward W. Kernan,

Division Director, Information Resources Management Division, Information Technology Services Directorate.

[FR Doc. 03–30770 Filed 12–11–03; 8:45 am]

BILLING CODE 9110–13–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–4809–N–50]

Federal Property Suitable as Facilities to Assist the Homeless

AGENCY: Office of the Assistant Secretary for Community Planning and Development, HUD.

ACTION: Notice.

SUMMARY: This notice identifies unutilized, underutilized, excess, and surplus Federal property reviewed by HUD for suitability for possible use to assist the homeless.

FOR FURTHER INFORMATION CONTACT: Mark Johnston, room 7266, Department of Housing and Urban Development, 451 Seventh Street SW., Washington, DC 20410; telephone (202) 708–1234; TTY number for the hearing- and speech-impaired (202) 708–2565 (these telephone numbers are not toll-free), or call the toll-free Title V information line at 1 (800)–927–7588.

SUPPLEMENTARY INFORMATION: In accordance with 24 CFR part 581 and section 501 of the Stewart B. McKinney Homeless Assistance Act (42 U.S.C. 11411), as amended, HUD is publishing this notice to identify Federal buildings and other real property that HUD has reviewed for suitability for use to assist the homeless. The properties were reviewed using information provided to HUD by Federal landholding agencies regarding unutilized and underutilized buildings and real property controlled

by such agencies or by GSA regarding its inventory of excess or surplus Federal property. This notice is also published in order to comply with the December 12, 1988 Court Order in *National Coalition for the Homeless* v. *Veterans Administration*, No. 88–2503–OG (D.D.C.).

Properties reviewed are listed in this Notice according to the following categories: Suitable/available, suitable/unavailable, suitable/to be excess, and unsuitable. The properties listed in the three suitable categories have been reviewed by the landholding agencies, and each agency has transmitted to HUD: (1) Its intention to make the property available for use to assist the homeless, (2) its intention to declare the property excess to the agency's needs, or (3) a statement of the reasons that the property cannot be declared excess or made available for use as facilities to assist the homeless.

Properties listed as suitable/available will be available exclusively for homeless use for a period of 60 days from the date of this Notice. Where property is described as for ''off-site use only'' recipients of the property will be required to relocate the building to their own site at their own expense. Homeless assistance providers interested in any such property should send a written expression of interest to HHS, addressed to Shirley Kramer, Division of Property Management, Program Support Center, HHS, room 5B–41, 5600 Fishers Lane, Rockville, MD 20857; (301) 443–2265. (This is not a toll-free number.) HHS will mail to the interested provider an application packet, which will include instructions for completing the application. In order to maximize the opportunity to utilize a suitable property, providers should submit their written expressions of interest as soon as possible. For complete details concerning the processing of applications, the reader is encouraged to refer to the interim rule governing this program, 24 CFR part 581.

For properties listed as suitable/to be excess, that property may, if subsequently accepted as excess by GSA, be made available for use by the homeless in accordance with applicable law, subject to screening for other Federal use. At the appropriate time, HUD will publish the property in a Notice showing it as either suitable/available or suitable/unavailable.

For properties listed as suitable/unavailable, the landholding agency has decided that the property cannot be declared excess or made available for use to assist the homeless, and the property will not be available.

Properties listed as unsuitable will not be made available for any other purpose for 20 days from the date of this notice. Homeless assistance providers interested in a review by HUD of the determination of unsuitability should call the toll free information line at 1–800–927–7588 for detailed instructions or write a letter to Mark Johnston at the address listed at the beginning of this notice. Included in the request for review should be the property address (including zip code), the date of publication in the **Federal Register**, the landholding agency, and the property number.

For more information regarding particular properties identified in this notice (*i.e.*, acreage, floor plan, existing sanitary facilities, exact street address), providers should contact the appropriate landholding agencies at the following addresses: GSA: Mr. Brian K. Polly, Assistant Commissioner, General Services Administration, Office of Property Disposal, 18th and F Streets, NW., Washington, DC 20405; (202) 501–0052; (These are not toll-free numbers).

Dated: December 4, 2003.

John D. Garrity,

Director, Office of Special Needs Assistance Programs.

TITLE V, FEDERAL SURPLUS PROPERTY PROGRAM FEDERAL REGISTER REPORT FOR 12/12/2003

Unsuitable Properties

Land (by State)

Kentucky

Site 12A.
Licking River Access Site.
Wilder Co: Campbell KY 41071.
Landholding Agency: GSA.
Property Number: 54200330010.
Status: Excess.
Reason: Floodway.
GSA Number: 4–D–KY–0613.

[FR Doc. 03–30505 Filed 12–11–03; 8:45 am]

BILLING CODE 4210–29–M

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

Receipt of Applications for Permits and Re-opening of Comment Period

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of receipt of applications for permits and re-opening comment period for a marine mammal permit application.

SUMMARY: The public is invited to comment on the following applications to conduct certain activities with endangered species and marine mammals.

DATES: Written data, comments or requests must be received by January 12, 2004.

ADDRESSES: 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 within 30 days of the date of publication of this notice to: U.S. Fish and Wildlife Service, Division of Management Authority, 4401 North Fairfax Drive, Room 700, Arlington, Virginia 22203; fax 703/358–2281.

FOR FURTHER INFORMATION CONTACT: Division of Management Authority, telephone 703/358–2104.

SUPPLEMENTARY INFORMATION:

Endangered Species

The public is invited to comment on the following applications 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.*). Written data, comments, or requests for copies of these complete applications should be submitted to the Director (See **ADDRESSES** above).

Applicant: Todd King, Cheyenne, WY, PRT–080017.

The applicant requests a permit to import the 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 enhancement of the survival of the species.

Applicant: Alfredo Julian, Vancouver, WA, PRT–080046.

The applicant requests a permit to import the 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 enhancement of the survival of the species.

George Carden Circus International, Inc, Springfield, MO, PRT–079868, 079870, 079871, and 079872.

The applicant requests permits to re-export and re-import four Asian elephants (*Elephas maximus*) to worldwide locations for the purpose of enhancement of the species through conservation education. The permit numbers and animals are: 079868—Vickie, 079870—Jenny, 079871—Judy, 079872—Cyd. This notification covers

activities to be conducted by the applicant over a three-year period and the import of any potential progeny born while overseas.

Endangered Marine Mammals and Marine Mammals

The public is invited to comment on the following application for a permit to conduct certain activities with endangered marine mammals. The application was submitted to satisfy requirements of the Endangered Species Act of 1973, *as amended* (16 U.S.C. 1531, *et seq.*) and the Marine Mammal Protection Act of 1972, *as amended* (16 U.S.C. 1361 *et seq.*), and the regulations governing endangered species (50 CFR part 17) and marine mammals (50 CFR part 18). Written data, comments, or requests for copies of the complete application or requests for a public hearing on this application should be submitted to the Director (See **ADDRESSES** above). Anyone requesting a hearing should give specific reasons why a hearing would be appropriate. The holding of such a hearing is at the discretion of the Director.

Applicant: Florida Atlantic University, Boca Raton, FL, PRT–063561.

The Service is re-opening the comment period for this application submitted by Edmund R. Gerstein requesting a permit to conduct a study to archive and evaluate Florida manatee (*Trichehus manatus latirostris*) responses to controlled approaches with boats equipped with propeller guards for the purpose of scientific research. Some of the approaches will incorporate a device to project an alerting signal designed to be within the manatees's hearing sensitivity. A notice of receipt of this application for a permit was published in the **Federal Register** on December 24, 2002 (67 FR 78504), and the comment period closed on January 23, 2003. On October 20, 2003, the applicant submitted additional information in support of his application. The re-opening of the comment period will allow all interested parties to review the new information and provide the Service with any additional comments regarding these applications. This notification covers activities to be conducted by the applicant over a three-year period.

Concurrent with the publication of this notice in the **Federal Register**, the Division of Management Authority is forwarding copies of the above applications to the Marine Mammal Commission and the Committee of Scientific Advisors for their review.

Dated: November 21, 2003.

Monica Farris,

Senior Permit Biologist, Branch of Permits, Division of Management Authority.

[FR Doc. 03–30785 Filed 12–11–03; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[AZ040–03–7122–EX–5513; AZA–29640 & AZA–31133]

Notice of Availability of Final Environmental Impact Statement (FEIS) for the Dos Pobres/San Juan Project, Graham County, AZ

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of Availability (NOA) of Final Environmental Impact Statement (FEIS).

SUMMARY: The Bureau of Land Management (BLM), Safford Field Office, Arizona, has prepared an FEIS analyzing the impacts on the human environment of a mining plan of operation proposed by the Phelps Dodge Mining Company, a division of the Phelps Dodge Corporation. The Dos Pobres/San Juan Project is located approximately 8 miles north of Safford, Arizona. The FEIS (1) assesses the environmental impacts of the project as described in the three mining plan alternatives (Proposed Action, Partial Backfill, and No Action) and two land exchange alternatives (Land Exchange and No Land Exchange); (2) determines if there are direct, indirect and cumulative impacts; and (3) identifies mitigative measures. The FEIS was prepared to comply with the Council on Environmental Quality's regulations (40 CFR part 1500–1508) for implementing the National Environmental Policy Act of 1969, 43 U.S.C. 1701, the Federal Land Exchange Facilitation Act of 1988, 43 U.S.C. 1716 and 1740, and BLM regulations governing land exchanges (43 CFR parts 2090 and 2200) and mining plans of operation (43 CFR parts 3715 and 3809).

DATES: The Record of Decision for this project will not be issued prior to 60-days following the Environmental Protection Agency (EPA) publication of its NOA of the Final Environmental Impact Statement for the Dos Pobres/San Juan Project, Graham County, AZ.

ADDRESSES: A limited number of copies of the FEIS are available and copies may also be reviewed at the Bureau of Land Management, Safford Field Office, 711 14th Avenue, Safford, Arizona 85546 or the Bureau of Land Management, Arizona State Office, 222 North Central Avenue, Phoenix, Arizona 85004.

FOR FURTHER INFORMATION CONTACT: Scott Evans, Project Manager, at BLM Safford Field Office, telephone number (928) 348–4414; or Tina Lee, Project Manager, at SWCA, Inc., telephone number (520) 325–9194.

SUPPLEMENTARY INFORMATION: The proposed Dos Pobres/San Juan Project is an integrated copper mining project using conventional open pit mining and solution extraction/electro winning technologies to meet a continuing demand for copper. The BLM's preferred alternative is the Land Exchange alternative (Alternative 2.2.2) in which Phelps Dodge acquires title to the selected lands and BLM acquires title to the offered private lands.

Chapter 7 of the FEIS summarizes public comments on the draft environmental impact statement (DEIS) and BLM responses to the comments.

The U.S. Army Corps of Engineers (COE), a cooperating agency on the Dos Pobres/San Juan Project EIS, has jurisdiction over the Project through its Clean Water Act permitting authority and will select as its preferred alternative the least environmentally damaging, practicable alternative from the Mining Plan Alternatives Set.

The EPA, also a cooperating agency, delegated authority for section 402 compliance to the Arizona Department of Environmental Quality (ADEQ) in December 2002; therefore ADEQ will be issuing the AZPDES permit for this project.

Dated: August 5, 2003.

Frank Rowley,

Acting Field Office Manager.

[FR Doc. 03–30765 Filed 12–11–03; 8:45 am]

BILLING CODE 4310–32–P

DEPARTMENT OF THE INTERIOR

Minerals Management Service

Agency Information Collection Activities: Proposed Collection; Comment Request

AGENCY: Minerals Management Service (MMS), Interior.

ACTION: Notice of extension of two currently approved information collections (1010–0018 and 1010–0039).

SUMMARY: To comply with the Paperwork Reduction Act of 1995 (PRA), MMS is inviting comments on two collections of information that we will submit to the Office of Management and Budget (OMB) for review and approval. The information collection requests are titled ''Form MMS–126,

Well Potential Test Report (WPT)'' and ''Form MMS–127, Sensitive Reservoir Information Report (SRI).''

DATES: Submit written comments by February 10, 2004.

ADDRESSES: Mail or hand carry comments to the Department of the Interior; Minerals Management Service; Attention: Rules Processing Team; Mail Stop 4024; 381 Elden Street; Herndon, Virginia 20170–4817. If you wish to email comments, the address is: *rules.comments@mms.gov.* Reference ''Information Collection Form MMS–126'' or ''Form MMS–127'' as appropriate in your email subject line and mark your message for return receipt. Include your name and return address in your message.

FOR FURTHER INFORMATION CONTACT: Arlene Bajusz, Rules Processing Team at (703) 787–1600. You may also contact Arlene Bajusz to obtain a copy, at no cost, of forms MMS–126 and MMS–127.

SUPPLEMENTARY INFORMATION:

Titles and OMB Control Numbers: Form MMS–126, Well Potential Test Report (WPT), 1010–0039; Form MMS–127, Sensitive Reservoir Information Report (SRI), 1010–0018.

Abstract: The Outer Continental Shelf (OCS) Lands Act, as amended (43 U.S.C. 1331 *et seq.* and 43 U.S.C. 1801 *et seq.*), authorizes the Secretary of the Interior (Secretary) to prescribe rules and regulations to administer leasing of the OCS. Such rules and regulations will apply to all operations conducted under a lease. Operations on the OCS must preserve, protect, and develop oil and natural gas resources in a manner that is consistent with the need to make such resources available to meet the Nation's energy needs as rapidly as possible; to balance orderly energy resource development with protection of human, marine, and coastal environments; to ensure the public a fair and equitable return on the resources of the OCS; and to preserve and maintain free enterprise competition.

Section 5(a) of the OCS Lands Act requires the Secretary to prescribe rules and regulations ''to provide for the prevention of waste, and conservation of the natural resources of the Outer Continental Shelf, and the protection of correlative rights therein'' and to include provisions ''for the prompt and efficient exploration and development of a lease area.''

This information collection request (ICR) concerns forms used to collect information required under 30 CFR part 250. Various sections of 30 CFR part 250, subpart K, require respondents to submit forms MMS–126 and MMS–127. MMS District and Regional Supervisors use the information on form MMS–126 for various environmental, reservoir, reserves, and conservation analyses, including the determination of maximum production rates (MPRs) when necessary for certain oil and gas completions. The form contains information concerning the conditions and results of a well potential test. This requirement implements the conservation provisions of the OCS Lands Act and 30 CFR part 250. The information obtained from the well potential test is essential to determine if an MPR is necessary for a well and to establish the appropriate rate. It is not possible to specify an MPR in the absence of information about the production rate capability (potential) of the well.

MMS District and Regional Supervisors use the information submitted on form MMS–127 to determine whether a rate-sensitive reservoir is being prudently developed. This represents an essential control mechanism that MMS uses to regulate production rates from each sensitive reservoir being actively produced. Occasionally, the information available on a reservoir early in its producing life may indicate it to be non-sensitive, while later and more complete information would establish the reservoir as being sensitive. Production from a well completed in the gas cap of a sensitive reservoir requires approval from the Regional Supervisor. The information submitted on form MMS–127 provides reservoir parameters that are revised at least annually or sooner if reservoir development results in a change in reservoir interpretation. The engineers and geologists use the information for rate control and reservoir studies.

MMS will protect information from respondents considered proprietary under the Freedom of Information Act (5 U.S.C. 552) and its implementing regulations (43 CFR part 2) and under regulations at 30 CFR 250.196, ''Data and information to be made available to the public.'' No items of a sensitive nature are collected. Responses are mandatory.

Frequency: On occasion but not less than annually.

Estimated Number and Description of Respondents: Approximately 130 Federal OCS oil and gas or sulphur lessees.

Estimated Reporting and Recordkeeping ''Hour'' Burden: The currently approved ''hour'' burden for both forms is 1 hour each.

Estimated Reporting and Recordkeeping ''Non-Hour Cost'' Burden: MMS has identified no ''non-hour cost'' burden associated with either form MMS–126 or MMS–127.

Public Disclosure Statement: The PRA (44 U.S.C. 3501, *et seq.*) provides that an agency may not conduct or sponsor a collection of information unless it displays a currently valid OMB control number. Until OMB approves a collection of information, you are not obligated to respond.

Comments: Before submitting an ICR to OMB, PRA section 3506(c)(2)(A) requires each agency ''* * * to provide notice * * * and otherwise consult with members of the public and affected agencies concerning each proposed collection of information * * *''. Agencies must specifically solicit comments to: (a) Evaluate whether the proposed collection of information is necessary for the agency to perform its duties, including whether the information is useful; (b) evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information; (c) enhance the quality, usefulness, and clarity of the information to be collected; and (d) minimize the burden on the respondents, including the use of automated collection techniques or other forms of information technology.

Agencies must also estimate the ''non-hour cost'' burdens to respondents or recordkeepers resulting from the collection of information. Therefore, if you have costs to generate, maintain, and disclose this information, you should comment and provide your total capital and startup cost components or annual operation, maintenance, and purchase of service components. You should describe the methods you use to estimate major cost factors, including system and technology acquisition, expected useful life of capital equipment, discount rate(s), and the period over which you incur costs. Capital and startup costs include, among other items, computers and software you purchase to prepare for collecting information, monitoring, and record storage facilities. You should not include estimates for equipment or services purchased: (i) Before October 1, 1995; (ii) to comply with requirements not associated with the information collection; (iii) for reasons other than to provide information or keep records for the Government; or (iv) as part of customary and usual business or private practices.

MMS will summarize written responses to this notice and address them in the submission for OMB approval. As a result of your comments, MMS will make any necessary adjustments to the burden in the submission to OMB.

Public Comment Policy: MMS's practice is to make comments, including names and home addresses of respondents, available for public review during regular business hours. If you wish your name and/or address to be withheld, you must state this prominently at the beginning of your comment. MMS will honor this request to the extent allowable by law; however, anonymous comments will not be considered. All submissions from organizations or businesses, and from individuals identifying themselves as representatives or officials of organizations or businesses, will be made available for public inspection in their entirety.

MMS Federal Register Liaison Officer: Denise Johnson (202) 208–3976.

Dated: December 5, 2003.

E.P. Danenberger,

Chief, Engineering and Operations Division.

[FR Doc. 03–30793 Filed 12–11–03; 8:45 am]

BILLING CODE 4310–MR–P

DEPARTMENT OF THE INTERIOR

Bureau of Reclamation

Central Valley Project Improvement Act, Water Management Plans

AGENCY: Bureau of Reclamation, Interior.

ACTION: Notice of availability.

SUMMARY: The following Water Management Plans are available for review:

- Carpinteria Water District
- Kern Tulare Water District
- Montecito Water District
- Rag Gulch Water District

To meet the requirements of the Central Valley Project Improvement Act of 1992 (CVPIA) and the Reclamation Reform Act of 1982, the Bureau of Reclamation (Reclamation) developed and published the Criteria for Evaluating Water Management Plans (Criteria). Note: For the purpose of this announcement, Water Management Plans (Plans) are considered the same as Water Conservation Plans. The above entities have developed a Plan, which Reclamation has evaluated and preliminarily determined to meet the requirements of these Criteria. Reclamation is publishing this notice in order to allow the public to comment on the preliminary determinations. Public comment on Reclamation's preliminary (*i.e.*, draft) determination is invited at this time.

DATES: All public comments must be received by January 12, 2004.

ADDRESSES: Please mail comments to Bryce White, Bureau of Reclamation, 2800 Cottage Way, Sacramento, California 95825, or contact at (916) 978–5208 (TDD: 978–5608), or e-mail at *bwhite@mp.usbr.gov.*

FOR FURTHER INFORMATION CONTACT: To be placed on a mailing list for any subsequent information, please contact Bryce White at the e-mail address or telephone number above.

SUPPLEMENTARY INFORMATION: We are inviting the public to comment on our preliminary (*i.e.*, draft) determination of Plan adequacy. Section 3405(e) of the CVPIA (title 34 Pub. L. 102–575), requires the ''Secretary of the Interior to establish and administer an office on Central Valley Project water conservation best management practices that shall * * * develop criteria for evaluating the adequacy of all water conservation plans developed by project contractors, including those plans required by section 210 of the Reclamation Reform Act of 1982.'' Also, according to section 3405(e)(1), these criteria must be developed ''* * * with the purpose of promoting the highest level of water use efficiency reasonably achievable by project contractors using best available cost-effective technology and best management practices.'' These criteria state that all parties (Contractors) that contract with Reclamation for water supplies (municipal and industrial contracts over 2,000 acre-feet and agricultural contracts over 2,000 irrigable acres) must prepare Plans that contain the following information:

1. Description of the District
2. Inventory of Water Resources
3. Best Management Practices (BMPs) for Agricultural Contractors
4. BMPs for Urban Contractors
5. Plan Implementation
6. Exemption Process
7. Regional Criteria
8. Five-Year Revisions

Reclamation will evaluate Plans based on these criteria. A copy of these Plans will be available for review at Reclamation's Mid-Pacific (MP) Regional Office located in Sacramento, California, and the local area office. Our practice is to make comments, including names and home addresses of respondents, available for public review. Individual respondents may request that Reclamation withhold their home address from public disclosure, and we will honor such request to the extent allowable by law. There also may be circumstances in which Reclamation would elect to withhold a respondent's identity from public disclosure, as allowable by law. If you wish us to withhold your name and/or address, you must state this prominently at the beginning of your comments. We will make all submissions from organizations, businesses, and from individuals identifying themselves as representatives or officials of organizations or businesses available for public disclosure in their entirety. If you wish to review a copy of these Plans, please contact Mr. White to find the office nearest you.

Dated: November 14, 2003.

Donna E. Tegelman,

Regional Resources Manager, Mid-Pacific Region, Bureau of Reclamation.

[FR Doc. 03–30751 Filed 12–11–03; 8:45 am]

BILLING CODE 4310–MN–P

INTERNATIONAL TRADE COMMISSION

[Investigation No. TA–421–4]

Certain Ductile Iron Waterworks Fittings From China

Determination

On the basis of information developed in the subject investigation, the United States International Trade Commission determines, pursuant to section 421(b)(1) of the Trade Act of 1974,[1] that certain ductile iron waterworks fittings [2] from the People's Republic of China are being imported into the United States in such increased quantities or under such conditions as to cause market disruption to the domestic producers of like or directly competitive products.[3]

Background

Following receipt of a petition, on September 5, 2003, on behalf of McWane, Inc.,[4] Birmingham, AL, the Commission instituted investigation No. TA–421–4, *Certain Ductile Iron Waterworks Fittings from China,* under section 421(b) of the Act to determine

[1] 19 U.S.C. 2451(b)(1).

[2] The products subject to this investigation are cast pipe or tube fittings of ductile iron (containing 2.5 percent carbon and over 0.02 percent magnesium or magnesium and cerium, by weight) with mechanical, push-on (rubber compression) or flanged joints attached. Included within this definition are fittings of all nominal diameters and of both full-bodied and compact designs. The imported products are provided for in statistical reporting number 7307.19.3070 of the Harmonized Tariff Schedule of the United States (HTS).

[3] Commissioners Koplan and Lane determine that certain ductile iron waterworks fittings from China are being imported into the United States in such increased quantities as to cause market disruption to the domestic producers of like products.

[4] McWane operates three subsidiaries that produce the subject products including: Clow Water Systems Co., Coshocton, OH; Tyler Pipe Co., Tyler, TX; and Union Foundry Co., Anniston, AL.

whether certain ductile iron waterworks fittings from China are being imported into the United States in such increased quantities or under such conditions as to cause market disruption to the domestic producers of like or directly competitive products. The petition also alleged under section 421(i)(1)(A) of the Act, that critical circumstances exist with respect to imports of the subject product from China, and on October 20, 2003, the Commission made a negative determination [5] [6] with respect to whether delay in taking action under this section would cause damage to the relevant domestic industry which would be difficult to repair (68 FR 61013, October 24, 2003).

Notice of the institution of the Commission's investigation and of the scheduling of a public hearing to be held in connection therewith was given by posting a copy of the notice on the Commission's Web site (*http://www.usitc.gov*) and by publishing the notice in the **Federal Register** of September 15, 2003 (68 FR 54010). The hearing was held on November 6, 2003, in Washington, DC; all persons who requested the opportunity were permitted to appear in person or by counsel.

By order of the Commission.

Issued: December 8, 2003.

Marilyn R. Abbott,

Secretary.

[FR Doc. 03–30731 Filed 12–11–03; 8:45 am]

BILLING CODE 7020–02–P

DEPARTMENT OF JUSTICE

Antitrust Division

Notice Pursuant to the National Cooperative Research and Production Act of 1993__Industrial Macromolecular Crystallography Association (''IMCA'')

Notice is hereby given that, on November 17, 2003, pursuant to Section 6(a) of the National Cooperative Research and Production Act of 1993__Industrial Macromolecular Crystallography Association (IMCA) has filed written notifications simultaneously with the Attorney General and the Federal Trade Commission disclosing changes in its membership status. The notifications were filed for the purpose of extending the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances. Specifically, Novartis Institute for Biomedical Research, Inc., Cambridge, MA has been added as a party to this venture. Also, The Procter and Gamble Distributing Company, Cincinnati, OH; Pharmacia Corporation, Peapack, NJ; Pharmacia and Upjohn Company, Peapack, NJ; and Glaxo Wellcome Inc., Research Triangle Park, NC have been dropped as parties to this venture.

No other changes have been made in either the membership or planned activity of the group research project. Membership in this group research project remains open, and IMCA intends to file additional written notification disclosing all changes in membership.

On October 23, 1990, IMCA filed its original notification pursuant to Section 6(a) of the Act. The Department of Justice published a notice in the **Federal Register** pursuant to section 6(b) of the Act on December 3, 1990 (55 FR 49953).

The last notification was filed with the Department on July 18, 2000. A notice was published in the **Federal Register** pursuant to section 6(b) of the Act on May 23, 2001 (66 FR 28546).

Dorothy B. Fountain,

Deputy Director of Operations Antitrust Division.

[FR Doc. 03–30735 Filed 12–11–03; 8:45 am]

BILLING CODE 4410–11–M

DEPARTMENT OF JUSTICE

Antitrust Division

Notice Pursuant to the National Cooperative Research and Production Act of 1993—Nano-Engineered Thermal Interfaces Materials Enabling Next Generation Electronics

Notice is hereby given that, on October 2, 2003, pursuant to Section 6(a) of the National Cooperative Research and Production Act of 1993, 15 U.S.C. 4301 *et seq.* (''the Act''), Nano-Engineered Thermal Interfaces Materials Enabling Next Generation Microelectronics has filed written notifications simultaneously with the Attorney General and the Federal Trade Commission disclosing changes in its membership status. The notifications were filed for the purpose of extending the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances. Specifically, Cabot Corporation, Albuquerque, NM has been added as a party to this venture.

No other changes have been made in either the membership or planned activity of the group research project. Membership in this group research project remains open, and Nano-Engineered Thermal Interfaces Materials Enabling Next Generation Microelectronics intends to file additional written notification disclosing all changes in membership.

On October 2, 2003, Nano-Engineered Thermal Interfaces Enabling Next Generation Microelectronics filed its original notification pursuant to section 6(a) of the Act. The Department of Justice published a notice in **Federal Register** pursuant to section 6(b) of the Act on December 1, 2003 (68 FR 67216).

Dorothy B. Fountain,

Deputy Director of Operations Antitrust Division.

[FR Doc. 03–30737 Filed 12–11–03; 8:45 am]

BILLING CODE 4410–11–M

DEPARTMENT OF JUSTICE

Antitrust Division

Notice of Pursuant to the National Cooperative Research and Production Act of 1993—National Shipbuilding Research Program (''NSRP'')

Notice is hereby given that, on October 29, 2003, pursuant to section 6(a) of the National Cooperative Research and Production Act of 1993, 15 U.S.C. 4301 *et seq.* (''the Act''), National Shipbuilding Research Program (''NSRP'') has filed written notifications simultaneously with the Attorney General and the Federal Trade Commission disclosing changes in its membership status. The notifications were filed for the purpose of extending the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances. Specifically, VT Halter Marine, Inc., Gulfport, MS, a subsidiary of Vision Technologies Systems, Inc., Alexandria, VA, a subsidiary of Singapore Technologies Engineering, Ltd., Singapore, Singapore, has been added as a party to this venture.

No other changes have been made in either the membership or planned activity of the group research project. Membership in this group research project remains open, and NSRP intends to file additional written notification disclosing all changes in membership.

On Mary 13, 1998, NSRP filed its original notification pursuant to section 6(a) of the Act. The Department of Justice published a notice in the **Federal Register** pursuant to section 6(b) of the Act on January 29, 1999 (64 FR 4708).

The last notification was filed with the Department on October 9, 2003. A notice was published in the **Federal Register** pursuant to section 6(b) of the

[5] Commissioner Lane made an affirmative critical circumstances determination.

[6] Commissioner Pearson did not participate in the critical circumstances determination.

Act on November 12, 2003 (68 FR 64125).

Dorothy B. Fountain,

Deputy Director of Operations, Antitrust Division.

[FR Doc. 03–30732 Filed 12–11–03; 8:45 am]

BILLING CODE 4410–11–M

DEPARTMENT OF JUSTICE

Antitrust Division

Notice Pursuant to the National Cooperative Research and Production Act of 1993—Optical Switch Venture

Notice is hereby given that, on October 16, 2003, pursuant to section 6(a) of the National Cooperative Research and Production Act of 1993, 15 U.S.C. 4301 *et seq.* (''the Act''), Agiltron Incorporated has filed written notifications simultaneously with the Attorney General and the Federal Trade Commission disclosing (1) the identities of the parties and (2) the nature and objectives of the venture. The notifications were filed for the purpose invoking the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances. Pursuant to section 6(a) of the Act, the identities of the parties are Agiltron Incorporated, Wilmington, MA, and AC Photonics Incorporated, Santa Clara, CA. The nature and objectives of the venture are to develop and demonstrate a new type of optical switch based on an optical MEMS platform.

Dorothy B. Fountain,

Deputy Director of Operations, Antitrust Division.

[FR Doc. 03–30734 Filed 12–11–03; 8:45 am]

BILLING CODE 4410–11–M

DEPARTMENT OF JUSTICE

Antitrust Division

Notice Pursuant to the National Cooperative Research and Production Act of 1993—Semiconductor Test Consortium, Inc.

Notice is hereby given that, on November 12, 2003, pursuant to section 6(a) of the National Cooperative Research and Production Act of 1993, 15 U.S.C. 4301 *et seq.* (''the Act''), Semiconductor Test Consortium, Inc. has filed written notifications simultaneously with the Attorney General and the Federal Trade Commission disclosing changes in its membership status. The notifications were filed for the purpose of extending the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances. Specifically, Tokyo Electron Ltd., Tokyo, Japan; Tokyo Seimitsu Co., Ltd., Tokyo, Japan; Port Orford Company, Rollingbay, WA have been added as parties to this venture.

No other changes have been made in either the membership or planned activity of the group research project. Membership in this group research project remains open, and Semiconductor Test Consortium, Inc. intends to file additional written notification disclosing all changes in membership.

On May 27, 2003, Semiconductor Test Consortium, Inc. filed its original notification pursuant to section 6(a) of the Act. The Department of Justice published a notice in the **Federal Register** pursuant to section 6(b) of the Act of June 17, 2003 (68 FR 35913).

This last notification was filed with the Department on August 18, 2003. A notice was published in the **Federal Register** pursuant to section 6(b) of the Act on September 8, 2003 (68 FR 52959).

Dorothy B. Fountain,

Deputy Director of Operations, Antitrust Division.

[FR Doc. 03–30733 Filed 12–11–03; 8:45 am]

BILLING CODE 4410–11–M

DEPARTMENT OF JUSTICE

Antitrust Division

Notice Pursuant to the National Cooperative Research and Production Act of 1993—USB Flash Drive Alliance (''UFDA'')

Notice is hereby given that, on November 12, 2003, pursuant to Section 6(a) of the National Cooperative Research and Production Act of 1993, 15 U.S.C. 4301 *et seq.* (''the Act''), USB Flash Drive Alliance (''UFDA'') has filed written notifications simultaneously with Attorney General and the Federal Trade Commission disclosing (1) the identities of the parties and (2) the nature and objectives of the venture. The notifications were filed for the purpose of invoking the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances. Pursuant to section 6(b) of the Act, the identities of the parties are Kingston Technologies, Fountain Valley, CA; Lexar Media, Inc., Fremont, CA; Samsung Semiconductor, Inc., San Jose, CA; SimpleTech, Inc., Santa Ana, CA; Microsoft Corporation, Redmond, WA; Viking Interworks, a Sanimna-SCI Company, Rancho Santa Margarita, CA; Crucial Technology, a division of Micron, Boise, ID; GenesysLogic, San Jose, CA; and PNY Technologies, Inc., Parsippany, NJ. The nature and objectives of the venture are to promote the advancement of the general use of USB flash drive devices through the creation of a generic industry recognized category (USB flash drives), and use this category to educate consumers about the benefits and uses of USB flash drives.

Dorothy B. Fountain,

Deputy Director of Operations Antitrust Division.

[FR Doc. 03–30736 Filed 12–11–03; 8:45 am]

BILLING CODE 4410–11–M

DEPARTMENT OF LABOR

Employment Standards Administration

Wage and Hour Division

Minimum Wages for Federal and Federally Assisted Construction; General Wage Determination Decisions

General wage determination decisions of the Secretary of Labor are issued in accordance with applicable law and are based on the information obtained by the Department of Labor from its study of local wage conditions and data made available from other sources. They specify the basic hourly wage rates and fringe benefits which are determined to be prevailing for the described classes of laborers and mechanics employed on construction projects of a similar character and in the localities specified therein.

The determinations in these decisions of prevailing rates and fringe benefits have been made in accordance with 29 CFR part 1, by authority of the Secretary of Labor pursuant to the provisions of the Davis-Bacon Act of March 3, 1931, as amended (46 Stat. 1494, as amended, 40 U.S.C. 276a) and of other Federal statutes referred to in 29 CFR part 1, Appendix, as well as such additional statutes as may from time to time be enacted containing provisions for the payment of wages determined to be prevailing by the Secretary of Labor in accordance with the Davis-Bacon Act. The prevailing rates and fringe benefits determined in these decisions shall, in accordance with the provisions of the foregoing statutes, constitute the minimum wages payable on Federal and federally assisted construction projects to laborers and mechanics of the specified classes engaged on contract work of the character and in the localities described therein.

Good cause is hereby found for not utilizing notice and public comment procedure thereon prior to the issuance of these determinations as prescribed in 5 U.S.C. 553 and not providing for delay in the effective date as prescribed in that section, because the necessity to issue current construction industry wage determinations frequently and in large volume causes procedures to be impractical and contrary to the public interest.

General wage determination decisions, and modifications and supersedeas decisions thereto, contain no expiration dates and are effective from their date of notice in the **Federal Register**, or on the date written notice is received by the agency, whichever is earlier. These decisions are to be used in accordance with the provisions of 29 CFR parts 1 and 5. Accordingly, the applicable decision, together with any modifications issued, must be made a part of every contract for performance of the described work within the geographic area indicated as required by an applicable Federal prevailing wage law and 29 CFR part 5. The wage rates and fringe benefits, notice of which is published herein, and which are contained in the Government Printing Office (GPO) document entitled ''General Wage Determinations Issued Under The Davis-Bacon And Related Acts,'' shall be the minimum paid by contractors and subcontractors to laborers and mechanics.

Any person, organization, or governmental agency having an interest in the rates determined as prevailing is encouraged to submit wage rate and fringe benefit information for consideration by the Department. Further information and self-explanatory forms for the purpose of submitting this data may be obtained by writing to the U.S. Department of Labor, Employment Standards Administration, Wage and Hour Division, Division of Wage Determinations, 200 Constitution Avenue, NW., Room S–3014, Washington, DC 20210.

Modification to General Wage Determination Decisions

The number of the decisions listed to the Government Printing Office document entitled ''General Wage Determinations Issued Under the Davis-Bacon and Related Acts'' being modified are listed by Volume and State. Dates of publication in the **Federal Register** are in parentheses following the decisions being modified.

Volume I

Rhode Island
RI030001 (Jun. 13, 2003)

Volume II

Pennsylvania
PA030001 (Jun. 13, 2003)
PA030002 (Jun. 13, 2003)
PA030003 (Jun. 13, 2003)
PA030004 (Jun. 13, 2003)
PA030005 (Jun. 13, 2003)
PA030006 (Jun. 13, 2003)
PA030007 (Jun. 13, 2003)
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PA030018 (Jun. 13, 2003)
PA030019 (Jun. 13, 2003)
PA030020 (Jun. 13, 2003)
PA030021 (Jun. 13, 2003)
PA030023 (Jun. 13, 2003)
PA030024 (Jun. 13, 2003)
PA030025 (Jun. 13, 2003)
PA030026 (Jun. 13, 2003)
PA030027 (Jun. 13, 2003)
PA030028 (Jun. 13, 2003)
PA030030 (Jun. 13, 2003)
PA030031 (Jun. 13, 2003)
PA030032 (Jun. 13, 2003)
PA030035 (Jun. 13, 2003)
PA030038 (Jun. 13, 2003)
PA030040 (Jun. 13, 2003)
PA030042 (Jun. 13, 2003)
PA030052 (Jun. 13, 2003)
PA030054 (Jun. 13, 2003)
PA030059 (Jun. 13, 2003)
PA030060 (Jun. 13, 2003)
PA030061 (Jun. 13, 2003)
PA030065 (Jun. 13, 2003)
West Virginia
WV030001 (Jun. 13, 2003)
WV030002 (Jun. 13, 2003)
WV030003 (Jun. 13, 2003)
WV030005 (Jun. 13, 2003)
WV030006 (Jun. 13, 2003)
WV030009 (Jun. 13, 2003)
WV030010 (Jun. 13, 2003)
WV030011 (Jun. 13, 2003)

Volume III

Kentucky
KY030001 (Jun. 13, 2003)
KY030002 (Jun. 13, 2003)
KY030003 (Jun. 13, 2003)
KY030004 (Jun. 13, 2003)
KY030006 (Jun. 13, 2003)
KY030007 (Jun. 13, 2003)
KY030025 (Jun. 13, 2003)
KY030027 (Jun. 13, 2003)
KY030029 (Jun. 13, 2003)
KY030035 (Jun. 13, 2003)

Volume IV

None

Volume V

New Mexico
NM030001 (Jun. 13, 2003)

Volume VI

None

Volume VII

None

General Wage Determination Publication

General wage determinations issued under the Davis-Bacon and Related Acts, including those noted above, may be found in the Government Printing Office (GPO) document entitled ''General Wage Determinations Issued Under the Davis-Bacon and Related Acts''. This publication is available at each of the 50 Regional Government Depository Libraries and many of the 1,400 Government Depository Libraries across the country.

General wage determinations issued under the Davis-Bacon and Related Acts, are available at no cost on the Government Printing Office site at *http://www.access.gpo.gov/davisbacon*. They are also available electronically by subscription to the Davis-Bacon Online Service (*http://davisbacon.fedworld.gov*) of the National Technical Information Service (NTIS) of the U.S. Department of Commerce at 1–800–363–2068. This subscription offers value-added features such as electronic delivery of modified wage decisions directly to the user's desktop, the ability to access prior wage decisions issued during the year, extensive Help desk Support, etc.

Hard-copy subscriptions may be purchased from : Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402, (202) 512–1800.

When ordering hard-copy subscription(s), be sure to specify the State(s) of interest, since subscriptions may be ordered for any or all of the six separate Volumes, arranged by State. Subscriptions include an annual edition (issued in January or February) which includes all current general wage determinations for the States covered by each volume. Throughout the remainder of the year, regular weekly updates will be distributed to subscribers.

Signed in Washington, DC, this 4th day of December, 2003.

Carl J. Poleskey,

Chief, Branch of Construction Wage Determinations.

[FR Doc. 03–30539 Filed 12–11–03; 8:45 am]

BILLING CODE 4510–27–M

DEPARTMENT OF LABOR

Occupational Safety and Health Administration

[Docket No. ICR–1218–0145 (2004)]

Formaldehyde Standard (29 CFR 1910.1048); Extension of the Office of Management and Budget's (OMB) Approval of Information Collection (Paperwork) Requirements

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

ACTION: Request for comment.

SUMMARY: OSHA solicits comments concerning its proposal to decrease the existing burden hour estimates, and to extend OMB approval of the information collection requirements of the Formaldehyde Standard (29 CFR 1910.1048). The standard protects employees from adverse health effects from occupational exposure to Formaldehyde.

DATES: Comments must be submitted by the following dates:

Hard Copy: Your comments must be submitted (postmarked or received) by February 10, 2004.

Facsimile and electronic transmission: Your comments must be sent by February 10, 2004.

ADDRESSES:

I. Submission of Comments

Regular mail, express delivery, hand-delivery, and messenger service: Submit your comments and attachments to the OSHA Docket Office, Docket No. ICR–1218–0145 (2004), Room N–2625, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210. OSHA Docket Office and Department of Labor hours of operation are 8:15 a.m. to 4:15 p.m., e.s.t.

Facsimile: If your comments, including any attachments, are 10 pages or fewer, you may fax them to the OSHA Docket Office at (202) 693–1648. You must include the docket number, ICR–1218–0145 (2004), in your comments.

Electronic: You may submit comments, but not attachments, through the Internet at *http://ecomments.osha.gov*. (Please see the **SUPPLEMENTARY INFORMATION** below for additional information on submitting comments.)

You may submit comments in response to this document by (1) Hard copy, (2) FAX transmission (facsimile), or (3) electronically through the OSHA Web page. Please note you cannot attach materials such as studies or journal articles to electronic comments. If you have additional materials, you must submit three copies of them to the OSHA Docket Office at the address above. The additional materials must clearly identify your electronic comments by name, date, subject and docket number so we can attach them to your comments. Because of security-related problems there may be a significant delay in the receipt of comments by regular mail. Please contact the OSHA Docket Office at (202) 693–2350 for information about security procedures concerning the delivery of materials by express delivery, hand delivery and messenger service.

II. Obtaining Copies of the Supporting Statement for the Information Collection Request

The Supporting Statement for the Information Collection Request (ICR) is available for downloading from OSHA's Web site at *http://www.osha.gov*. The complete ICR, containing the OMB–83–I Form, Supporting Statement, and attachments, is available for inspection and copying in the OSHA Docket Office, at the address listed above. A printed copy of the ICR can be obtained by contacting Todd Owen at (202) 693–2222.

FOR FURTHER INFORMATION CONTACT: Todd Owen, Directorate of Standards and Guidance, OSHA, U.S. Department of Labor, Room N–3609, 200 Constitution Avenue, NW., Washington, DC 20210; telephone (202) 693–2222.

SUPPLEMENTARY INFORMATION:

I. Background

The Department of Labor, as part of its continuing effort to reduce paperwork and respondent (*i.e.* employer) burden, conducts a preclearance consultation program to provide the public with an opportunity to comment on proposed and continuing information collection requirements in accordance with the Paperwork Reduction Act of 1995 (PRA–95) (44 U.S.C. 3506(c)(2)(A)). This program ensures that information is in the desired format, reporting burden (time and costs) is minimal, collection instruments are clearly understood, and OSHA's estimate of the information collection burden is correct. The Occupational Safety and Health Act of 1970 (the Act) authorizes information collection by employers as necessary or appropriate for enforcement of the Act or for developing information regarding the causes and prevention of occupational injuries, illnesses, and accidents (29 U.S.C. 657).

The information collection requirements specified in the Formaldehyde Standard protect employees from the adverse health effects that may result from their exposure to Formaldehyde. The major information collection requirements of the Formaldehyde Standard require employers to perform exposure monitoring to determine employees exposure to Formaldehyde, notifying employees of their Formaldehyde exposures, providing examining physicians with specific information, ensuring that employees receive a copy of their medical examination results, training, maintaining employees' exposure monitoring and medical records for specific periods, and providing access to these records by OSHA, the National Institute for Occupational Safety and Health, the affected employees, and their authorized representatives.

II. Special Issues for Comment

OSHA has a particular interest in comments of the following issues:

—Whether the information collection requirements are necessary for the proper performance of the Agency's functions, including whether the information is useful;

—The accuracy of the Agency's estimate of the burden (time and costs) of the information collection requirements, including the validity of the methodology and assumptions used;

—The quality, utility, and clarity of the information collected; and

—Ways to minimize the burden on employers who must comply; for example, by using automated or other technological information collection and transmission techniques.

III. Proposed Actions

OSHA proposes to extend the Office of Management and Budget's (OMB) approval of the collection of information requirements specified by the Standard on Formaldehyde (29 CFR 1910.1048). OSHA is lowering its burden hour estimate by 100.597 hours mainly as a result of lowering the estimated number of employee medical examinations. The Agency will summarize the comments submitted in response to this notice, and will include this summary in its request to OMB to extend the approval of these information collection requirements.

Type of Review: Extension of currently approved information collection requirements.

Title: Formaldehyde Standard (29 CFR 1910.1048).

OMB Number: 1218–0145.

Affected Public: Business or other for-profit organizations; Federal government; State, local, or tribal governments.

Number of Respondents: 133,196.

Frequency: On occasion.

Total Responses: 1,794,628.

Average Time per Response: Varies from 5 minutes for employers to maintain exposure monitoring and medical records for each employee to 1 hour for employees to receive a medical examination.

Estimated Total Burden Hours: 490,482 hours.

Estimated Cost (Operation and Maintenance): $52,058,424.

IV. Authority and Signature

John L. Henshaw, Assistant Secretary of Labor for Occupational Safety and Health, directed the preparation of this notice. The authority for this notice is the Paperwork Reduction Act of 1995 (44 U.S.C. 3506) and Secretary of Labor's Order No. 5–2002 (67 FR 65008).

Signed at Washington, DC, on December 4, 2003.

John L. Henshaw,

Assistant Secretary of Labor.

[FR Doc. 03–30789 Filed 12–11–03; 8:45 am]

BILLING CODE 4510–26–M

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

Sunshine Act Meeting

December 5, 2003.

TIME AND DATE: 10 a.m., Wednesday, December 17, 2003.

PLACE: Hearing Room, 9th Floor, 601 New Jersey Avenue, NW., Washington, DC.

STATUS: Open.

MATTERS TO BE CONSIDERED: The Commission will consider and act upon the following in open session:

Secretary of Labor v. *Cannelton Industries, Inc.,* Docket Nos. WEVA 2002–111–R and WEVA 2002–112–R. (Issues include whether the judge erred by permitting a ''pumpers' examination'' to be substituted for a preshift examination under 30 CFR 75.360.)

Any person attending this meeting who requires special accessibility features and/or auxiliary aids, such as sign language interpreters, must inform the Commission in advance of those needs. Subject to 29 CFR 2706.150(a)(3) and § 2706.160(d).

FOR FURTHER INFORMATION CONTACT: Jean Ellen, (202) 434–9950/(202) 708–9300 for TDD Relay/1–800–877–8339 for toll free.

Jean H. Ellen,

Chief Docket Clerk.

[FR Doc. 03–30884 Filed 12–10–03; 12:19 pm]

BILLING CODE 6735–01–M

NATIONAL CREDIT UNION ADMINISTRATION

Community Development Revolving Loan Fund for Credit Unions

AGENCY: National Credit Union Administration.

ACTION: Notice of application period.

SUMMARY: The National Credit Union Administration (NCUA) will accept applications for participation in the Community Development Revolving Loan Fund's Loan Program throughout calendar year 2004, subject to availability of funds. Application procedures for qualified low-income credit unions are in NCUA Rules and Regulations.

ADDRESSES: Applications for participation may be obtained from and should be submitted to: NCUA, Office of Credit Union Development, 1775 Duke Street, Alexandria, VA 22314–3428.

Applications may be submitted throughout calendar year 2004.

FOR FURTHER INFORMATION CONTACT: Anthony LaCreta, Director, Office of Credit Union Development at the above address or telephone (703s) 518–6610.

SUPPLEMENTARY INFORMATION: Part 705 of the NCUA Rules and Regulations implements the Community Development Revolving Loan Fund (Fund) for Credit Unions. The purpose of the Fund is to assist officially designated ''low-income'' credit unions in providing basic financial services to residents in their communities that result in increased income, ownership and employment. The Fund makes available low interest loans in amounts up to $300,000 in the aggregate to qualified participating ''low-income'' designated credit unions. Interest rates are currently set at one percent. Fund participation is limited to existing credit unions with an official ''low-income'' designation. Student credit unions are not eligible to participate in this program.

This notice is published pursuant to Section 705.9 of the NCUA Rules and Regulations that states NCUA will provide notice in the **Federal Register** when funds in the program are available.

By the National Credit Union Administration Board on December 4, 2003.

Becky Baker,

Secretary, NCUA Board.

[FR Doc. 03–30752 Filed 12–11–03; 8:45 am]

BILLING CODE 7535–01–P

NUCLEAR REGULATORY COMMISSION

[Docket No. 52–007]

Exelon Generation Company, LLC; Notice of Hearing and Opportunity To Petition for Leave To Intervene Early Site Permit for the Clinton ESP Site

Pursuant to the Atomic Energy Act of 1954, as amended (the Act), and the regulations in Title 10, Code of Federal Regulations, Part 50, Domestic Licensing of Production and Utilization Facilities, Part 52, Early Site Permits, Standard Design Certifications, and Combined Licenses for Nuclear Power Plants, and Part 2, Rules of Practice for Domestic Licensing Proceedings and Issuance of Orders, notice is hearby given that a hearing will be held, at a time and place to be set in the future by the Commission or designated Atomic Safety and Licensing Board (Board). The hearing will consider the application dated September 25, 2003 filed by Exelon Generation Company, LLC (Exelon) pursuant to Subpart A of 10 CFR Part 52 for an early site permit (ESP). The application requests approval of a site owned by AmerGen Energy Company, LLC (AmerGen is a joint venture of Exelon and British Energy), in DeWitt County, Illinois, approximately 6 miles east of Clinton, Illinois, between the cities of Bloomington and Decatur to the north and south, respectively, and Lincoln and Champaign-Urbana to the west and east, respectively, as a location for one or more new nuclear reactors that would, if authorized for construction and operation in a separate licensing proceeding under Subpart C of 10 CFR Part 52 or under 10 CFR Part 50, have a capacity of no more than 6800 Megawatts (thermal) additional for the site. The docket number established for this application is 52–007.

The hearing will be conducted by a Board which will be designated by the Chairman of the Atomic Safety and Licensing Board Panel or by the Nuclear Regulatory Commission (NRC, the Commission). Notice as to the membership of the Board will be published in the **Federal Register** at a later date.

The NRC staff will complete a detailed technical review of the

application and will document its findings in a safety evaluation report (SER) and an environmental impact statement (EIS). In addition, the Commission will refer a copy of the application to the Advisory Committee on Reactor Safeguards (ACRS) in accordance with 10 CFR 52.23, and the ACRS will report on those portions of the application that concern safety. Upon receipt of the ACRS report and completion of the NRC staff's SER and EIS, the Director, Office of Nuclear Reactor Regulation, NRC, will propose findings on the following issues:

Issues Pursuant to the Atomic Energy Act of 1954, as Amended:

(1) Whether the issuance of an ESP will be inimical to the common defense and security or to the health and safety of the public (Safety Issue 1); and, (2) whether, taking into consideration the site criteria contained in 10 CFR Part 100, a reactor, or reactors, having characteristics that fall within the parameters for the site, can be constructed and operated without undue risk to the health and safety of the public (Safety Issue 2).

Issue Pursuant to the National Environmental Policy Act (NEPA) of 1969, as Amended:

Whether, in accordance with the requirements of Subpart A of 10 CFR Part 51, the ESP should be issued as proposed.

The Board will conduct the hearing in accordance with Subpart G of 10 CFR Part 2. If the hearing is contested as defined by 10 CFR 2.4, the presiding officer will consider Safety Issues 1 and 2 and the issue pursuant to NEPA set forth above.

If the hearing is not a contested proceeding as defined by 10 CFR 2.4, the presiding officer will determine: Whether the application and the record of the proceeding contain sufficient information, and the review of the application by the Commission's staff has been adequate to support a negative finding on Safety Issue 1 above, and an affirmative finding on Safety Issue 2 above, as proposed to be made by the Director, Office of Nuclear Reactor Regulation; and whether the review conducted by the Commission pursuant to NEPA has been adequate.

Regardless of whether the proceeding is contested or uncontested, the presiding officer will: (1) Determine whether the requirements of Section 102(2) (A), (C), and (E) of NEPA and Subpart A of 10 CFR Part 51 have been complied with in the proceeding; (2) independently consider the final balance among the conflicting factors contained in the record of the proceeding with a view to determining the appropriate action to be taken; and (3) determine, after considering reasonable alternatives, whether the ESP should be issued, denied, or appropriately conditioned to protect environmental values.

In accordance with 10 CFR 2.714, any person whose interest may be affected by this proceeding and who desires to participate as a party shall file a written petition for leave to intervene. Petitions must set forth with particularity the interest of the petitioner in the proceeding, how that interest may be affected by the results of the proceeding, including the reasons why the petitioner should be permitted to intervene with particular reference to the factors set forth in 10 CFR 2.714(d)(1), and the specific aspect or aspects of the subject matter of the proceeding as to which the petitioner wishes to intervene.

The Commission, the presiding officer, or the Atomic Safety and Licensing Board designated to rule on petitions to intervene shall, in ruling on petitions to intervene, consider the following factors, among other things: (1) The nature of the petitioner's right under the Act to be made a party to the proceeding, (2) the nature and extent of the petitioner's property, financial, or other interest in the proceeding, and (3) the possible effect of any order that may be entered in the proceeding on the petitioner's interest.

All such petitions must be filed no later than 30 days from the date of publication of this notice in the **Federal Register**. Nontimely filings will not be entertained absent a determination by the Commission, the presiding officer, or the Atomic Safety and Licensing Board designated to rule on the petition, that the petition should be granted based upon a balancing of the factors specified in 10 CFR 2.714(a)(1)(i)–(v).

The Board will convene a special prehearing conference of the parties to the proceeding and persons who have filed petitions for leave to intervene, or their counsel, to be held at such times as may be appropriate, at a place to be set by the Board for the purpose of dealing with the matters specified in 10 CFR 2.751a. Notice of this special prehearing conference will be published in the **Federal Register**. The Board will convene a prehearing conference of the parties, or their counsel, to be held subsequent to any special prehearing conference, after discovery has been completed, or within such other time as may be appropriate, at a time and place to be set by the Board for the purpose of dealing with the matters specified in 10 CFR 2.752.

Not later than fifteen (15) days prior to the holding of the special prehearing conference pursuant to 2.751a, or if no special prehearing conference is held, fifteen (15) days prior to the holding of the first prehearing conference, the petitioner shall file a supplement to his or her petition to intervene that must include a list of the contentions which petitioner seeks to have litigated in the hearing. A petitioner who fails to file a supplement that satisfies the requirements of 10 CFR 2.714(b)(2) with respect to at least one contention will not be permitted to participate as a party. Additional time for filing the supplement may be granted based upon a balancing of the factors in 10 CFR 2.714(a)(1).

Each contention must consist of a specific statement of the issue of law or fact to be raised or controverted. In addition, the petitioner shall provide the following information with respect to each contention: (1) A brief explanation of the basis of the contention, (2) a concise statement of the alleged facts or expert opinion which support the contention and on which the petitioner intends to rely in proving the contention at the hearing, together with references to those specific sources and documents of which the petitioner is aware and on which the petitioner intends to rely to establish those facts or expert opinion, and (3) sufficient information (which may include information pursuant to 10 CFR 2.714(b)(2) (i) and (ii)) to show that a genuine dispute exists with the applicant on a material issue of law or fact. This showing must include references to the specific portions of the application (including the applicant's environmental report and safety report) that the petitioner disputes and the supporting reasons for each dispute, or, if the petitioner believes that the application fails to contain information on a relevant matter as required by law, the identification of each failure and the supporting reasons for the petitioner's belief. On issues arising under NEPA, the petitioner shall file contentions based on the applicant's environmental report. The petitioner can amend those contentions or file new contentions if there are data or conclusions in the NRC draft or final EIS, or any supplements relating thereto, that differ significantly from the data or conclusions in the applicant's document.

The Commission, the presiding officer, or the Atomic Safety and Licensing Board designated to rule on petitions to intervene shall, in ruling on the admissibility of a contention, refuse to admit a contention if: (1) The contention and supporting material fail to satisfy the requirements of 10 CFR 2.714(b)(2); or (2) the contention, if

proven, would be of no consequence in the proceeding because it would not entitle petitioner to relief.

A person permitted to intervene becomes a party to the proceeding, subject to any limitations imposed pursuant to 10 CFR 2.714(f). Unless otherwise expressly provided in the order allowing intervention, the granting of a petition for leave to intervene does not change or enlarge the issues specified in the notice of hearing.

Petitions for leave to intervene may be filed by delivery to the NRC Public Document Room at One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852–2738, or by mail addressed to the Secretary, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001; Attention: Rulemakings and Adjudications Staff. Because of the continuing disruptions in delivery of mail to United States Government offices, it is also requested that petitions for leave to intervene be transmitted to the Secretary of the Commission either by facsimile transmission to 301–415–1101 or by e-mail to *hearingdocket@nrc.gov.* A copy of the petition should also be sent to the Assistant General Counsel for Reactor Programs, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, Thomas S. O'Neill, Associate General Counsel Exelon Nuclear, 4300 Winfield Road, Warrenville, IL 60555, and to Stephen Frantz, Esquire, Morgan, Lewis & Bockius LLP, 1111 Pennsylvania Avenue, NW., Washington, DC 20004. All petitions must be accompanied by proof of service upon all parties to the proceeding or their attorneys of record.

A person who is not a party may, in the discretion of the presiding officer, be permitted to make a limited appearance by making an oral or written statement of his position on the issues at any session of the hearing or any prehearing conference within such limits and on such conditions as may be fixed by the presiding officer, but may not otherwise participate in the proceeding.

A copy of the Exelon ESP application is available for public inspection at the Commission's Public Document Room (PDR), located at One White Flint North, 11555 Rockville Pike (first floor), Rockville, Maryland. Publicly available records are accessible from the Agencywide Documents Access and Management System (ADAMS) Public Electronic Reading Room on the Internet at the NRC Web site, *http://www.nrc.gov/reading-rm/adams.html.* The accession number for the application is ML032721596. Persons who do not have access to ADAMS, or who encounter problems in accessing the documents located in ADAMS, should contact the NRC Public Document Room staff by telephone at 1–800–397–4209, 301–415–4737 or by e-mail to *pdr@nrc.gov.*

The application is also available to local residents at the Vespasian Warner Public Library in Clinton, Illinois, and it is available on the NRC Web page at *http://www.nrc.gov/reactors/new-licensing/license-reviews/esp.html.*

Dated at Rockville, Maryland, this 8th day of December, 2003.

For the Nuclear Regulatory Commission.

Annette Vietti-Cook,

Secretary of the Commission.

[FR Doc. 03–30759 Filed 12–11–03; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

Policy Statement on the Treatment of Environmental Justice Matters in NRC Regulatory and Licensing Actions

AGENCY: Nuclear Regulatory Commission.

ACTION: Draft policy statement: Extension of comment period.

SUMMARY: On November 5, 2003 (68 FR 62642), the Nuclear Regulatory Commission (NRC) published for public comment a draft policy statement on the treatment of environmental justice matters in NRC regulatory and licensing actions. Several persons have subsequently requested an extension of time for submitting comments. In the interest of obtaining public comment from the broadest range of stakeholders, the comment period on the draft policy statement is being extended for an additional 30 days from the original January 5, 2004 deadline to February 4, 2004.

DATES: The comment period on this draft policy statement has been extended and now expires on February 4, 2004. Comments received after this date will be considered if it is practical to do so, but the Commission is able to ensure consideration only for comments received on or before this date.

ADDRESSES: Submit comments to the Secretary, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, Attention: Rulemakings and Adjudications Staff. Deliver comments to: 11555 Rockville Pike, Rockville, Maryland, between 7:30 a.m. and 4:15 p.m., on Federal workdays. Because of continuing disruptions in the delivery of mail to United States Government offices, it is requested that comments also be transmitted to the Secretary of the Commission either by means of facsimile transmission to (301) 415–1101, or by e-mail to *SECY@nrc.gov.* You may also provide comments via NRC's interactive rulemaking Web site (*http://ruleforum.llnl.gov*). This site also provides the availability to upload comments as files if your Web browser supports that function. Comments received may be examined at the NRC Public Document Room, 11555 Rockville Pike, Rockville, Maryland, or at NRC's Public Electronic Reading Room at *http://www.nrc.gov/reading-rm/adams.html.*

FOR FURTHER INFORMATION CONTACT: James Lieberman, Special Counsel, Office of General Counsel, U.S. Nuclear Regulatory Commission, Washington, DC, 20555–0001. Telephone: (301) 415–2746; fax number: (301) 415–2036; e-mail: *jxl@nrc.gov.*

Dated at Rockville, Maryland, this 8th day of December 2003.

For the Nuclear Regulatory Commission.

Annette Vietti-Cook,

Secretary of the Commission.

[FR Doc. 03–30758 Filed 12–11–03; 8:45 am]

BILLING CODE 7590–01–P

SECURITIES AND EXCHANGE COMMISSION

Sunshine Act, Meeting

FEDERAL REGISTER CITATION OF PREVIOUS ANNOUNCEMENT: [68 FR 68126, December 5, 2003].

STATUS: Closed Meeting.

PLACE: 450 Fifth Street, NW., Washington, DC.

ANNOUNCEMENT OF ADDITIONAL MEETING: Additional Meeting.

A Closed Meeting will be held on Thursday, December 11, 2003 at 3 p.m.

Commissioners, Counsel to the Commissioners, the Secretary to the Commission, and recording secretaries will attend the Closed Meeting. Certain staff members who have an interest in the matter may also be present.

Commissioner Campos, as duty officer, determined that no earlier notice thereof was possible.

The General Counsel of the Commission, or his designee, has certified that, in his opinion, one or more of the exemptions set forth in 5 U.S.C. 552b(c) (5), (7), (9), and (10) and 17 CFR 200.402(a) (5), (7), (9) and (10), permit consideration of the scheduled matters at the Closed Meeting.

Commissioner Campos, as duty officer, voted to consider the items listed for the closed meeting in a closed session.

The subject matter of the Closed Meeting to be held on Thursday, December 11, 2003 will be:

Institution of injunctive actions; and

Institution of administrative proceedings of an enforcement nature

At times, changes in Commission priorities require alterations in the scheduling of meeting items. For further information and to ascertain what, if any, matters have been added, deleted or postponed, please contact the Office of the Secretary at (202) 942–7070.

Dated: December 10, 2003.

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 03–30934 Filed 12–10–03; 8:45 am]

BILLING CODE 8010–01–P

SECURITIES AND EXCHANGE COMMISSION

Sunshine Act; Meetings

Notice is hereby given, pursuant to the provisions of the Government in the Sunshine Act, Pub. L. 94–409, that the Securities and Exchange Commission will hold the following meetings during the week of December 15, 2003:

A Closed Meeting will be held on Tuesday, December 16, 2003 at 2 p.m., and an Open Meeting will be held on Wednesday, December 17, 2003, at 10 a.m. in Room 1C30, the William O. Douglas Room.

Commissioner Campos, as duty officer, determined that no earlier notice thereof was possible.

Commissioners, Counsel to the Commissioners, the Secretary to the Commission, and recording secretaries will attend the Closed Meeting. Certain staff members who have an interest in the matters may also be present.

The General Counsel of the Commission, or his designee, has certified that, in his opinion, one or more of the exemptions set forth in 5 U.S.C. 552b(c)(5), (7), 9(B) and (10) and 17 CFR 200.402(a)(5), (7), (9)(ii) and (10), permit consideration of the scheduled matters at the Closed Meeting.

Commissioner Campos, as duty officer, voted to consider the items listed for the closed meeting in closed session.

The subject matter of the Closed Meeting scheduled for Tuesday, December 16, 2003 will be:

Formal orders of investigation;

Institution and settlement of administrative proceedings of an enforcement nature;

Institution and settlement of injunctive actions; and

Adjudicatory matter.

The subject matter of the Open Meeting scheduled for Wednesday, December 17, 2003 will be:

1. The Commission will consider whether to approve a proposed rule change by the New York Stock Exchange to amend and restate its Constitution to reform the governance and management architecture of the Exchange.

For further information, please contact Rebekah Liu, at (202) 942–0133.

2. The Commission will consider whether to propose amendments to Form N–1A under the Securities Act of 1933 and the Investment Company Act of 1940 that would require an open-end management investment company to provide enhanced prospectus disclosure regarding breakpoint discounts on front-end sales loads.

For further information, please contact Christian L. Broadbent at (202) 942–0721.

3. The Commission will consider whether to issue a concept release on mutual fund transaction costs. The release would seek public comment on whether mutual funds should be required to quantify and disclose to investors as a separate line item the amount of transaction costs they incur; include transaction costs in their expense ratios and fee tables; provide other quantitative measures or additional disclosure that would provide investors an indication of the level of the investment company's transaction costs; or some combination of the above. The release also would seek comment on whether mutual funds should be required to record transaction costs or the portion of those costs that represent soft dollar benefits (*i.e.*, the non-execution portion) as an expense in their financial statements.

For further information contact: Paul Goldman at (202) 942–0510.

At times, changes in Commission priorities require alterations in the scheduling of meeting items. For further information and to ascertain what, if any, matters have been added, deleted or postponed, please contact:

The Office of the Secretary at (202) 942–7070.

Dated: December 10, 2003.

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 03–30935 Filed 12–10–03; 8:45 am]

BILLING CODE 8010–01–P

DEPARTMENT OF STATE

[Public Notice 4555]

Culturally Significant Objects Imported for Exhibition Determinations: ''Byzantium: Faith and Power (1261–1557)''

AGENCY: Department of State.

ACTION: Notice.

SUMMARY: Notice is hereby given of the following determinations: Pursuant to the authority vested in me by the Act of October 19, 1965 (79 Stat. 985; 22 U.S.C. 2459), Executive Order 12047 of March 27, 1978, the Foreign Affairs Reform and Restructuring Act of 1998 (112 Stat. 2681, *et seq.*; 22 U.S.C. 6501 note, *et seq.*), Delegation of Authority No. 234 of October 1, 1999, Delegation of Authority No. 236 of October 19, 1999, as amended, and Delegation of Authority No. 257 of April 15, 2003 (68 FR 19875), I hereby determine that the objects to be included in the exhibition ''Byzantium: Faith and Power (1261–1557),'' imported from abroad for temporary exhibition within the United States, are of cultural significance. The objects are imported pursuant to loan agreements with the foreign owners. I also determine that the exhibition or display of the exhibit objects at the Metropolitan Museum of Art, New York, NY, from on or about March 15, 2004, to on or about July 4, 2004, and at possible additional venues yet to be determined, is in the national interest. Public notice of these determinations is ordered to be published in the **Federal Register**. Additionally, notice is hereby given that one object for which determinations were previously made, and published in the **Federal Register** on July 30, 2003, are included in this exhibition.

FOR FURTHER INFORMATION CONTACT: For further information, including a list of the exhibit objects, contact Julianne Simpson, Attorney-Adviser, Office of the Legal Adviser, U.S. Department of State, (telephone: (202) 619–6529). The address is U.S. Department of State, SA–44, 301 4th Street, SW., Room 700, Washington, DC 20547–0001.

Dated: December 8, 2003.

C. Miller Crouch,

Principal Deputy Assistant Secretary for Educational and Cultural Affairs, Department of State.

[FR Doc. 03–30788 Filed 12–11–03; 8:45 am]

BILLING CODE 4710–08–P

DEPARTMENT OF STATE

[Public Notice 4554]

United States Climate Change Science Program

ACTION: Request U.S. nomination of experts for consideration as coordinating lead authors, lead authors, contributing authors, expert reviewers, and review editors for the Fourth Assessment Report (AR4) of the Intergovernmental Panel on Climate Change (IPCC).

SUMMARY: The role of the IPCC is to assess on a comprehensive, objective, open and transparent basis, the scientific, technical, and socio-economic information relevant to understanding the scientific basis of risk of human-induced climate change, its potential impacts, and options for adaptation and mitigation. The IPCC has three working groups: Working Group I assesses the scientific aspects of the climate system and climate change; Working Group II assesses the vulnerability of socio-economic and natural systems to climate change, negative and positive consequences of climate change, and options for adapting to it; and Working Group III assesses options for limiting greenhouse gas emissions and otherwise mitigating climate change. The IPCC provides scientific, technical, and socio-economic advice to the world community, and in particular to the parties to the United Nations Framework Convention on Climate Change (UNFCCC) through its periodic assessment reports and special reports. The IPCC has decided to continue to prepare comprehensive assessment reports and agreed to complete its Fourth Assessment Report in 2007.

The U.S. Government has received a request from the IPCC to nominate experts for consideration as coordinating lead authors, lead authors, contributing authors, expert reviewers, and review editors for the different chapters and volumes of the Fourth Assessment Report. Further information on this request—such as the IPCC request for nominations, the approved outlines of the three IPCC working groups for the AR4, a description of the roles responsibilities associated with them, and a nomination form that must be completed for each nominee—may be found at either the IPCC Secretariat (*http://www.ipcc.ch/ar4/nominations/nominations.htm*) or CCSP (*http://www.climatescience.gov/Library/ipcc/default.htm*) Web sites.

DATES: Completed nomination forms for each nominee should be returned to the Climate Change Science Program Office (*ipcc_nominations@usgcrp.gov*) by noon Monday, January 5, 2004.

FOR FURTHER INFORMATION CONTACT: David Allen, U.S. Climate Change Science Program, Suite 250, 1717 Pennsylvania Ave, NW., Washington, DC 20006. (Phone: 202–419–3468, Fax: 202–223–3065, Email: *dallen@usgcrp.gov*); or visit the CCSP Web site at *http://www.climatescience.gov.*

Dated: December 8, 2003.

Roberta L. Chew,

Office Director, Acting, Office of Global Change, Bureau of Oceans and International Environmental and Scientific Affairs, U.S. Department of State.

[FR Doc. 03–30787 Filed 12–11–03; 8:45 am]

BILLING CODE 4710–09–P

OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE

Harmonization of Most Favored Nation Tariff Rates for the United States, Canada, and Mexico; Liberalization of the Rules of Origin Applicable Under Provisions of the North American Free Trade Agreement

AGENCY: Office of the United States Trade Representative.

ACTION: Notification of an opportunity to submit proposals to consider tariff harmonization and/or liberalization of the rules of origin under the North American Free Trade Agreement.

SUMMARY: Section 202(q)(2) of the North American Free Trade Agreement Implementation Act (''the Act'') (19 USC 3331(b)) authorizes the President to proclaim modifications to the NAFTA rules of origin set forth in the Harmonized Tariff Schedule of the United States (HTS), subject to the consultation and layover provisions of section 103 of the Act. This notice is intended to inform the public of the opportunity to submit proposals to request the liberalization of the rules of origin under the NAFTA. In addition, this notice seeks proposals to request the harmonization of the most-favored-nation (MFN) tariff rates of the United States, Canada, and Mexico.

DATES: Public comments are due at USTR by noon, Friday, February 6, 2004.

ADDRESSES: Submission by electronic mail: *nafta2004@ustr.gov.* Submissions by facsimile: Kent Shigetomi, Director, Mexico and NAFTA Affairs, at (202) 395–9675. The public is strongly encouraged to submit documents electronically rather than by facsimile. See requirements for submissions below.

FOR FURTHER INFORMATION CONTACT: Kent Shigetomi, Director, Mexico and NAFTA Affairs, Office of Western Hemisphere Affairs, Office of the United States Trade Representative, Room 523, 600 17th Street, NW., Washington, DC 20508; telephone: (202) 395–3412; fax: (202) 395–9675. E-mail to *nafta2004@ustr.gov.*

SUPPLEMENTARY INFORMATION: On October 7, 2003, the Free Trade Commission (''FTC'' or ''the Commission''), the body responsible for the implementation of the NAFTA, agreed to pursue further liberalization of the NAFTA rules of origin. The Commission also agreed to commence a study of the MFN tariffs of each of the Parties. (In the case of the United States these are the general or normal trade relations (NTR) rates referenced in general note 3(a)(ii) of the HTS.) The study is to determine whether harmonizing these tariffs could further promote North American trade by reducing export-related transaction costs. Each of the Parties to the NAFTA agreed to initiate consultations with its respective domestic industries to determine which products could be covered by this exercise.

Rules of Origin

The NAFTA and the Act provide for preferential tariff and trade treatment of goods of U.S., Canadian, and Mexican origin. Goods qualify for preferential treatment when imported into the United States if they meet the requirements of the general NAFTA rules of origin set out in section 202 of the Act (19 U.S.C. 3332) and the specific rules incorporated into the HTS. The NAFTA provides that the NAFTA Parties can agree to amend the NAFTA's origin rules. Section 202(q)(2) of the Act authorizes the President to proclaim modifications to the NAFTA rules of origin set forth in the HTS, subject to the consultation and layover provisions of section 103 of the Act.

Since the NAFTA entered into force, the Parties have modified many of the rules of origin. Modifications were made in order to conform the rule of origin to tariff classification changes, to make them less restrictive, and to make them less burdensome to administer.

Tariff Harmonization

Beginning in 1994, the Parties have undertaken four separate tariff acceleration exercises, speeding the elimination of tariffs on several hundred line items, covering billions of dollars in trade. With virtually all tariffs between

the countries now eliminated, the Parties are considering harmonizing their MFN tariffs. Under NAFTA Article 308, the three countries did harmonize at zero tariff rates for computers/computer parts, local area network equipment and semiconductors.

Tariff harmonization could eliminate the need for preferential rule of origin requirements. Currently, NAFTA rules of origin are designed to ensure that tariff free treatment applies to all goods that originate or are substantially modified in North America while enabling NAFTA Parties to apply their own tariff rates to products of third country origin. Harmonizing MFN tariff rates at zero could eliminate the need for preferential rules of origin since the origin determination would be made when a good first enters the NAFTA area, making it unnecessary to have additional origin requirements for intra-NAFTA trade.

Additional Information

No decisions have been made to pursue rule of origin changes or harmonization of MFN tariffs, or the scope or degree of such changes. A decision to do so will consider several factors including (1) The expected reduction in transaction and manufacturing costs in North America and increase in trade that could result from either action; (2) the feasibility of devising, implementing and monitoring new rules of origin or harmonized MFN tariffs; (3) the level and breadth of interest in such an exercise by manufacturers, processors, traders and consumers in North America.

The following factors are also being considered as part of a possible framework for such an initiative:

(1) Harmonization would occur as countries with the higher MFN duties reduce such duties to the level of the lowest current duty rate applied by a NAFTA country, or move to a rate lower than any currently applied.

(2) Harmonization at a zero rate of duty is the most attractive option, and is the only option that could eliminate the need for preferential rules of origin.

(3) As was the case for products covered under Article 308, harmonization of an entire sector or broad range of goods would provide more benefits and be easier to implement and enforce.

(4) The NAFTA governments expect to proceed on the basis of consensus; that is, proposed rule of origin changes or tariff harmonization would be broadly supported by interested parties within each country.

Requirements for Comments/Proposals

A. Governments encourage submissions that enjoy broad support. Submitters should indicate if they have discussed their proposals with representatives of the affected sector in the other NAFTA countries and, if so, the result of such discussions. if representatives of an affected sector in one of the other NAFTA countries supports the proposal and the similar organization in the third NAFTA country does not support the proposal, such information should be included. Governments encourage interested parties to explore submitting proposals from organizations in all three countries.

B. Scope and Coverage of Proposals. Governments encourage interested parties to review the broadest appropriate range of items and to submit proposals that reflect a consensus reached after such a broad-based review. A single proposal can thus include requests covering multiple tariff headings. Proposals should cover entire 8-digit tariff subheadings, and may also be submitted at the 6, 4, or 2 digit level where the intent is to cover all subsidiary duties.

Requirements for Submissions: In order to facilitate the prompt processing of submissions, the Office of the United States Trade Representative strongly urges and prefers electronic (e-mail) submissions to *nafta2004@ustr.gov* in response to this notice. Documents should be submitted as WordPerfect, Microsoft Word, or text (.TXT) files. In the event that an e-mail submission is impossible, submissions should be made by facsimile. Supporting documentation submitted in the form of spreadsheets is acceptable in Quattro Pro or Excel format. For any document containing business confidential information submitted electronically, the file name of the business confidential version should begin with the characters ''BC-'' and the file name of the public version should begin with the characters ''P-.'' The P- or BC- should be followed by the name of the submitter. Persons who make submissions by e-mail should not provide separate cover letters; information that might appear in a cover letter should be included in the submission itself. Similarly, to the extent possible, any attachments to the submission should be included in the same file as the submission itself, and not as separate files. Written comments will be placed in a file open to public inspection pursuant to 15 CFR 2003.5, except confidential business information exempt from public inspection in accordance with 15 CFR 2003.6. Confidential business information submitted in accordance with 15 CFR 2003.6 must be clearly marked ''BUSINESS CONFIDENTIAL'' at the top of each page, including any cover letter or cover page, and must be accompanied by a nonconfidential summary of the confidential information. All public documents and nonconfidential summaries shall be available for public inspection in the USTR Reading Room. The USTR Reading Room is open to the public, by appointment only, from 10 a.m. to 12 noon and 1 p.m. to 4 p.m., Monday through Friday. An appointment to review the file may be made by calling (202) 395–6186. Appointments must be scheduled at least 48 hours in advance.

Regina K. Vargo,

Assistant United States Trade Representative for the Americas.

[FR Doc. 03–30786 Filed 12–11–03; 8:45 am]

BILLING CODE 3190–W3–M

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Aircraft Certification Policy Notice

AGENCY: Federal Aviation Administration (DOT).

ACTION: Notice of availability and request for public comment.

SUMMARY: This notice announces the availability of and requests comments on the issuance of a proposed Certification Policy Notice for approving Complex Supplemental Type Certificates (STC). The proposed Certification Policy Notice introduces a new classification of STCs, and instructs Aircraft Certification Office engineers, STC applicants, and STC installers how to manage STCs classified as complex.

DATES: Identify comments as Certification Policy Complex STC and they must arrive by February 12, 2004.

ADDRESSES: Send all comments on the proposed Certification Policy Notice to: Federal Aviation Administration, Aircraft Certification Service, Aircraft Engineering Division, Room 815, 800 Independence Avenue, SW., Washington, DC 20591. ATTN: Stephen (Steve) Flanagan, AIR–110. Or, deliver comments to: Federal Aviation Administration, Room 815, 800 Independence Avenue, SW., Washington, DC 20591.

FOR FURTHER INFORMATION CONTACT: Stephen (Steve) Flanagan, Aerospace Engineer, Federal Aviation Administration, Aircraft Certification

Service, Aircraft Engineering Division, Certification Procedures Branch, AIR–110, Room 815, 800 Independence Avenue, SW., Washington, DC 20591, Telephone (202) 267–3549, FAX (202) 267–5340. E-mail *steve.flanagan@faa.gov.*

SUPPLEMENTARY INFORMATION:

Comments Invited

You may comment on the proposed Certification Policy Notice listed in this notice by sending such written data, views, or arguments to the above listed address. You may also examine comments received on the proposed Certification Policy Notice, before and after the comment closing date, in Room 815, FAA Headquarters Building, 800 Independence Avenue, SW., Washington, DC 20591, weekdays except Federal holidays, between 8:30 a.m. and 4:30 p.m. The Director of the Aircraft Certification Service will consider all communications received by the closing date before issuing the final Certification Policy Notice.

Background

We typically issue STCs that permit installation on any aircraft of a specific type and model designation. Aircraft compatibility is addressed by the following limitation: ''The installer is responsible for determining the compatibility of this STC with other previously approved modifications.'' Nevertheless there have been installations made on inappropriate aircraft. These inappropriate installations could have been prevented if STC approvals were restricted to a specified baseline aircraft configuration that includes details of the STC physical and functional interfaces with the prototype aircraft.

Applicant's installation drawings or other installation instructions have not always been detailed enough for accurate replication of the design. This is especially true when follow-on STC installations occur at facilities other than that used by the STC holder for the prototype installation.

The STC certification process does not adequately address how to evaluate the compatibility of an STC with other previously installed STCs, major alterations or repairs. We need a more rigorous compatibility evaluation for certain STCs. This proposed policy ensures that the modified aircraft will be airworthy.

How To Get Copies

You may get a copy of the proposed Certification Policy Notice via the Internet at, *http://www.faa.gov/certification/aircraft/notice.htm,* or by contacting the person listed in the section titled **FOR FURTHER INFORMATION CONTACT**.

Issued in Washington, DC, on December 8, 2003.

David W. Hempe,

Manager, Aircraft Engineering Division, Aircraft Certification Service.

[FR Doc. 03–30742 Filed 12–11–03; 8:45 am]

BILLING CODE 4910–13–M

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Notice of Intent To Rule on Application 04–11–C–00–BNA To Impose and Use the Revenue From a Passenger Facility Charge (PFC) at Nashville International Airport, Nashville, TN

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of intent to rule on application.

SUMMARY: The FAA proposed to rule and invites public comment on the application to impose and use the revenue from a PFC at Nashville International Airport under the provisions of the 49 U.S.C. 40117 and part 158 of the Federal Aviation Regulations (14 CFR part 158).

DATES: Comments must be received on or before January 12, 2004.

ADDRESSES: Comments on this application may be mailed or delivered in triplicate to the FAA at the following address: Memphis Airports District Office, 2862 Business Park Drive, Building G. Memphis, Tennessee 38118–1555.

In addition, one copy of any comments submitted to the FAA must be mailed or delivered to Mr. Doug Wolfe, Senior Vice-President and Chief Financial Officer of the Metropolitan Nashville Airport Authority at the following address One Terminal Drive, Suite 501, Nashville, Tennessee, 37214.

Air carriers and foreign air carriers may submit copies of written comments previously provided to the Metropolitan Nashville Airport Authority under section 158.23 of Part 158.

FOR FURTHER INFORMATION CONTACT: Cynthia K. Wills, Program Manager, Memphis Airports District Office, 2862 Business Park Drive, Building G, Memphis, Tennessee 38118–1555, (901) 322–8190. The application may be reviewed in person at this same location.

SUPPLEMENTARY INFORMATION: The FAA proposes to rule and invites public comments on the application to impose and use the revenue from a PFC at Nashville International Airport under the provisions of the 49 U.S.C. 40117 and Part 158 of the Federal Aviation Regulations (14 CFR part 158).

On December 4, 2003, the FAA determined that the application to impose and use the revenue from a PFC submitted by Metropolitan Nashville Airport Authority was substantially complete within the requirements of section 158.25 of Part 158. The FAA will approve or disapprove the application, in whole or in part, no later than March 26, 2004.

The following is a brief overview of the application.

Proposed charge effective date: March 31, 2007.

Proposed charge expiration date: May 1, 2014.

Level of the proposed PFC: $3.00.

Total estimated PFC revenue: $81,526,000.

Brief description of proposed project(s): Airfield Construction, Develop GA Area, Engineering Study to Develop Land, PFC Eligible Project Reimbursement, Relocate Electrical Vault, Storm Water Treatment Facility Study, Widen TW Fillets.

Class or classes of air carriers which the public agency has requested not be required to collect PFCs: Part 135, Air Taxi.

Any person may inspect the application in person at the FAA office listed above under **FOR FURTHER INFORMATION CONTACT** and at the FAA regional Airports office located at: Southern Region Headquarters, 1701 Columbia Avenue, College Park, Georgia, 30337.

In addition, any person may, upon request, inspect the application, notice and other documents germane to the application in person at the Metropolitan Nashville Airport Authority.

Issued in Memphis, Tennessee, on December 4, 2003.

LaVerne F. Reid,

Manager, Memphis Airports District Office, Southern Region.

[FR Doc. 03–30741 Filed 12–11–03; 8:45 am]

BILLING CODE 4910–13–M

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

[Docket Nos. FMCSA–99–5748, FMCSA–99–6156]

Qualification of Drivers; Exemption Applications; Vision

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), DOT.

ACTION: Notice of renewal of exemption; request for comments.

SUMMARY: This notice publishes the FMCSA decision to renew the exemptions from the vision requirement in the Federal Motor Carrier Safety Regulations for 12 individuals. The FMCSA has statutory authority to exempt individuals from vision standards if the exemptions granted will not compromise safety. The agency has concluded that granting these exemptions will provide a level of safety that will be equivalent to, or greater than, the level of safety maintained without the exemptions for these commercial motor vehicle (CMV) drivers.

DATES: This decision is effective January 3, 2004. Comments from interested persons should be submitted by January 12, 2004.

ADDRESSES: You may submit comments identified by DOT DMS Docket Numbers FMCSA–99–5748 and FMCSA–99–6156 by any of the following methods:

- Web site: *http://dms.dot.gov.* Follow the instructions for submitting comments on the DOT electronic docket site.
- Fax: 1–202–493–2251.
- Mail: Docket Management Facility; U.S. Department of Transportation, 400 Seventh Street, SW., Nassif Building, Room PL–401, Washington, DC 20590–0001.
- Hand Delivery: Room PL–401 on the plaza level of the Nassif Building, 400 Seventh Street, SW., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal Holidays.
- Federal eRulemaking Portal: Go to *http://www.regulations.gov.* Follow the on-line instructions for submitting comments.

Instructions: All submissions must include the agency name and docket numbers for this notice. For detailed instructions on submitting comments and additional information on the rulemaking process, see the Public Participation heading of the Supplementary Information section of this document. Note that all comments received will be posted without change to *http://dms.dot.gov*, including any personal information provided. Please see the Privacy Act heading under Regulatory Notices.

Docket: For access to the docket to read background documents or comments received, go to *http://dms.dot.gov* at any time or to Room PL–401 on the plaza level of the Nassif Building, 400 Seventh Street, SW., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal Holidays.

FOR FURTHER INFORMATION CONTACT: Ms. Sandra Zywokarte, Office of Bus and Truck Standards and Operations, (202) 366–2987, FMCSA, Department of Transportation, 400 Seventh Street, SW., Washington, DC 20590–0001. Office hours are from 7:45 a.m. to 4:15 p.m., e.t., Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION:

Public Participation: The DMS is available 24 hours each day, 365 days each year. You can get electronic submission and retrieval help guidelines under the ''help'' section of the DMS Web site. If you want us to notify you that we received your comments, please include a self-addressed, stamped envelope or postcard or print the acknowledgement page that appears after submitting comments on-line.

Privacy Act: Anyone is able to search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review the Department of Transportation's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (Volume 65, Number 70; Pages 19477–78) or you may visit *http://dms.dot.gov.*

Exemption Decision

Under 49 U.S.C. 31315 and 31136(e), the FMCSA may renew an exemption from the vision requirement in 49 CFR 391.41(b)(10), which applies to drivers of CMVs in interstate commerce, for a 2-year period if it finds ''such exemption would likely achieve a level of safety that is equivalent to, or greater than, the level that would be achieved absent such exemption.'' The procedures for requesting an exemption (including renewals) are set out in 49 CFR Part 381. This notice addresses 12 individuals who have requested renewal of their exemptions in a timely manner. The FMCSA has evaluated these 12 applications for renewal on their merits and decided to extend each exemption for a renewable 2-year period. They are:

Woodrow E. Bohley
Curtis N. Fulbright
Martin Postma
Kenneth E. Bross
Richard L. Loeffelholz
Robert G. Rascicot
Charlie F. Cook
Herman C. Mash
Jon H. Wurtele
Russell W. Foster
Frank T. Miller
Walter M. Yohn, Jr.

These exemptions are extended subject to the following conditions: (1) That each individual have a physical exam every year (a) by an ophthalmologist or optometrist who attests that the vision in the better eye continues to meet the standard in 49 CFR 391.41(b)(10), and (b) by a medical examiner who attests that the individual is otherwise physically qualified under 49 CFR 391.41; (2) that each individual provide a copy of the ophthalmologist's or optometrist's report to the medical examiner at the time of the annual medical examination; and (3) that each individual provide a copy of the annual medical certification to the employer for retention in the driver's qualification file and retain a copy of the certification on his/her person while driving for presentation to a duly authorized Federal, State, or local enforcement official. Each exemption will be valid for 2 years unless rescinded earlier by the FMCSA. The exemption will be rescinded if: (1) The person fails to comply with the terms and conditions of the exemption; (2) the exemption has resulted in a lower level of safety than was maintained before it was granted; or (3) continuation of the exemption would not be consistent with the goals and objectives of 49 U.S.C. 31315 and 31136(e).

Basis for Renewing Exemptions

Under 49 U.S.C. 31315(b)(1), an exemption may be granted for no longer than 2 years from its approval date and may be renewed upon application for additional 2-year periods. In accordance with 49 U.S.C. 31315 and 31136(e), each of the 12 applicants has satisfied the entry conditions for obtaining an exemption from the vision requirements (64 FR 40404, 64 FR 66962, 66 FR 66969, 64 FR 54948, 65 FR 159). Each of these 12 applicants has requested timely renewal of the exemption and has submitted evidence showing that the vision in the better eye continues to meet the standard specified at 49 CFR 391.41(b)(10) and that the vision impairment is stable. In addition, a review of each record of safety while driving with the respective vision deficiencies over the past 2 years indicates each applicant continues to meet the vision exemption standards. These factors provide an adequate basis for predicting each driver's ability to continue to drive safely in interstate commerce. Therefore, the FMCSA concludes that extending the exemption for each renewal applicant for a period of 2 years is likely to achieve a level of

safety equal to that existing without the exemption.

Comments

The FMCSA will review comments received at any time concerning a particular driver's safety record and determine if the continuation of the exemption is consistent with the requirements at 49 U.S.C. 31315 and 31136(e). However, the FMCSA requests that interested parties with specific data concerning the safety records of these drivers submit comments by January 12, 2004.

In the past the FMCSA has received comments from Advocates for Highway and Auto Safety (Advocates) expressing continued opposition to the FMCSA's procedures for renewing exemptions from the vision requirement in 49 CFR 391.41(b)(10). Specifically, Advocates objects to the agency's extension of the exemptions without any opportunity for public comment prior to the decision to renew, and reliance on a summary statement of evidence to make its decision to extend the exemption of each driver.

The issues raised by Advocates were addressed at length in 66 FR 17994 (April 4, 2001). The FMCSA continues to find its exemption process appropriate to the statutory and regulatory requirements.

Issued on: December 8, 2003.

Rose A. McMurray,

Associate Administrator, Policy and Program Development.

[FR Doc. 03–30806 Filed 12–11–03; 8:45 am]

BILLING CODE 4910–EX–P

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

[Docket No. FMCSA–2001–10578]

Qualification of Drivers; Exemption Applications; Vision

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), DOT.

ACTION: Notice of renewal of exemption; request for comments.

SUMMARY: This notice publishes the FMCSA decision to renew the exemptions from the vision requirement in the Federal Motor Carrier Safety Regulations for 27 individuals. The FMCSA has statutory authority to exempt individuals from vision standards if the exemptions granted will not compromise safety. The agency has concluded that granting these exemptions will provide a level of safety that will be equivalent to, or greater than, the level of safety maintained without the exemptions for these commercial motor vehicle (CMV) drivers.

DATES: This decision is effective December 27, 2003. Comments from interested persons should be submitted by January 12, 2004.

ADDRESSES: You may submit comments identified by DOT DMS Docket Number FMCSA–2001–10578 by any of the following methods:

- Web site: *http://dms.dot.gov.* Follow the instructions for submitting comments on the DOT electronic docket site.
- Fax: 1–202–493–2251.
- Mail: Docket Management Facility; U.S. Department of Transportation, 400 Seventh Street, SW., Nassif Building, Room PL–401, Washington, DC 20590–0001.
- Hand Delivery: Room PL–401 on the plaza level of the Nassif Building, 400 Seventh Street, SW., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal Holidays.
- Federal eRulemaking Portal: Go to *http://www.regulations.gov.* Follow the on-line instructions for submitting comments.

Instructions: All submissions must include the agency name and docket numbers for this notice. For detailed instructions on submitting comments and additional information on the rulemaking process, see the Public Participation heading of the Supplementary Information section of this document. Note that all comments received will be posted without change to *http://dms.dot.gov,* including any personal information provided. Please see the Privacy Act heading under Regulatory Notices.

Docket: For access to the docket to read background documents or comments received, go to *http://dms.dot.gov* at any time or to Room PL–401 on the plaza level of the Nassif Building, 400 Seventh Street, SW., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal Holidays.

FOR FURTHER INFORMATION CONTACT: Ms. Sandra Zywokarte, Office of Bus and Truck Standards and Operations, (202) 366–2987, FMCSA, Department of Transportation, 400 Seventh Street, SW., Washington, DC 20590–0001. Office hours are from 7:45 a.m. to 4:15 p.m., e.t., Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION:

Public Participation: The DMS is available 24 hours each day, 365 days each year. You can get electronic submission and retrieval help guidelines under the ''help'' section of the DMS web site. If you want us to notify you that we received your comments, please include a self-addressed, stamped envelope or postcard or print the acknowledgement page that appears after submitting comments on-line.

Privacy Act: Anyone is able to search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review the Department of Transportation's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (Volume 65, Number 70; Pages 19477–78) or you may visit *http://dms.dot.gov.*

Exemption Decision

Under 49 U.S.C. 31315 and 31136(e), the FMCSA may renew an exemption from the vision requirement in 49 CFR 391.41(b)(10), which applies to drivers of CMVs in interstate commerce, for a 2-year period if it finds ''such exemption would likely achieve a level of safety that is equivalent to, or greater than, the level that would be achieved absent such exemption.'' The procedures for requesting an exemption (including renewals) are set out in 49 CFR part 381. This notice addresses 27 individuals who have requested renewal of their exemptions in a timely manner. The FMCSA has evaluated these 27 applications for renewal on their merits and decided to extend each exemption for a renewable 2-year period. They are:

Anthony Brandano
Vernon J. Dohrn
Stanley E. Elliott
Elmer E. Gockley
Paul C. Gruenberg, Jr.
Glenn T. Hehner
Thomas M. Ingebretsen
Lonnie M. Jones
Martin D. Keough
Ricky J. Knutson
Randall B. Laminack
Norman R. Lamy
James A. Lenhart
Dennis L. Lockhart, Sr.
Jerry J. Lord
Raymond P. Madron
Ronald S. Mallory
Charles J. Morman
Eugene C. Murphy
Jack E. Potts, Jr.
John E. Rogstad
Jerry W. Russell
Stephen G. Sniffin
John R. Snyder
Rene R. Trachsel
John H. Voigts

Kendle F. Waggle, Jr.

These exemptions are extended subject to the following conditions: (1) That each individual have a physical exam every year (a) by an ophthalmologist or optometrist who attests that the vision in the better eye continues to meet the standard in 49 CFR 391.41(b)(10), and (b) by a medical examiner who attests that the individual is otherwise physically qualified under 49 CFR 391.41; (2) that each individual provide a copy of the ophthalmologist's or optometrist's report to the medical examiner at the time of the annual medical examination; and (3) that each individual provide a copy of the annual medical certification to the employer for retention in the driver's qualification file and retain a copy of the certification on his/her person while driving for presentation to a duly authorized Federal, State, or local enforcement official. Each exemption will be valid for 2 years unless rescinded earlier by the FMCSA. The exemption will be rescinded if: (1) The person fails to comply with the terms and conditions of the exemption; (2) the exemption has resulted in a lower level of safety than was maintained before it was granted; or (3) continuation of the exemption would not be consistent with the goals and objectives of 49 U.S.C. 31315 and 31136(e).

Basis for Renewing Exemptions

Under 49 U.S.C. 31315(b)(1), an exemption may be granted for no longer than 2 years from its approval date and may be renewed upon application for additional 2-year periods. In accordance with 49 U.S.C. 31315 and 31136(e), each of the 27 applicants has satisfied the entry conditions for obtaining an exemption from the vision requirements (66 FR 53826, 66 FR 66966). Each of these 27 applicants has requested timely renewal of the exemption and has submitted evidence showing that the vision in the better eye continues to meet the standard specified at 49 CFR 391.41(b)(10) and that the vision impairment is stable. In addition, a review of each record of safety while driving with the respective vision deficiencies over the past 2 years indicates each applicant continues to meet the vision exemption standards. These factors provide an adequate basis for predicting each driver's ability to continue to drive safely in interstate commerce. Therefore, the FMCSA concludes that extending the exemption for each renewal applicant for a period of 2 years is likely to achieve a level of safety equal to that existing without the exemption.

Comments

The FMCSA will review comments received at any time concerning a particular driver's safety record and determine if the continuation of the exemption is consistent with the requirements at 49 U.S.C. 31315 and 31136(e). However, the FMCSA requests that interested parties with specific data concerning the safety records of these drivers submit comments by January 12, 2004.

In the past the FMCSA has received comments from Advocates for Highway and Auto Safety (Advocates) expressing continued opposition to the FMCSA's procedures for renewing exemptions from the vision requirement in 49 CFR 391.41(b)(10). Specifically, Advocates objects to the agency's extension of the exemptions without any opportunity for public comment prior to the decision to renew, and reliance on a summary statement of evidence to make its decision to extend the exemption of each driver.

The issues raised by Advocates were addressed at length in 66 FR 17994 (April 4, 2001). The FMCSA continues to find its exemption process appropriate to the statutory and regulatory requirements.

Issued on: December 8, 2003.

Rose A. McMurray,

Associate Administrator, Policy and Program Development.

[FR Doc. 03–30805 Filed 12–11–03; 8:45 am]

BILLING CODE 4910–EX–P

DEPARTMENT OF TRANSPORTATION

Maritime Administration

[Docket No. MARAD 2003 16651]

Information Collection Available for Public Comments and Recommendations

ACTION: Notice and request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, this notice announces the Maritime Administration's (MARAD's) intentions to request extension of approval for three years of a currently approved information collection.

DATES: Comments should be submitted on or before February 10, 2004.

FOR FURTHER INFORMATION CONTACT: Patricia Ann Thomas, Maritime Administration, MAR–630, 400 Seventh St., SW., Washington, DC 20590. Telephone: (202) 366–2646; FAX: (202) 493–2180; or e-mail: *patricia.thomas@marad.dot.gov.* Copies of this collection also can be obtained from that office.

SUPPLEMENTARY INFORMATION:

Title of Collection: Merchant Marine Medals and Awards.

Type of Request: Extension of currently approved information collection.

OMB Control Number: 2133–0506.

Form Numbers: None.

Expiration Date of Approval: Three years from date of approval by the Office of Management and Budget.

Summary of Collection of Information: This information collection provides a method of awarding merchant marine medals and decorations to masters, officers, and crew members of U.S. ships in recognition of their service in areas of danger during the operations by the Armed Forces of the United States in World War II, Korea, Vietnam, and Operation Desert Storm.

Need and Use of the Information: This information is used by MARAD personnel to process and verify requests for service awards.

Description of Respondents: Masters, officers and crew members of U.S. ships.

Annual Responses: 1200 responses.

Annual Burden: 1200 hours.

Comments: Comments should refer to the docket number that appears at the top of this document. Written comments may be submitted to the Docket Clerk, U.S. DOT Dockets, Room PL–401, 400 Seventh Street, SW., Washington, DC 20590. Comments also may be submitted by electronic means via the Internet at *http://dms.dot.gov/submit.* Specifically address whether this information collection is necessary for proper performance of the functions of the agency and will have practical utility, accuracy of the burden estimates, ways to minimize this burden, and ways to enhance the quality, utility, and clarity of the information to be collected. All comments received will be available for examination at the above address between 10 a.m. and 5 p.m. EDT (or EST), Monday through Friday, except Federal Holidays. An electronic version of this document is available on the World Wide Web at *http://dms.dot.gov.*

Dated: December 9, 2003.

By Order of the Maritime Administrator,

Joel C. Richard,

Secretary, Maritime Administration.

[FR Doc. 03–30813 Filed 12–11–03; 8:45 am]

BILLING CODE 4910–81–P

DEPARTMENT OF TRANSPORTATION

Maritime Administration

[Docket Number MARAD 2003 16610]

Requested Administrative Waiver of the Coastwise Trade Laws

AGENCY: Maritime Administration, Department of Transportation.

ACTION: Invitation for public comments on a requested administrative waiver of the Coastwise Trade Laws for the vessel BETELGEUSE II.

SUMMARY: As authorized by Pub. L. 105–383 and Pub. L. 107–295, the Secretary of Transportation, as represented by the Maritime Administration (MARAD), is authorized to grant waivers of the U.S.-build requirement of the coastwise laws under certain circumstances. A request for such a waiver has been received by MARAD. The vessel, and a brief description of the proposed service, is listed below. The complete application is given in DOT docket 2003–16610 at *http://dms.dot.gov.* Interested parties may comment on the effect this action may have on U.S. vessel builders or businesses in the U.S. that use U.S.-flag vessels. If MARAD determines, in accordance with Pub. L. 105–383 and MARAD's regulations at 46 CFR part 388 (68 FR 23084; April 30, 2003), that the issuance of the waiver will have an unduly adverse effect on a U.S.-vessel builder or a business that uses U.S.-flag vessels in that business, a waiver will not be granted. Comments should refer to the docket number of this notice and the vessel name in order for MARAD to properly consider the comments. Comments should also state the commenter's interest in the waiver application, and address the waiver criteria given in § 388.4 of MARAD's regulations at 46 CFR part 388.

DATES: Submit comments on or before January 12, 2004.

ADDRESSES: Comments should refer to docket number MARAD–2003 16610. Written comments may be submitted by hand or by mail to the Docket Clerk, U.S. DOT Dockets, Room PL–401, Department of Transportation, 400 7th St., SW., Washington, DC 20590–0001. You may also send comments electronically via the Internet at *http://dmses.dot.gov/submit/.* All comments will become part of this docket and will be available for inspection and copying at the above address between 10 a.m. and 5 p.m., E.T., Monday through Friday, except Federal holidays. An electronic version of this document and all documents entered into this docket is available on the World Wide Web at *http://dms.dot.gov.*

FOR FURTHER INFORMATION CONTACT: Michael Hokana, U.S. Department of Transportation, Maritime Administration, MAR–830 Room 7201, 400 Seventh Street, SW., Washington, DC 20590. Telephone (202) 366–0760.

SUPPLEMENTARY INFORMATION: As described by the applicant the intended service of the vessel BETELGEUSE II is:

Intended Use: ''Captained and bareboat charters daily and weekly.''

Geographic Region: ''Naples, Florida and Gulf of Mexico.''

Dated: December 3, 2003.

By order of the Maritime Administrator.

Joel C. Richard,

Secretary, Maritime Administration.

[FR Doc. 03–30812 Filed 12–11–03; 8:45 am]

BILLING CODE 4910–81–P

DEPARTMENT OF TRANSPORTATION

Maritime Administration

[Docket Number: MARAD 2003 16606]

Requested Administrative Waiver of the Coastwise Trade Laws

AGENCY: Maritime Administration, Department of Transportation.

ACTION: Invitation for public comments on a requested administrative waiver of the Coastwise Trade Laws for the vessel ENDURANCE.

SUMMARY: As authorized by Pub. L. 105–383 and Pub. L. 107–295, the Secretary of Transportation, as represented by the Maritime Administration (MARAD), is authorized to grant waivers of the U.S.-build requirement of the coastwise laws under certain circumstances. A request for such a waiver has been received by MARAD. The vessel, and a brief description of the proposed service, is listed below. The complete application is given in DOT docket 2003–16606 at *http://dms.dot.gov.* Interested parties may comment on the effect this action may have on U.S. vessel builders or businesses in the U.S. that use U.S.-flag vessels. If MARAD determines, in accordance with Pub. L. 105–383 and MARAD's regulations at 46 CFR part 388 (68 FR 23084; April 30, 2003), that the issuance of the waiver will have an unduly adverse effect on a U.S.-vessel builder or a business that uses U.S.-flag vessels in that business, a waiver will not be granted. Comments should refer to the docket number of this notice and the vessel name in order for MARAD to properly consider the comments. Comments should also state the commenter's interest in the waiver application, and address the waiver criteria given in § 388.4 of MARAD's regulations at 46 CFR part 388.

DATES: Submit comments on or before January 12, 2004.

ADDRESSES: Comments should refer to docket number MARAD–2003 16606. Written comments may be submitted by hand or by mail to the Docket Clerk, U.S. DOT Dockets, Room PL–401, Department of Transportation, 400 7th St., SW., Washington, DC 20590–0001. You may also send comments electronically via the Internet at *http://dmses.dot.gov/submit/.* All comments will become part of this docket and will be available for inspection and copying at the above address between 10 a.m. and 5 p.m., E.T., Monday through Friday, except Federal holidays. An electronic version of this document and all documents entered into this docket is available on the World Wide Web at *http://dms.dot.gov.*

FOR FURTHER INFORMATION CONTACT: Michael Hokana, U.S. Department of Transportation, Maritime Administration, MAR–830 Room 7201, 400 Seventh Street, SW., Washington, DC 20590. Telephone (202) 366–0760.

SUPPLEMENTARY INFORMATION: As described by the applicant the intended service of the vessel ENDURANCE is:

Intended Use: ''Charter of passengers for recreational purposes.''

Geographic Region: ''California, Oregon, Washington State.''

Dated: December 2, 2003.

By order of the Maritime Administrator.

Joel C. Richard,

Secretary, Maritime Administration.

[FR Doc. 03–30811 Filed 12–11–03; 8:45 am]

BILLING CODE 4910–81–P

DEPARTMENT OF TRANSPORTATION

Maritime Administration

[Docket Number MARAD 2003 16605]

Requested Administrative Waiver of the Coastwise Trade Laws

AGENCY: Maritime Administration, Department of Transportation.

ACTION: Invitation for public comments on a requested administrative waiver of the Coastwise Trade Laws for the vessel HOVER ONE.

SUMMARY: As authorized by Pub. L. 105–383 and Pub. L. 107–295, the Secretary of Transportation, as represented by the Maritime Administration (MARAD), is authorized to grant waivers of the U.S.-build requirement of the coastwise laws under certain circumstances. A request for such a waiver has been received by MARAD. The vessel, and a brief

description of the proposed service, is listed below. The complete application is given in DOT docket 2003–16605 at *http://dms.dot.gov.* Interested parties may comment on the effect this action may have on U.S. vessel builders or businesses in the U.S. that use U.S.-flag vessels. If MARAD determines, in accordance with Pub. L. 105–383 and MARAD's regulations at 46 CFR part 388 (68 FR 23084; April 30, 2003), that the issuance of the waiver will have an unduly adverse effect on a U.S.-vessel builder or a business that uses U.S.-flag vessels in that business, a waiver will not be granted. Comments should refer to the docket number of this notice and the vessel name in order for MARAD to properly consider the comments. Comments should also state the commenter's interest in the waiver application, and address the waiver criteria given in § 388.4 of MARAD's regulations at 46 CFR part 388.

DATES: Submit comments on or before January 12, 2004.

ADDRESSES: Comments should refer to docket number MARAD–2003 16605. Written comments may be submitted by hand or by mail to the Docket Clerk, U.S. DOT Dockets, Room PL–401, Department of Transportation, 400 7th St., SW., Washington, DC 20590–0001. You may also send comments electronically via the Internet at *http://dmses.dot.gov/submit/.* All comments will become part of this docket and will be available for inspection and copying at the above address between 10 a.m. and 5 p.m., E.T., Monday through Friday, except Federal holidays. An electronic version of this document and all documents entered into this docket is available on the World Wide Web at *http://dms.dot.gov.*

FOR FURTHER INFORMATION CONTACT: Michael Hokana, U.S. Department of Transportation, Maritime Administration, MAR–830 Room 7201, 400 Seventh Street, SW., Washington, DC 20590. Telephone (202) 366–0760.

SUPPLEMENTARY INFORMATION: As described by the applicant the intended service of the vessel HOVER ONE is:

Intended Use: ''Passenger transportation between Sandusky, OH, and Kelly's Island, OH, primarily over the ice during winter months, when displacement vessels cannot operate.''

Geographic Region: ''Great Lakes.''

Dated: December 2, 2003.

By order of the Maritime Administrator.

Joel C. Richard,

Secretary, Maritime Administration.

[FR Doc. 03–30807 Filed 12–11–03; 8:45 am]

BILLING CODE 4910–81–P

DEPARTMENT OF TRANSPORTATION

Maritime Administration

[Docket Number MARAD 2003 16607]

Requested Administrative Waiver of the Coastwise Trade Laws

AGENCY: Maritime Administration, Department of Transportation.

ACTION: Invitation for public comments on a requested administrative waiver of the Coastwise Trade Laws for the vessel MONTAUK LIGHT.

SUMMARY: As authorized by Pub. L. 105–383 and Pub. L. 107–295, the Secretary of Transportation, as represented by the Maritime Administration (MARAD), is authorized to grant waivers of the U.S.-build requirement of the coastwise laws under certain circumstances. A request for such a waiver has been received by MARAD. The vessel, and a brief description of the proposed service, is listed below. The complete application is given in DOT docket 2003–16607 at *http://dms.dot.gov.* Interested parties may comment on the effect this action may have on U.S. vessel builders or businesses in the U.S. that use U.S.-flag vessels. If MARAD determines, in accordance with Pub. L. 105–383 and MARAD's regulations at 46 CFR part 388 (68 FR 23084; April 30, 2003), that the issuance of the waiver will have an unduly adverse effect on a U.S.-vessel builder or a business that uses U.S.-flag vessels in that business, a waiver will not be granted. Comments should refer to the docket number of this notice and the vessel name in order for MARAD to properly consider the comments. Comments should also state the commenter's interest in the waiver application, and address the waiver criteria given in § 388.4 of MARAD's regulations at 46 CFR part 388.

DATES: Submit comments on or before January 12, 2004.

ADDRESSES: Comments should refer to docket number MARAD–2003 16607. Written comments may be submitted by hand or by mail to the Docket Clerk, U.S. DOT Dockets, Room PL–401, Department of Transportation, 400 7th St., SW., Washington, DC 20590–0001. You may also send comments electronically via the Internet at *http://dmses.dot.gov/submit/.* All comments will become part of this docket and will be available for inspection and copying at the above address between 10 a.m. and 5 p.m., E.T., Monday through Friday, except federal holidays. An electronic version of this document and all documents entered into this docket is available on the World Wide Web at *http://dms.dot.gov.*

FOR FURTHER INFORMATION CONTACT: Michael Hokana, U.S. Department of Transportation, Maritime Administration, MAR–830 Room 7201, 400 Seventh Street, SW., Washington, DC 20590. Telephone (202) 366–0760.

SUPPLEMENTARY INFORMATION: As described by the applicant the intended service of the vessel MONTAUK LIGHT is:

Intended Use: ''Carrying passengers for pleasure charters, day and overnight.''

Geographic Region: ''New York, Connecticut, Rhode Island, Massachusetts, Maine, New Hampshire, New Jersey, Maryland, Virginia, Florida.''

Dated: December 2, 2003.

By order of the Maritime Administrator.

Joel C. Richard,

Secretary, Maritime Administration.

[FR Doc. 03–30810 Filed 12–11–03; 8:45 am]

BILLING CODE 4910–81–P

DEPARTMENT OF TRANSPORTATION

Maritime Administration

[Docket Number MARAD 2003 16608]

Requested Administrative Waiver of the Coastwise Trade Laws

AGENCY: Maritime Administration, Department of Transportation.

ACTION: Invitation for public comments on a requested administrative waiver of the Coastwise Trade Laws for the vessel MYSTIQUE.

SUMMARY: As authorized by Pub. L. 105–383 and Pub. L. 107–295, the Secretary of Transportation, as represented by the Maritime Administration (MARAD), is authorized to grant waivers of the U.S.-build requirement of the coastwise laws under certain circumstances. A request for such a waiver has been received by MARAD. The vessel, and a brief description of the proposed service, is listed below. The complete application is given in DOT docket 2003–16608 at *http://dms.dot.gov.* Interested parties may comment on the effect this action may have on U.S. vessel builders or businesses in the U.S. that use U.S.-flag vessels. If MARAD determines, in accordance with Pub. L. 105–383 and MARAD's regulations at 46 CFR part 388 (68 FR 23084; April 30, 2003), that the issuance of the waiver will have an unduly adverse effect on a U.S.-vessel builder or a business that uses U.S.-flag vessels in that business, a waiver will not be granted. Comments should refer to the docket number of this notice and the vessel name in order for MARAD to

properly consider the comments. Comments should also state the commenter's interest in the waiver application, and address the waiver criteria given in § 388.4 of MARAD's regulations at 46 CFR part 388.

DATES: Submit comments on or before January 12, 2004.

ADDRESSES: Comments should refer to docket number MARAD–2003 16608. Written comments may be submitted by hand or by mail to the Docket Clerk, U.S. DOT Dockets, Room PL–401, Department of Transportation, 400 7th St., SW., Washington, DC 20590–0001. You may also send comments electronically via the Internet at *http://dmses.dot.gov/submit/.* All comments will become part of this docket and will be available for inspection and copying at the above address between 10 a.m. and 5 p.m., E.T., Monday through Friday, except Federal holidays. An electronic version of this document and all documents entered into this docket is available on the World Wide Web at *http://dms.dot.gov.*

FOR FURTHER INFORMATION CONTACT: Michael Hokana, U.S. Department of Transportation, Maritime Administration, MAR–830 Room 7201, 400 Seventh Street, SW., Washington, DC 20590. Telephone (202) 366–0760.

SUPPLEMENTARY INFORMATION: As described by the applicant the intended service of the vessel MYSTIQUE is:

Intended Use: ''A for-profit business in charter for guests on a weekly basis throughout the calendar year.''

Geographic Region: ''East Coast and Gulf Coast of the United States including Chesapeake Bay.''

Dated: December 2, 2003.

By order of the Maritime Administrator.

Joel C. Richard,

Secretary, Maritime Administration.

[FR Doc. 03–30809 Filed 12–11–03; 8:45 am]

BILLING CODE 4910–81–P

DEPARTMENT OF TRANSPORTATION

Maritime Administration

[Docket Number MARAD 2003 16609]

Requested Administrative Waiver of the Coastwise Trade Laws

AGENCY: Maritime Administration, Department of Transportation.

ACTION: Invitation for public comments on a requested administrative waiver of the Coastwise Trade Laws for the vessel NICOLE MARIE.

SUMMARY: As authorized by Pub. L. 105–383 and Pub. L. 107–295, the Secretary of Transportation, as represented by the Maritime Administration (MARAD), is authorized to grant waivers of the U.S.-build requirement of the coastwise laws under certain circumstances. A request for such a waiver has been received by MARAD. The vessel, and a brief description of the proposed service, is listed below. The complete application is given in DOT docket 2003–16609 at *http://dms.dot.gov.* Interested parties may comment on the effect this action may have on U.S. vessel builders or businesses in the U.S. that use U.S.-flag vessels. If MARAD determines, in accordance with Pub. L. 105–383 and MARAD's regulations at 46 CFR part 388 (68 FR 23084; April 30, 2003), that the issuance of the waiver will have an unduly adverse effect on a U.S.-vessel builder or a business that uses U.S.-flag vessels in that business, a waiver will not be granted. Comments should refer to the docket number of this notice and the vessel name in order for MARAD to properly consider the comments. Comments should also state the commenter's interest in the waiver application, and address the waiver criteria given in § 388.4 of MARAD's regulations at 46 CFR part 388.

DATES: Submit comments on or before January 12, 2004.

ADDRESSES: Comments should refer to docket number MARAD–2003 16609. Written comments may be submitted by hand or by mail to the Docket Clerk, U.S. DOT Dockets, Room PL–401, Department of Transportation, 400 7th St., SW., Washington, DC 20590–0001. You may also send comments electronically via the Internet at *http://dmses.dot.gov/submit/.* All comments will become part of this docket and will be available for inspection and copying at the above address between 10 a.m. and 5 p.m., E.T., Monday through Friday, except Federal holidays. An electronic version of this document and all documents entered into this docket is available on the World Wide Web at *http://dms.dot.gov.*

FOR FURTHER INFORMATION CONTACT: Michael Hokana, U.S. Department of Transportation, Maritime Administration, MAR–830 Room 7201, 400 Seventh Street, SW., Washington, DC 20590. Telephone 202–366–0760.

SUPPLEMENTARY INFORMATION: As described by the applicant the intended service of the vessel NICOLE MARIE:

Intended Use: ''Bareboat Charter.''

Geographic Region: ''Alaska except for SE Alaska, Washington State based in Seattle, and Oregon.''

Dated: December 2, 2003.

By order of the Maritime Administrator.

Joel C. Richard,

Secretary, Maritime Administration.

[FR Doc. 03–30808 Filed 12–11–03; 8:45 am]

BILLING CODE 4910–81–P

Corrections

Federal Register

Vol. 68, No. 239

Friday, December 12, 2003

This section of the FEDERAL REGISTER contains editorial corrections of previously published Presidential, Rule, Proposed Rule, and Notice documents. These corrections are prepared by the Office of the Federal Register. Agency prepared corrections are issued as signed documents and appear in the appropriate document categories elsewhere in the issue.

DEPARTMENT OF DEFENSE

Department of the Army

Performance Review Board Membership for the Office of the Secretary of the Army

Correction

In notice document 03–30365 beginning on page 68359 in the issue of Monday, December 8, 2003, make the following corrections:

1. On page 68359, in the second column, in paragraph 23, in the first line ''Mr. Mat Reres'' should read ''Mr. Matt Reres.''

2. On the same page, in the third column, in paragraph 36, in the first line, ''MG David F. Wherely, Jr.'' should read ''MG David F. Wherley, Jr.''

3. On the same page, in the same column, in paragraph 41, in the second line, ''Coast Analysis'' should read ''Cost Analysis.''

[FR Doc. C3–30365 Filed 12–11–03; 8:45 am]

BILLING CODE 1505–01–D

Federal Register

Friday,

December 12, 2003

Part II

Department of Commerce

Patent and Trademark Office

37 CFR Parts 1, 2, 10 and 11

Changes to Representation of Others Before the United States Patent and Trademark Office; Proposed Rule

DEPARTMENT OF COMMERCE

Patent and Trademark Office

37 CFR Parts 1, 2, 10 and 11

[Docket No.: 2002–C–005]

RIN 0651–AB55

Changes to Representation of Others Before the United States Patent and Trademark Office

AGENCY: United States Patent and Trademark Office, Commerce.

ACTION: Notice of proposed rulemaking.

SUMMARY: The United States Patent and Trademark Office (Office or USPTO) proposes to update the procedures regarding enrollment and discipline. The Office also proposes to replace the current USPTO Code of Professional Responsibility, which is based on the Model Code of Professional Responsibility of the American Bar Association, with new USPTO Rules of Professional Conduct, largely based on the Model Rules of Professional Conduct of the American Bar Association.

DATES: To be ensured of consideration, written comments must be received on or before February 10, 2004.

ADDRESSES: Comments should be sent by electronic mail over the Internet addressed to: *ethicsrules.comments@uspto.gov.* Comments may also be submitted by mail addressed to: Mail Stop OED-Ethics Rules, United States Patent and Trademark Office, P.O. Box 1450, Alexandria, Virginia 22313–1450 or by facsimile to (703) 306–4134, marked to the attention of Harry I. Moatz. Although comments may be submitted by mail or facsimile, the Office prefers to receive comments via the Internet. If comments are submitted by mail, the Office would prefer that the comments be submitted on a DOS formatted 3½-inch disk accompanied by a paper copy. The comments will be available for public inspection at the Office of Enrollment and Discipline, located in Room 1103, Crystal Plaza 6, 2221 South Clark Street, Arlington, Virginia, and will be available through anonymous file transfer protocol (ftp) via the Internet (address: *http://www.uspto.gov*). Since comments will be made available for public inspection, information that is not desired to be made public, such as an address or telephone number, should not be included in the comments.

FOR FURTHER INFORMATION CONTACT: Harry I. Moatz ((703) 305–9145), Director of Enrollment and Discipline (OED Director), directly by phone, or by facsimile to (703) 305–4136, marked to the attention of Mr. Moatz, or by mail addressed to: Mail Stop OED-Ethics Rules, U.S. Patent and Trademark Office, P.O. Box 1450, Alexandria, Virginia 22313–1450.

SUPPLEMENTARY INFORMATION: At this time, nearly 28,000 individuals are registered as patent attorneys and agents, of whom about 80% have indicated that they are attorneys. The registered patent attorneys have offices located in all fifty States and the District of Columbia. More than 2,500 individuals applied for admission to the registration examination given on October 18, 2000. At the same time, the Martindale-Hubbell reports that there are more than 900,000 lawyers and law firms listed in its legal directory. More than 17,000 attorneys are members of the Intellectual Property Law Committee of the American Bar Association. Any attorney who is a member in good standing of the bar of the highest court of a State or the District of Columbia is eligible to practice before the Office in trademark and other non-patent matters. 5 U.S.C. 500(a). Forty-two of the bars have adopted the Model Rules of Professional Conduct of the American Bar Association or a modification thereof, and two have disciplinary rules which are a combination of the Model Code and the Model Rules of Professional Conduct of the American Bar Association. Adopting ethics rules that are largely based on the Model Rules of Professional Conduct of the American Bar Association would provide attorneys, as well as registered patent agents, with consistent ethical standards, and large bodies of both case law and ethics opinions.

This notice of proposed rule making sets out rules in three areas:

(1) Rules of general applicability, and rules governing the recognition of individuals to practice as attorneys and agents before the Office in patent, trademark, and other non-patent matters (§§ 11.1–11.18);

(2) Rules governing investigation and disciplinary proceedings for possible violations of the Office Rules of Professional Conduct (§§ 11.19–11.62). Disciplinary proceedings can result in reprimand, suspension or exclusion (disbarment) of individuals from practicing before the Office who, after notice and opportunity for a hearing, are found to have violated an imperative USPTO Rule of Professional Conduct; and

(3) Rules setting out the proposed Office Rules of Professional Conduct (§§ 11.100–11.806).

These changes are intended to improve the Office's processes for handling applications for registration, petitions, investigations, and disciplinary proceedings. The changes also are intended to bring standards of ethical practice before the Office into closer conformity with the Rules of Professional Conduct adopted by the majority of States, while addressing circumstances particular to practice before the Office. As these environments change (*e.g.*, by adoption of amendments to the Model Rules of Professional Conduct of the American Bar Association) the Office will consider whether to make further changes to the rules.

This proposed rule making is being conducted under the auspices of the General Counsel of the United States Patent and Trademark Office, James Toupin (703) 308–2000, and the supervision of the OED Director, Harry I. Moatz (703) 305–9145). They would appreciate feedback on the overall rule making process in addition to any comments on the merits of the proposed rules.

Table 1 shows the principal sources of the proposed rules relating to (1) admission to practice of attorneys and agents in patent matters, and (2) practice in trademark and non-patent matters.

Table 2 shows the principal sources of the rules proposed for disciplinary proceedings.

Table 3 shows the principal sources of the rules proposed for the Office Rules of Professional Conduct.

Discussion of Specific Rules:

Section 1.1 would be amended to add paragraph (4) to provide an address for correspondence for the Office of Enrollment and Discipline in enrollment, registration and investigation matters.

Section 1.4 would be amended to revise the references from §§ 10.18(b)(2), 10.18(c), and 10.23(c)(15) to §§ 11.18(b)(2), 11.18(c), and 11.804(c)(i)(15), respectively.

Section 1.21 would be amended to revise one paragraph into two distinct fees, add ten paragraphs to provide for ten new fees, as well as to reserve paragraph (3), redesignate another paragraph and change a section citation therein. These fees are intended to fund the costs of the registration examination process, disciplinary system, and maintain the roster of registered practitioners up-to-date. Bar disciplinary activities are generally regarded as being in the interest of maintaining the Bar's reputation for integrity and supporting the willingness of potential clients to engage the services of practitioners. The continual

updating of the USPTO roster is also in the interest of assuring that registered practitioners are identified to the public they seek to serve. The cost is currently met by funds from application, issue, or maintenance fees. By adopting these fees to be paid by registered practitioners, the costs of these activities are not passed on to applicants. Thus, USPTO will recover the costs associated with these activities from the practitioners instead of the public in general. The funds would be directed to these activities and would not be diverted to support other proposals. The fees are based on the status of the registered practitioner.

The USPTO is revising the way in which its registration examination is administered. Currently, the examination is administered twice a year, using a unique set of questions each time. The USPTO is moving to a frequently administered computer-based examination using a slate of questions randomly selected from a large data bank of questions and answers that will be publicly available. This change will make the testing process more efficient and will benefit applicants by permitting instant notification of test results, eliminating the current approximately six weeks needed to report the results of a paper-based examination. The computer-based examination will also facilitate more frequent administration and permit the test to be given simultaneously in many locations, thus reducing delays and travel expenses for applicants. Paragraph 1.21(a)(1)(ii)(B) would increase the examination fee to $450 for the test administered by the USPTO in order to recover the full costs of the examination process. Paragraph 1.21(a)(1)(ii)(A) would introduce a reduced examination fee of $200 for the test administered by a private sector entity. The $200 fee would cover the costs of establishing and maintaining an up-to-date question and answer data bank to be used in the computerized delivery of the examination, but excludes the costs of actual test administration. This $200 fee will apply where administrative testing arrangements are made by a private sector entity. Applicants paying the $200 fee would schedule the test with the private sector entity, and pay a service fee, estimated to be $150, to the entity.

A registered practitioner in active status is one who is able to represent clients and conduct business before the USPTO in patent cases. To maintain active status, the practitioner would pay the annual fee required under §§ 1.21(a)(7)(i) and 11.8(d) and comply with the continuing legal education (CLE) requirements under §§ 11.12(a) and (e). With respect to the CLE requirement, an inactive or administratively suspended practitioner would have to contact the OED Director to be advised which CLE's to take.

A registered practitioner in inactive status would be prohibited from representing clients and continuing to practice before the Office in patent cases. Inactive status may be of an administrative nature where the status is inconsistent with the role of a practitioner, as in the cases of examiners working for the Office and judges. Inactive status also may be voluntary, as in the case of practitioners who have retired or are unable to continue their practice due to disability-related matters but still desire to maintain a recognized professional association with the USPTO. Practitioners with a disability may become inactive.

A registered practitioner under administrative inactive status is not responsible for payment of the annual fee, or complying with the CLE requirements while in this status, but will have to complete the continuing education requirements for restoration to active status. A registered practitioner under voluntary inactive status is responsible for paying a reduced annual fee and completing the CLE requirements during the period of inactivation. For the purposes of this section, the fee for a registered practitioner in voluntary inactive status is 25% of the fee for a registered practitioner in active status. If a condition occurs that automatically terminates a practitioner's administrative inactive status, *e.g.*, separation from the USPTO, it would be permissible for that practitioner to seek a voluntary inactive status where the practitioner does not intend to represent clients and practice before the Office, but still desires to maintain a professionally recognized association with the Office.

A registered practitioner who is administratively suspended is one who has failed to pay the annual fee required under § 11.8(d) or to comply with the continuing legal education requirements under §§ 11.12(a) and (e). Registered practitioners under active status can be administratively suspended under failure to comply with payment of the annual fee or failure to meet the CLE requirements. Registered practitioners under voluntary inactive status can only be administratively suspended for failure to comply with payment of the reduced annual fee.

Paragraph 1.21(a)(5)(i) would be added for a new fee for review of a decision by the OED Director. Paragraphs 1.21(a)(7) (i) and (ii) would be added for a new annual fee for registered patent attorneys and agents based on their active or inactive status. Paragraphs 1.21(a)(7) (iii) provides for a new fee due with a request from a practitioner seeking restoration to active status from inactive status. Paragraph 1.21(a)(7) (iv) would be added for payment of the balance due on the annual fee upon restoring active status to a registered practitioner in inactive status. Paragraph 1.21(a)(8) would be added for a new annual fee for individuals granted limited recognition. An individual granted limited recognition would not be eligible for voluntary inactive status. Paragraph 1.21(a)(9) would be added to set fees associated with the administrative suspension of a registered practitioner. Paragraph 1.21(a)(9)(i) would be added for a new fee for delinquency in payment of the annual fee or completing the required CLE requirements. Paragraph 1.21(a)(9)(ii) would be added for a new fee for reinstatement following administrative suspension. Paragraph 1.21(a)(5) has been redesignated (a)(5)(ii), and section citation of 10.2(c) would be changed to § 11.2(d). Redesignated (a)(5)(ii), and section citation of 10.2(c) would be changed to § 11.2(d). Paragraph 1.21(a)(10) would be added for a fee paid on application by a person for recognition or registration after disbarment, suspension, or resignation pending disciplinary proceedings in any other jurisdiction; on petition for reinstatement by a person excluded, suspended, or excluded on consent from practice before the Office; on application by a person for recognition or registration who is asserting rehabilitation from prior conduct that resulted in an adverse decision in the Office regarding the person's moral character; and on application by a person for recognition or registration after being convicted of a felony or crime involving moral turpitude or breach of fiduciary duty. Paragraph 1.21(a)(11) would be added for a paper version of the continuing training program and furnished narrative. Paragraph 1.21(a)(12) would be added for Application by Sponsor for Pre-approval of a Continuing Education Program.

Paragraph (a)(5) of § 1.21 would be revised to add two paragraphs. Paragraph (i) would introduce a fee for review by the OED Director of a decision by a staff member of the Office of Enrollment and Discipline. Section

1.21(a)(5) would be revised and redesignated (a)(5)(ii).

Paragraph (a)(6) of § 1.21 would be eventually revised by deleting the fee for regrade and reserve the omitted paragraph.

Paragraph (a)(7) of § 1.21 is proposed to be added to provide for a new annual fee paid by active and voluntary inactive registered patent attorneys and agents.

Paragraph (a)(8) of § 1.21(a)(8) is proposed to be added to provide for a new annual fee paid by individuals granted limited recognition to practice before the Office.

Paragraph (a)(9) of § 1.21 is proposed to be added to provide for new fees associated with delinquency resulting in administrative suspension of a registered practitioner, and reinstatement of the practitioner.

Paragraph (a)(12) of § 1.21 is proposed to be added to provide for a fee to be paid by a sponsor upon submitting to the OED Director all information called for by the ''Application by Sponsor for Pre-approval of a Continuing Education Program.''

Section 1.31 would be amended to revise the references from §§ 10.6 and 10.9 to §§ 11.6 and 11.9, respectively.

Section 1.33(c) would be amended to revise the references from §§ 10.5 and 10.11 to §§ 11.5 and 11.11, respectively.

Section 1.455 would be amended to revise the reference from § 10.10 to § 11.10.

Section 2.11 would be amended to revise the reference from § 10.14 to § 11.14.

Section 2.17(a) would be amended to revise the reference from §§ 10.1 and 10.14 to §§ 11.1 and 11.14, respectively.

Section 2.17(c) would be amended to revise the reference from § 10.1 to § 11.1.

Section 2.24 would be amended to revise the reference from § 10.14 to § 11.14.

Section 2.161(b)(3) would be amended to revise the reference from § 10.1 to § 11.1.

Section 11.1 would set out definitions of terms used in Part 11. The defined terms include: affidavit, application, attorney, belief, consent, consult, differing interests, employee of a tribunal, firm, fraud, full disclosure, giving information, hearing officer, knowingly, law clerk, legal counsel, legal profession, legal service, legal system, matter, OED Director, Office, partner, person, practitioner, proceeding before the Office, professional legal corporation, reasonable, reasonably should know, registration, respondent, secret, solicit, state, substantial, tribunal, and United States.

In the proposed rules, the word ''individual'' is used to mean a natural person, as opposed to a juristic entity. The definition of ''person'' is similar to the definition of ''person'' in 1 U.S.C. 1. ''Attorney'' is defined in the same manner as the term is used in 5 U.S.C. 500(b). The proposed definition includes an attorney who is a member of one bar in good standing, and ''under an order of any court or Federal agency suspending, enjoining, restraining, disbarring or otherwise restricting'' the attorney from practice before the bar of another state or Federal agency. The broad definition is believed necessary inasmuch as 5 U.S.C. 500(b) provides that ''an individual who is a member in good standing of the bar of the highest court of a State may represent a person before an agency * * *.'' Though an attorney suspended in one state and a member in good standing in another state could represent a person before the Office, nevertheless the grounds for suspension in one state may give rise to grounds for suspending the attorney from practice before the Office, 5 U.S.C. 500(d)(2), after notice and opportunity for a hearing. See *Selling* v. *Radford*, 243 U.S. 46 (1917).

The phrase ''full disclosure'' is used to define the explanation a practitioner must give a client regarding potential and actual conflicts of interest. The explanation is based on discussions of full disclosure found in Opinion No. 1997–148, Standing Committee on Professional Responsibility and Conduct (California), and in *In re James*, 452 A.2d 163 (D.C. App. 1982).

Section 11.2, like current § 10.2, would continue to provide for the OED Director. The proposed rule sets out the duties of the OED Director, including receiving and acting upon applications, conducting investigations concerning the moral character and reputation of individuals seeking registration, conducting investigations of possible violations by practitioners of the Office Rules of Professional Conduct, initiating disciplinary proceedings, dismissing complaints or closing investigations, and filing with the Director of the United States Patent and Trademark Office (''USPTO Director'') certificates of convictions of practitioners. Except as otherwise noted, any final decision of the OED Director refusing to register an individual, refund a fee, recognize an individual, or reinstate a suspended or excluded practitioner would be reviewable by the USPTO Director. A fee, set forth in 37 CFR 1.21(a)(5), would be charged.

Section 11.3 would provide for waiver of the rules and qualified immunity.

Paragraph (a) of § 11.3, like current § 10.170, would provide for suspension, except as provided in section (b), in an extraordinary situation, when justice requires, of any requirement of the regulations of this part which is not a requirement of the statutes.

Paragraph (b) of § 11.3 would prohibit waiver of any provision of the Office Rules of Professional Conduct, §§ 11.100 through 11.806; the disciplinary jurisdiction of the rules, § 11.19; or the procedures for interim suspension and disciplinary proceeding based on reciprocal discipline or conviction of a serious crime, § 11.24.

Paragraph (c) of § 11.3, like current § 10.170(b), would provide that a petition to waive a rule will not stay a disciplinary proceeding unless ordered by the USPTO Director or a hearing officer.

Paragraph (d) of § 11.3 would provide a qualified privilege for complaints submitted to the OED Director. This privilege should arise from the necessity to reduce to the extent possible any probability that an ethics complainant having honest cause to complain may be intimidated by a practitioner into not filing a complaint. Some states recognize that a complainant has absolute immunity for filing a complaint regardless of the outcome of the proceeding. *See Drummond* v. *Stahl*, 127 Ariz. 122, 618 P.2d 616 (Ct. App. Div 1 1980), *cert. denied*, 450 U.S. 967, 101 S.Ct. 1484, 67 L. Ed. 2d 616 (1981); *Katz* v. *Rosen*, 48 Cal. App. 3d 1032, 121 Cal. Rptr. 853 (1st. Dist. 1975); *Field* v. *Kearns*, 43 Conn. App. 265, 682 A.2d 148 (1996), *cert. denied*, 239 Conn. 942, 684 A.2d 711 (1996); *Jarvis* v. *Drake*, 250 Kan. 645,830 P.2d 23 (1992); *Kerpelman* v. *Bricker*, 23 Md. App. 628, 329 A.2d 423 (1974); *Netterville* v. *Lear Siegler, Inc.,* 397 So.2d 1109 (Miss. 1981); *Sinnett* v. *Albert*, 188 Neb. 176, 195 N.W.2d 506 (1972); *Weiner* v. *Weintraub*, 22 N.Y.2d 330, 292 N.Y.S.2d 667, 239 N.E.2d 540 (1968); *Elsass* v. *Tabler*, 131 Ohio App.3d 66, 721 N.E.2d 503 (1999); *McAfee* v. *Feller*, 452 S.W.2d 56 (Tex. Civ. App. Houston 14th Dist. 1970). Complaints filed with a state bar committee are absolutely privileged as communications made in a quasi-judicial proceeding. *E.g., Goldstein* v. *Serio*, 496 So.2d 412 (La. Ct. App. 4th Cir. 1986), writ denied, 501 So.2d 208, 209 (La. 1987).

Under English common law, the ''absolute privilege'' from defamation actions that attaches to all statements and testimony by witnesses, judges, and parties in the course of any judicial proceeding has been held to apply to

testimony and statements made in the course of solicitor disciplinary proceedings. *See Addis* v. *Crocker*, 1 Q.B. 11, 2 All E.R. 629 CA. *See Halisbury's Laws of England*, Libel and Slander 28:98–101. Several states provide absolute privilege for complaints and testimony in ethics proceedings through statutes, court rules, or rules of attorney discipline. *See* Alaska Attorney Rules, Disciplinary Enforcement Rule 9 (Supp.1983); Ariz. Rules Regulating Conduct of Attorneys, Rule XII (Michie Supp. 1983); Cal. Art. 5.5 § 6094 (1984); Colo.R.C.P. Rule 259(C) (Michie Supp. 1983); *Stone* v. *Rosen*, 348 So. 2d 397 (Fla.Dist.Ct.App. 3 1977); Ga. Code App. to Title 9, Part IV, State Bar Rule 4–221(g); Hawaii S. Ct. Rule 16.7 (1992); La. Rev. Stat. Ann. § 37 ch. 4 App., Art. of Incorp. Of La. State Bar Ass'n., Art. 15 § 13 (West Supp. 1983); Minn. Rules of Law: Prof. Resp., Rule 21 (1977); Miss. Code Ann. § 73–3–345 (1992); N.J.S.Ct.Rule 1:20–11(b)(1984); *Sullivan* v. *Crisona*, 283 N.Y.S.2d 62 (Sup. Ct. 1967) (interpreting N.Y. Judiciary Law § 90); N.D. Cent. Code § 27–14–03 (1974); Okla. Ct. Rules Governing Disciplinary Proc., Chap. 1, App. 1–A, Rule 5, Sec.5.4 (1981); S.C. Rules on Disciplinary Procedure for Att'ys §§ 11, 26 (Lawyers Coop. Supp. 1983) (complaints may be subject to contempt sanctions and injunction against malicious filing, but privilege prevents lawsuits predicated on filing or testimony); S.D. Codified Laws Ann. § 16–19–30 (1994); W. Va. State Bar Bylaws Art. VI § 43 (1982); Wyo. Ct. Rules, Disciplinary Code for the Wyo. State Bar, Rule VI (1973).

Other jurisdictions provide qualified immunity or privilege. *See* Ind. S.Ct. Rules Part VI, Admission & Discipline Rule 23 § 20 (1983) (immunity in absence of malice); Kan.S.Ct.Rule 223 (same privilege as attaches in other judicial proceedings); Me. Bar Rule 7(f)(1) (1983) (immunity in absence of malice); Neb.S.Ct. Rule 106 (1983) (absolute privilege for good faith complainant); *In re Proposed Rules Relating to Grievance Pro.,* 341 A.2d 272 (N.H. 1975) (approving proposed rules effective July 25, 1975, Rule 10 providing immunity for statements made in good faith).

Communications made to licensing agencies in connection with an application for issuance, renewal, or revocation of a license have frequently been held to be entitled to absolute privilege. *Alagna* v. *New York & Cuba Mail S.S. Co.,* 155 Misc. 796 279 NYS 319 (1935) (complaint to Federal Communications Commission complaining of conduct of licensed radio operators held absolutely privileged). Communications to Federal agencies responsible for protecting the public are privileged. *See Holmes* v. *Eddy*, 341 F.2d 477 (CA 4 1965) (holding communication to the Securities and Exchange Commission did not amount to defamation since Commission had statutory duty to protect public from frauds through stock issues, and communication was treated as confidential and not disclosed until beginning of court action); *Riccobene* v. *Scales*, 19 F.Supp 2d 577 (N.D. W. Va. 1998) (statements by attorney, representing Army officer's wife, to officer's superior made in course of representing the wife, are absolutely privileged as they were intended to obtain Army's help in ending domestic abuse, and Army had clear interest in receiving reports of domestic violence committed by soldiers).

A person filing a complaint with the Office is proscribed from providing materially false written statements. Under 18 U.S.C 1001(a) criminal penalties are provided for whoever, in any matter within the jurisdiction of the Office ''knowingly and willfully * * * (2) makes any materially false, fictitious, or fraudulent statement or representation; or (3) makes or uses any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry.''

The Office is responsible for protecting the public from persons, agents and attorneys demonstrated to be ''incompetent or disreputable, or guilty of gross misconduct, or who does not comply with the regulations established under section 2(b)(2)(D) of'' the Patent Statute. 35 U.S.C. 2(b)(2)(D). The proposed rule provides potential complainants with appropriate notice of the qualified immunity while enabling the Office to fulfill its responsibility.

Recognition To Practice Before the USPTO

Section 11.4, like current § 10.3, would provide for a Committee on Enrollment, which will advise the OED Director in connection with the Director's duties under § 11.2(b)(2).

Section 11.5 would provide for keeping a register of attorneys and agents recognized to practice before the Office in patent matters, and a definition of practice before the Office.

Paragraph (a) of § 11.5, like current § 10.5, would continue to provide for maintaining a single register of attorneys and agents registered to practice before the Office. The proposed rule would conform to actual practice.

Paragraph (b) of § 11.5 would add a new concept for disciplinary and non-disciplinary matters. The paragraph introduces definitions for practice before the Office broadly, as well as practice before the Office in patent matters, and practice before the Office in trademark matters. The proposed broad definition of practice before the Office is similar to the definition of ''practice'' adopted by the Internal Revenue Service. 31 CFR 10.2(e). Practice before the Office would not include the physical or electronic delivery of documents to the Office.

The definition of practice before the Office in patent matters is derived from *Sperry* v. *Florida*, 373 U.S. 379, 137 USPQ 578 (1963). In *Sperry,* the Supreme Court found that ''preparation and prosecution of patent applications for others constitutes the practice of law.'' The Court recognized that ''[s]uch conduct inevitably requires the practitioner to consider and advise his clients as to the patentability of their inventions under the statutory criteria, 35 U.S.C. 101–103, 161, 171, as well as to consider the advisability of relying upon alternative forms of protection which may be available under state law. It also involves his participation in the drafting of the specification and claims of the patent application, 35 U.S.C. 112, which this Court long ago noted 'constitute[s] one of the most difficult legal instruments to draw with accuracy,' *Topliff* v. *Topliff*, 145 U.S. 156, 171. And upon rejection of the application, the practitioner may also assist in the preparation of amendments, 37 CFR 1.117–1.126,[1] which frequently requires written argument to establish the patentability of the claimed invention under the applicable rules of law and in light of the prior art. 37 CFR 1.119.'' Sperry, 373 U.S. at 383, 137 USPQ at 579.

Consistent with the foregoing, courts in several jurisdictions have held the preparation of patent applications by unregistered individuals to be the unauthorized practice of law. *See In re Amalgamated Development Co., Inc.,* 375 A.2d 494, 195 USPQ 192 (D.D.C. 1977), *cert. denied*, 434 U.S. 924 (1977); *People* v. *O'Brien*, 142 USPQ 239 (N.Y. 1964); *Cowgill* v. *Albright*, 307 N.E. 2d 191, 191 USPQ 103 (Ct. App. Ohio 1973); and *Virginia* v. *Blasius*, 2 USPQ2d 1320 (Va. Cir. Ct. 1987).

In Ohio, the preparation, filing and prosecution of patent applications before the Office has been recognized as the practice of law. Formal Opinion 91–25 (1991) of the Board of Commissioners on Grievances and Discipline of the Ohio Supreme Court.

[1] 37 CFR 1.117–1.119, and 1.122–1.124 no longer exist.

The definition of practice before the Office in trademark matters is derived in part from disciplinary cases concerning attorneys engaged to prepare and prosecute trademark matters. *See Attorney Grievance Commission of Maryland* v. *Harper*, 477 A.2d 756 (Md. 1984) (holding attorney neglected legal matter by failing to prosecute filed trademark application); *State of Nebraska* v. *Gregory*, 554 N.W.2d 422 (Neb. 1996) (holding attorney did not competently act or zealously represent a client by failing to file a trademark application); *Office of Disciplinary Counsel* v. *Frease*, 660 N.E.2d 1156 (Ohio 1996) (holding attorney neglected legal matter entrusted to him when he did not file applications for trademark registration). The definition is also derived from case law involving unauthorized practice of law wherein a layperson offered trademark registration services. *See Statewide Grievance Committee* v. *Goldstein*, 1996 Conn. Super. LEXIS 3430 (Conn. Super. 1996) (enjoining layperson from advertising, offering to complete, and completing blank legal documents for ''areas commonly understood to be the practice of law including * * * trademark and/or patent,'' soliciting information from customers and using the information ''to select, prepare or complete legal documents,'' and ''providing written and/or oral instructions to customers advising them what to do with their legal documents.'').

The definition of practice before the Office also includes private conduct relating to good character and integrity essential for a practitioner in patent, trademark, or other non-patent law matters. The definition is derived from case law disciplining attorneys for misconduct not related to the practice of law. Any misbehavior, private or professional, that reveals a lack of good character and integrity essential for a person to practice as an attorney constitutes a basis for discipline. *Matter of Hasbrouck*, 657 A.2d 878 (N.J. 1995); *In re LaDuca*, 140, 299 A.2d 405 (N.J. 1973). That a person's activity does not arise from a lawyer-client relationship, that the behavior is not related to the practice of law or that the offense is not committed in the attorney's professional capacity is immaterial. *In re Suchanoff*, 460 A.2d 642 (N.J. 1983); *In re Franklin*, 365 A.2d 1361 (N.J. 1976).

Section 11.6, like current § 10.6, would provide for registration of individuals to practice before the Office in patent matters.

Paragraphs (a) and (b) of § 11.6 would provide for registration of attorneys and agents, respectively. Citizens of the United States could be registered regardless of their residence. The OED Director could register resident aliens, under appropriate circumstances. Registration of permanent resident aliens would be consistent with In re Griffiths, 413 U.S. 717 (1973) (permanent resident alien entitled to be admitted to Connecticut Bar notwithstanding status as alien). *See also Raffaelli* v. *Committee of Bar Examiners*, 496 P.2d 1264 (Cal. 1972) and *Application of Park*, 484 P.2d 1264 (Alas. 1971). The Office currently registers permanent resident aliens. *See In re Bhogaraju*, 178 USPQ 628 (Comm'r Pat. 1973); *In re Bramham*, 181 USPQ 723 (Comm'r Pat. 1974); and *In re Keen*, 187 USPQ 477 (Comm'r Pat. 1975).

The proposed rules would restrict circumstances under which an alien could be registered. Registration would be precluded if the practice of patent law before the Office is inconsistent with the terms of any visa under which the alien is admitted to and continues to reside in the United States. Registration would be precluded, for example, when the visa petition does not describe that the alien as being authorized to be employed in the capacity of representing patent applicants before the Office. *See In re Richardson*, 203 USPQ 959 (Comm'r Pat. 1979) (alien admitted to U.S. with H–3 visa for training could not practice patent law under terms of the visa), and *In re Mikhail*, 202 USPQ 71 (Comm'r Pat. 1976) (alien admitted to U.S. on B–1/B–2 visa and visiting the U.S. temporarily for business or pleasure could not practice under the terms of the visa). It is nevertheless appropriate for some aliens to be granted limited recognition under § 11.9. *See In re Messulam*, 185 USPQ 438 (Comm'r Pat. 1975) (granting limited recognition to alien admitted to U.S. on L–1 visa for purpose of rendering service to a single company for whom the alien had previously worked abroad and who would remain in the U.S. temporarily). *See also In re Gresset*, 189 USPQ 350 (Comm'r Pat. 1976).

Paragraph (c) of § 11.6, like current § 10.6(c), would continue to provide for registration of foreign patent agents on the basis of substantial reciprocity. Paragraph (c) would add procedures for removing a patent agent's name from the register if the patent agent is no longer registered in good standing before the patent office of the country in which he or she resides, or no longer resides in the foreign country. The procedures would avoid any necessity of going through an administrative proceeding.

Section 11.7, like current § 10.7, would set forth the requirements for registration.

Paragraphs (a)(1) and (a)(2) of § 11.7, like current § 10.7(a), would continue to require an individual to apply for registration, and establish possession of good moral character, as well as legal, scientific and technical qualifications, and competence to advise and assist patent applicants.

Paragraph (a)(3) of § 11.7 would explicitly place the burden of proof of good moral character and reputation on the applicant, and provide ''clear and convincing'' as the standard of proof.

Paragraph (b)(1) of § 11.7, like current § 10.7(b), would continue to require an individual to take and pass a registration examination in order to practice in patent matters before the Office.

Paragraph (b)(2) of § 11.7 would identify components of a complete registration application, give an individual submitting an incomplete application 60 days from the notice to file a complete application, and require individuals to update their applications wherever there is an addition to or change to information previously furnished with the application.

Paragraph (c) of § 11.7 would allow for a petition to the OED Director from any action refusing to register anindividual, refusing to admit an individual to the registration examination, refusing to reinstate an individual, or refusing to refund or defer any fee. The petition would be accompanied by the fee set forth in § 1.21(a)(5).

Paragraph (d) of § 11.7, like current § 10.7(b), would continue to provide for waiver of the examination for former patent examiners. Unlike § 10.7(b), waiver no longer would be available (except for a grandfathering provision) merely upon successfully serving in the patent examining corps for four years. Paragraph (d) would introduce new conditions for waiver of the registration examination for former patent examiners and expand the occasions for waiving the examination for other Office employees.

Currently, the requirement to take the examination may be waived in the case of any individual who has actively served for at least four years in the patent examining corps of the Office. The Office provides newly hired examiners with initial training. Thereafter, training provided by the Office is received on the job, or in more advanced formal training courses. Primary patent examiners are examiners who the Office has certified as having legal competence to act with a minimum of oversight. The Office also gives primary examiners a certificate granting authority to negotiate with

practitioners. Before an examiner is promoted to primary patent examiner, a group of patent applications that he or she has examined is reviewed for competence and compliance with rules and procedures. However, no test is administered to ascertain the examiner's knowledge of patent law, practice and procedure. After an examiner achieves primary status, there is no periodic testing/training to ensure that the individual maintains an expected level of competency in law, regulations and practice and procedures. Currently, subsequent training takes place in the form of lectures or memoranda following changes to the patent law and/or regulatory changes.

To ensure competence the Office is instituting a formal certification and recertification program for patent examiners, in keeping with its 21st Century Strategic Plan. The program will require examiners being promoted to grade GS–13 to pass a competency examination based on the examination taken by persons seeking to be registered as a patent practitioner.

Also, patent examiners, like licensed practitioners, would be required to receive training and pass recertification tests to update and maintain competence and proficiency in patent law, practices and procedures.

The proposed rule would provide for waiver of the registration examination for two groups of former patent examiners who were serving in the patent examining corps at the time of their separation.

Paragraph (d)(1) of § 11.7 would address former patent examiners who, by a date to be determined, had not actively served four years in the patent examining corps, and who were serving in the corps at the time of their separation. The registration examination would be waived for a former examiner if he or she met four conditions. The former examiner must have (i) actively served in the patent examining corps of the Office, (ii) received a certificate of legal competency and negotiation authority; (iii) been rated, after receiving the certificate of legal competency and negotiation authority, at least fully successful in each quality performance element of his or her performance plan for the last two complete fiscal years as a patent examiner, and (iv) not have been under an oral or written warning regarding the quality performance elements at the time of separation from the patent examining corps.

Paragraph (d)(2) of § 11.7 would address former patent examiners who, by a date to be determined, have actively served four years in the patent examining corps, and who were serving in the corps at the time of their separation. The examination would be waived for the former examiner if he or she meets three conditions. The former examiner must (i) have actively served for at least four years in the patent examining corps of the Office by the date to be determined, have been rated at least fully successful in each quality performance element of his or her performance plan for the last two complete fiscal years as a patent examiner in the Office; and (iii) not have been under an oral or written warning regarding the quality performance elements at the time of separation from the patent examining corps.

Requiring that an examiner be rated at least fully successful in the quality performance elements of his or her performance plan is in accord with prior practice. Former examiners, who upon separation from the Office, were rated unacceptable for quality performance elements have been required to take the registration examination. *Accord,* Commissioner's Decision, leg.01.pdf, posted on the Office Web site as *www.uspto.gov/web/offices/com/sol/foia/oed/legal/leg01.pdf.*

Paragraph (d)(3) of § 11.7 would address certain former Office employees who were not serving in the patent examining corps upon their separation from the Office. The examination would be waived for a former Office employee meeting four requirements. The former employee must demonstrate by petition that he or she possesses the necessary legal qualifications to render to patent applicants and others valuable service and assistance in the preparation and prosecution of their applications or other business before the Office by showing that (A) he or she has exhibited comprehensive knowledge of patent law equivalent to that shown by passing the registration examination as a result of having been in a position of responsibility in the Office in which he or she: (i) Provided substantial guidance on patent examination policy, including the development of rule or procedure changes, patent examination guidelines, changes to the Manual of Patent Examining Procedure, or development of training or testing materials for the patent examining corps; or (ii) represented the Office in patent cases before Federal courts; and (B) was rated at least fully successful in each quality performance element of his or her performance plan for the position for the last two complete rating periods in the Office, and was not under an oral warning regarding the quality performance elements at the time of separation from the Office.

Paragraph (d)(4) of § 11.7 would provide additional conditions for waiver of the examination for each individual covered in paragraphs (d)(1) through (d)(3). To be eligible for consideration for waiver, the individual must file a complete application within two years of separation from the Office, together with the fee required by § 1.21(a)(1)(i). All other individuals and former examiners filing an application or paying a fee more than two years after separation from the Office would be required to take and pass the examination in order to demonstrate competence to represent applicants before the Office. If the examination is not waived, the individual or former examiner also would have to pay the examination fee required by § 1.21(a)(1)(ii) within 30 days of notice.

Paragraph (e) of § 11.7 would eliminate the provision for regrade of an examination. The current rule requires the Office to treat each regrade request individually. Candidates requesting regrade seek, in effect, individualized regrading. Individualized regrading can promote the occurrence of arbitrary and capricious decisions.

The standard for review of the grading of the registration examination is ''whether the officials of the Patent Office acted fairly and without discrimination in the grading of the plaintiff's examination, pursuant to a uniform standard.'' *See Cupples* v. *Marzall,* 101 F.Supp. 579, 583 (D.D.C. 1952). The Office uses a set of model answers in grading examination answers. The use of Office Model Answers to grade the examination satisfies the Cupples standard ''because it provides a set of uniform standards by which all examinations can be fairly judged and is therefore not arbitrary and capricious.'' *Worley* v. *USPTO,* 2000 U.S. Dist. LEXIS 16992, 16997 (D.D.C. 2000). In contrast, ''permitting individualized and subjective regrading upon request would promote, not reduce, the likelihood that the Office would make arbitrary and capricious decisions regarding who passes and fails the Patent Bar examination.'' *Worley,* at 16998. *See also Kyriazis* v. *Dickinson,* No. 99–2299, slip op. at 7 (D.D.C. Dec. 8, 2000) (''this Court rejects Plaintiff's argument that a regrade of question 16 of the examination should consist of an individual determination as to whether Mr. Kyriazis's explanation for his answer constitutes the correct interpretation of patent law, rather than a determination whether the grading conformed with the PTO's Model Answers'').

To treat each regrade request individually requires dedication of

considerable resources. Further, such regrades require release of both the questions and Model Answers. In turn, release of the questions and answers necessitates preparation of new examinations twice each year. Producing new examinations twice each year requires dedication of considerable resources. The Office is already pressed for staff and time to provide these services. The Office intends to change the delivery of the registration examination. The examination would no longer be administered twice a year in a paper and pencil format. Instead, a private sector party would deliver the examination at computer terminals at that party's test sites. It is anticipated that the examination would be administered each business day. The examination would not be delivered to applicants on the Internet. The registration examination is and will continue to be a multiple choice examination. The Office intends to develop a databank of multiple choice questions in following years that can be reused in subsequent examinations. The source of the questions and answers would be the patent laws, rules and procedures as related in the Manual of Patent Examining Procedure (MPEP) and policy statements issued by the Office. The examination would be ''open-book'' in the sense that the MPEP and policies would be accessible at the same computer terminals where the examination is taken. Paper forms of the MPEP or policies could not be brought into the private sector party's test site. New questions would be introduced as MPEP revisions or policy statements introduce new policies, rules, procedures, or statutory law changes. The USPTO would announce when questions are added to the data base addressing revisions of the MPEP or new policy statements. Questions would be retired as necessary and consistent with the changes. Reuse of questions could reduce the time and resources needed to develop the examination each time it is given. To reuse questions and reduce pressure on the staff, it would be necessary to cease publication of the questions and the corresponding answers. This would preserve the fairness of the test for later applicants.

The Multistate Bar Examination (MBE), like the registration examination, is a multiple choice examination. Questions on the MBE are reused in later years. An individual may review on his own MBE examination papers under the guidelines established by the National Conference of Bar Examiners, *i.e.*, under supervision and without taking notes. *See Fields* v. *Kelly,* 986 F.2d 225, 227 (8th Cir 1993). Under proposed paragraph (g), an unsuccessful applicant would schedule an opportunity to review, *i.e.*, inspect the examination questions and answers he or she incorrectly answered under supervision without taking notes. The questions could not be copied. This would be the same as the guidelines established by the National Conference of Bar Examiners for inspection of the MBE.

Under proposed paragraph (e), an unsuccessful applicant satisfying the admission requirements would have a right to sit for future examinations. The due process clause of the Fourteenth Amendment does not require that unsuccessful applicants be given the opportunity for a regrade. The applicant is afforded due process by permitting him or her to sit for the examination again. *See Lucero* v. *Ogden,* 718 F.2d 355 (10th Cir. 1983), *cert. denied,* 465 U.S. 1035, 79 L. Ed. 2d 706, 104 S.Ct. 1308 (1984) (''Courts have consistently refrained from entering the arena of regrading bar examinations when an unqualified right of reexamination exists.''); *Tyler* v. *Vickery,* 517 F.2d 1089, 1103 (5th Cir. 1975), *cert. denied,* 426 U.S. 940, 49 L. Ed. 2d 393, 96 S.Ct. 2660 (1976); *Poats* v. *Givan,* 651 F.2d 495, 497 (7th Cir. 1981); *Davidson* v. *State of Georgia,* 622 F.2d 895, 897 (5th Cir. 1980); *Sutton* v. *Lionel,* 585 F.2d 400, 403 (9th Cir. 1978); *Whitfield* v. *Illinois Board of Bar Examiners,* 504 F.2d 474, 478 (7th Cir. 1974) (Constitution does not require an unsuccessful applicant be permitted to see his examination papers and to compare them with model answers or answers of successful applicants); *Bailey* v. *Board of Law Examiners,* 508 F.Supp. 106, 110 (W.D. Tex. 1980); and *Singleton* v. *Louisiana State Bar Ass'n.,* 413 F.Supp. 1092, 1099–1100 (E.D. La. 1976).

Limiting access to the questions would not deny the unsuccessful applicant equal protection of the laws. Inasmuch as some of the questions appear in following years, the questions must be kept secret in order to preserve the fairness of the test for later applicants. *See Fields* v. *Kelly,* 986 F.2d at 227. An unsuccessful applicant also is not deprived of a property right without due process by limiting access to the questions. Providing an opportunity to review the examination under supervision without taking notes affords the applicant a hearing at the administrative level. *Id.* at 228.

The Administrative Procedures Act provides procedural protections in matters involving an ''adjudication,'' which includes licensing. 5 U.S.C. 554. However, the Act also provides that these protections are not required where there is involved ''proceedings in which decisions rest solely on inspections, tests, or elections * * *.''5 U.S.C. 554(a)(3). This subsection implicitly recognizes that ''where examinations are available, further procedural protections are unnecessary. *See also* 1 K. Davis, Administrative Law Treatise § 7.09 (1958).'' *Whitfield* v. *Illinois Board of Bar Examiners,* 504 F.2d 474, 478 (7th Cir. 1974).

Paragraph (f) of § 11.7 would continue the current practice in which applicants seeking reciprocal recognition under § 11.6(c) must file an application and pay the fee set forth in § 1.21(a)(6). It would introduce the practice of paying the application fee required by § 1.21(a)(1)(i).

Paragraph (g) of § 11.7 would continue the practice of soliciting information bearing on the moral character and reputation of individuals seeking recognition. If information from any source is received that tends to reflect adversely on the moral character or reputation of an individual seeking recognition, the OED Director would conduct an investigation into the individual's moral character and reputation.

The proposed regulation specifies that the information sought bearing on the moral character and reputation of individuals includes events regardless of whether the records have been expunged or sealed by a state court. In accordance with the supremacy clause of the United States Constitution, ''a federal agency acting within the scope of its congressionally delegated authority may pre-empt state regulation.'' *Louisiana Public Service Comm'n.* v. *FCC,* 476 U.S. 355, 369, 90 L. Ed. 2d 369, 106 S.Ct. 1890 (1986). The pre-emptive force of a Federal agency's regulation does not depend on express Congressional authorization. Instead, the correct focus is on ''the proper bounds of [the Federal agency's] lawful authority to undertake such action.'' *City of New York* v. *FCC,* 486 U.S. 57, 64, 100 L. Ed. 2d 48, 108 S.Ct. 1637 (1988).

Congress has authorized the USPTO Director to adopt regulations requiring individuals to demonstrate that they are of good moral character and reputation before being recognized. 35 U.S.C. 2(b)(2)(D). The statute does not mention expungement as a means for removing statutory disqualifications. Congress does not appear to have contemplated these expungements would limit the USPTO Director's authority under statute. Requiring disclosure of expunged offenses is a rational and

reasonable method to promote licensing individuals presently possessing good moral character and reputation. In *Dickerson* v. *New Banner Institute, Inc.,* 460 U.S. 103, 103 S.Ct. 986, 74 L. Ed. 2d 845 (1983), the Supreme Court held that an Iowa expungement of a judgment did not remove disabilities imposed by the Federal Gun Control Act of 1968 on the basis of the state conviction, and that the expungement did not nullify the conviction. Information regarding expunged offenses is clearly relevant to, though not necessarily determinative of, an applicant's moral character. *See Wilson* v. *Wilson,* 416 F.Supp. 984 (D. Oregon 1976). Expungement, for example, does not signify that the person was innocent of the crime. Rather, expungement alleviates certain continuing effects of a conviction under various laws. State bar examiners consider the commission of any crime, including expunged offenses, in weighing an applicant's overall character and fitness to practice law. *See In re Leff,* 619 P.2d 232 (Ariz. 1980); *State Bar* v. *Langert,* 276 P.2d 596 (Calif. 1954); *Florida Board of Bar Examiners Re: Certified Question—Felony Convictions—Federal Youth Corrections Act,* 361 So.2d 424 (Fla. 1978); *In re Majorek,* 508 N.W.2d 275 (Neb. 1993); *In re McLaughlin,* 675 A.2d 1101 (N.J. 1995); and *In re Davis,* 403 N.E.2d 189 (Ohio 1980). Requiring disclosure of arrests, even if a state court has ordered expungement, does not violate a constitutional right to privacy. *See AFL–CIO* v. *HUD,* 118 F.3d 786 (D.D.C. 1997). The proposed rule would provide applicants with notice of the requirement for disclosure of expunged records.

The USPTO is seeking comments on the two alternatives proposed below for accepting a state bar's determination on the moral character of persons seeking to become registered practitioners who at the time of filing of their USPTO application, have been admitted as an attorney in a State Bar and continue to be in good standing.

One option is to require applicants who are attorneys to submit a certified copy of their State Bar application and moral character determination. The Office may accept the moral character determination as meeting the requirements set forth in § 11.7(g).

The second option is to require these applicants to submit a certified copy of their State Bar application and moral character determination and for the Office to accept the State Bar's character determination as meeting the requirements set forth in § 11.7(g) if, after review, the Office finds no substantial discrepancy between the information provided with their USPTO application and the State Bar application and moral character determination. In such a case, OED will accept the moral character determination of the State Bar as meeting the requirements set forth in § 11.7(g), so long as this acceptance is not inconsistent with other rules and the requirements of 35 U.S.C. 2(b)(2)(D). If the USPTO finds that there is substantial discrepancy or if OED obtains or receives other or new information, or if the determination of moral character conflicts with other rules or § 2(b)(2)(D), the USPTO reserves the right to make an independent decision.

The first option, accepting the state bar's determination on moral character without further review, is administratively convenient. However, it raises the issue of equal treatment between patent attorneys and patent agents as to standards applied. The nature of the patent application proceedings before the USPTO allows for registered practitioners to represent clients before the Office who may or may not be attorneys. In addition, ''Congress placed the responsibility on Director to protect the public.'' 35 U.S.C. § 2(b)(2)(D).[2] Under 35 U.S.C. § 32, the USPTO is under an obligation to consider the moral character of all applicants seeking to become registered practitioners. The states and USPTO have concurrent authority to protect the public. *Kroll* v. *Finnerty,* 242 F.3d 1359 (Fed. Cir. 2001). Thus, the USPTO may not have authority to resolve all moral character questions of attorneys by deferral to the state determinations. Complete deference to a determination on moral character made by state bars is inconsistent with the USPTO's responsibility of protecting the public. Further, it is possible that state bars may be unaware of violations brought to the attention of the Office. The Office cannot circumvent its responsibility to protect the public. In tandem, it is not the Office's intent to place an unnecessary burden on state bars to make determinations on issues that can be equally addressed by both entities. Thus, while it is appropriate to consider the determination on moral character made by state bars as part of the application process at the USPTO, it is inconsistent with the statute to accept the state bar determination as dispositive of the issue for USPTO purposes.

Under the first option, the USPTO would give deference to the state bars if the Office allows patent attorneys to submit a copy of their state bar applications and moral character determinations. Under the second option, the USPTO would still give deference, but reserves the authority to look further into the issue of moral character if there is substantial discrepancy between the information provided in the USPTO application form and the state bar application or if new information is provided related to this matter. This is a satisfactory compromise that enables both the states and the USPTO to exercise their respective authorities to protect the public.

Paragraph (h) of § 11.7 would define moral character. The definition is derived from *Konigsberg* v. *State Bar of Cal.,* 353 U.S. 252, 77 S.Ct. 722, 1 L.Ed.2d 810 (1957); and *In re Matthews,* 462 A.2d 165 (NJ 1983). This paragraph also would provide a nonexclusive list of moral character factors considered by the OED Director. The list would be substantially the same as that considered by the Committee of Bar Examiners of the State Bar of California in ''Statement on Moral Character Requirement For Admission to Practice Law in California,'' which is available at *www.calbar.org/shared/2admndx.htm.*

Paragraph (h)(1) of § 11.7 would provide not only that an applicant convicted of a felony or crime involving moral turpitude or breach of fiduciary duty is presumed not to be of good moral character, but also that the individual would be ineligible to apply for registration until two years after completion of any sentence and probation or parole. See In re Dortch, 687 A.2d 245 (Md. 1997); *Seide* v. *Committee of Bar Examiners (Calif.),* 782 P.2d 602 (Cal. 1989). The individual would have to pay the fee required by § 1.21(a)(10) with the application for registration.

Paragraph (h)(4) of § 11.7 would provide that an attorney disbarred or suspended from the practice of law, or an attorney who resigns in lieu of discipline would not be eligible to apply for registration for a period of two years following completion of the discipline. The OED Director would have discretion to waive the two-year period only if the individual demonstrates that he or she has been reinstated to practice law in the State where he or she had been disbarred or suspended, or had resigned. The attorney would have to

[2] ''[T]he primary responsibility for protection of the public from unqualified practitioners before the Patent [and Trademark] Office rests with the Commissioner of Patents [and Trademarks].'' *Gager* v. *Ladd,* 212 F.Supp. 671, 673, 136 USPQ 627, 628 (D.D.C. 1963), (quoting with approval *Cupples* v. *Marzall,* 101 F.Supp. 579, 583, 92 USPQ 169, 172 (D.D.C. 1952), *aff'd,* 204 F.2d 58, 97 USPQ 1 (D.C. Cir. 1953)).

pay the fee required by § 1.21(a)(10) with the application for registration.

Paragraph (i) of § 11.7 would identify factors that may be taken into consideration when evaluating rehabilitation of an applicant seeking a moral character determination for registration.

Paragraph (j) of § 11.7 would provide procedures for the OED Director and Committee on Enrollment to hear cases arising if the OED Director believes that any evidence suggests that an individual lacks good moral character and reputation. The procedures are in accord with those recognized in *Willner* v. *Committee on Character and Fitness,* 373 U.S. 96, 83 S.Ct. 1175 (1963) as providing due process. When the evidence is information supplied or confirmed by the individual, or is of an undisputed documentary character, the hearing will be on the written record. When a person or source whose reliability or veracity is questioned supplies the evidence, the individual may choose to have a hearing on the written record, or have an oral hearing to confront and cross-examine the person or source providing the evidence. The expense of an oral hearing could be a serious burden on an individual who is both distant from the Office and without an established practice. The rule provides such an individual with an alternative to an oral hearing, *i.e.*, being heard on a written record with briefing. The procedures for an oral hearing are similar to those adopted by the District of Columbia Court of Appeals. Rule 46(f) and (g). An oral hearing will provide the Committee and OED Director with an opportunity to observe the individual's demeanor.

Paragraph (k) of § 11.7 would allow an individual whose application for registration has been rejected because of lack of good moral character and reputation to reapply for registration. The individual would be permitted to reapply five years after the ruling, unless otherwise provided. The individual would also be required to take and pass the registration examination. This provision follows the same time provisions of Rule 201.12 of the Rules Governing Admission to the Bar of the State of Colorado. The individual would have to pay the fee required by § 1.21(a)(10) with the application for registration.

Section 11.8 would continue the practice under current 37 CFR 10.8 of requiring an oath and payment of a fee prior to registration, and conform to the practice of filing a completed Data Sheet.

Paragraph (a) of § 11.8 would provide a two-year period within which an applicant who passes the registration examination may complete registration. In effect, a passing score would be good for two years. The Office would deem this period reasonable for individuals who have not been registered, and not completed their registration within two years. Their continued familiarity with the Patent Statute, Office practices and procedures, and changes thereto in the interim is not established, and they could not lawfully practice before the Office in patent matters in that period. The two-year period is similar to the time afforded District of Columbia Bar applicants, who may request acceptance of a prior Multistate Bar Examination or essay exam result provided, *inter alia,* the prior administration of the examination was within 25 months of the examination about to be administered. *See* Rules 46(b)(8)(A)(3) and 46(b)(8)(B)(3) of the Rules of the District of Columbia Court of Appeals.

Under paragraph (a) of § 11.8, limited recognition would no longer be granted to individuals while awaiting registration. The period candidates await registration is expected to be reduced by the Office's soliciting information tending to affect the eligibility of candidates based on their character on both the Office Web site as well as the Official Gazette. The names of the candidates receiving a passing score will be published. The public will be given 60 days from publication on the Web to provide the information.

Paragraph (b) of § 11.8 would add procedures for applicants seeking registration as a patent attorney or agent. An individual seeking registration as a patent attorney would have to demonstrate that he or she is a member in good standing with the bar of the highest court of a state.

Paragraph (c) of § 11.8 would codify a practice of requiring individuals to update the information and answers they provide on their applications based on events occurring between the date an individual signs an application, and the date he or she is registered or recognized to practice before the Office in patent matters. This would include not only changes of address, but also events that may reflect adversely on the individual's moral character. The latter would serve the integrity of the registration process to require the applicant to update information and answers, and show that the individual continues to satisfy the requirements of § 11.7(a)(2)(i).

Paragraph (d) of § 11.8 would introduce an annual fee to be paid by registered practitioners. The amount of the fee would be set forth in § 1.21(a)(7). The annual fee would be due in three-month intervals depending on the first initial of a practitioner's last name. The roster would be divided into four units. The payment period for last names beginning with A–E shall be every January 1 through March 31; the payment period for last names beginning with F–K shall be every April 1 through June 30; the payment period for last names beginning with L through R shall be every July 1 through September 30; and the payment period for last names beginning with S through Z shall be every October 1 through December 31.

In the past, the fees paid by applicants and patentees have supported the costs of the activities that maintain the patent practitioner's community reputation for integrity. The proposed annual fee is introduced pursuant to 35 U.S.C. 41(d). The annual fee is intended to fund the costs of the disciplinary system, and maintaining the roster of registered practitioners up-to-date by (i) annually surveying the practitioners for current address/telephone/e-mail information, and (ii) daily updating the roster with new changes of address. With an annual fee, the Office would be funding the disciplinary system as State Bars do, by dues from the bar members. Bar disciplinary activities are generally regarded as being in the interest of maintaining the Bar's reputation for integrity and supporting the willingness of potential clients to engage the services of practitioners. The continual updating of the USPTO roster is also in the interest of assuring that registered practitioners are identified to the public they seek to serve. The current cost of USPTO disciplinary and roster maintenance programs is a little in excess of $100 per year per registered practitioner. That cost is currently met by funds from application, issue, or maintenance fees. It is problematic to charge applicants for this activity, since many of the complaints concern applications that were not filed or were filed or prosecuted improperly or should not have been filed in the first place, or patentees, who have received the benefit of competent counsel. The anomaly is magnified by the need for disciplinary action concerning practitioners who have been convicted of felonies, or disciplined by state bars for matters other than practice before the Office. By adopting an annual fee to be paid by registered practitioners, the costs of these activities is not passed on to applicants. Thus, USPTO will recover the costs associated with these activities from the practitioners instead of the public in general. The funds received from the annual fee would be directed

to these activities and would not be diverted to support other proposals. The annual fee would not be imposed on persons during the calendar year in which they are first registered to practice before the Office. Failure to comply with this rule would subject a registered practitioner to penalties set forth in § 11.11(b).

Section 11.9 would continue the same practice under current § 10.9 of providing limited recognition of individuals under the appropriate circumstances.

Paragraph (a) of § 11.9 would continue to provide for limited recognition of individuals to practice before the Office in a particular patent application or applications. The practice would be limited to individuals who are not attorneys representing the individual's close relative, such as a child, elderly parent.

Paragraph (b) of § 11.9 would provide for aliens, residing in the United States, to obtain limited recognition to practice before the Office in a particular patent application or applications if the Immigration and Naturalization Service or the Department of State has authorized the alien to be employed in the capacity of representing a patent applicant by preparing and prosecuting the applicant's U.S. patent application. Recognition may be granted if the applicant satisfies the provisions of § 11.7(a), (b), and (c) or (d). Consistent with current practice, limited recognition would be granted in maximum increments of one year, but would not be granted or extended to an alien residing abroad. Limited recognition also would not be granted to aliens admitted to the United States to be trained. Recognition to practice before the Office, like admission to practice law in any other jurisdiction, is not a training opportunity.

Paragraph (c) of § 11.9 would continue to provide for limited recognition of an individual not registered under § 11.6 to prosecute an international application only before the U.S. International Searching Authority and the U.S. International Preliminary Examining Authority.

Paragraph (d) of § 11.9 would provide for a limited recognition fee paid by an individual granted limited recognition under paragraphs (b) or (c) of § 11.9. The same individuals would also be required to pay an annual fee upon renewal or extension of the limited recognition previously granted. Failure to comply with the rule would subject the individual to loss of recognition.

Section 11.10 would set forth provisions regarding post-employment restrictions on practice before the Office. Paragraph (a) would permit only practitioners who are registered under § 11.6 or individuals given limited recognition under § 11.9 to prosecute patent applications of others before the Office.

Paragraph (b) of § 11.10 would parallel the provisions of 18 U.S.C. 207(a) and (b). The proposal would parallel the basic restrictions of § 207(a) on any registered former Office employee acting as representative, or intending to bring influence, in a particular matter in which he or she personally and substantially participated as an employee of the Office. The proposal also would parallel the basic two-year restriction of § 207(b) on any registered former Office employee acting as representative or with intent to influence as to a particular matter for which the employee had official responsibility. In addition, the proposal would proscribe the same conduct occurring behind the scenes by prohibiting conduct that ''aids in any manner'' the representation or communication with intent to influence. It is appropriate that the conduct proscribed by §§ 207(a) and (b) be extended to conduct occurring behind the scene. The conduct is proscribed by current § 10.10(b). A patent can be held unenforceable where a former patent examiner engaged in behind the scene efforts to obtain a reissue patent on a patent in which he or she personally and substantially participated as an examiner. *See Kearny & Trecker Corp.* v. *Giddings & Lewis, Inc.,* 452 F.2d 579 (7th Cir. 1971), *cert. denied,* 92 S.Ct. 1500 (1972).

Paragraph (c) of § 11.10 would introduce citation of the statutory and regulation provisions governing the post employment conduct of unregistered former employees. The provisions cover any unregistered former employees, who represent another person in an appearance or, by other communication, attempts to influence the Government, including the Office, concerning a particular matter in which he or she was involved. For example, a former patent examiner, whether or not he or she becomes a registered practitioner, may not appear as an expert witness against the Government in connection with a patent granted on an application he or she examined as a patent examiner.

Paragraph (d) of 11.10, like current § 10.10(c), would continue to proscribe an employee of the Office from prosecuting or aiding in any manner in the prosecution of a patent application for another.

Paragraph (e) of § 11.10 would continue the prohibition against conflicts of interest contained in current § 10.10(d). A number of statutory and regulatory provisions affect U.S. Government employees who are registered to practice before the Office. These provisions include 18 U.S.C. 203 and 205.

Section 205 is a criminal statute which ''precludes an officer or employee of the Government from acting as an agent or attorney for anyone else before a department, agency or court in connection with any particular matter in which the United States is a party or has a direct and substantial interest.'' *Memorandum of Attorney General Robert F. Kennedy Regarding Conflict of Interest Provisions of Public Law 87–848*, Feb 1, 1963, 28 F.R. 985. In interpreting a predecessor statute to § 205, Acting Attorney General Peyton Ford determined that ''the United States is a party or directly or indirectly interested'' in proceedings involving the filing and prosecution before the Patent Office of an application for patent, and that the predecessor statute therefore ''proscribe[d] the participation in such proceedings of Government employees for compensation on behalf of private parties.'' *Opinion of the Attorney General of the United States*, Vol. 41, Op. No. 4, 82 USPQ 165 (Atty. Gen. 1949). Under the current statute, ''[s]ection 203 bars services rendered for compensation solicited or received, but not those rendered without such compensation; section 205 bars both kinds of services.'' *Memorandum of Attorney General Robert F. Kennedy Regarding Conflict of Interest Provisions of Public Law 87–848*, Feb 1, 1963, 28 F.R. 985. *Accord, OGE Informal Advisory Letter 91 X 11*, 1991 WL 521202 (O.G.E.). Sections 203 and 205 apply to full-time and part-time employees.

OGE Informal Advisory Letter 91 X 11, 1991 WL 521202 (O.G.E.) recognizes one exception. The prohibition does not apply if an executive branch employee is ''a special employee'' as defined in 18 U.S.C. 202(a). The OGE Informal Advisory Letter also recognizes that the exception does not apply to a special Government employee for those particular matters involving specific parties in which the employee participated as a Government employee and, if the employee served in the department more than sixty days, to those matters pending before the department where he or she is employed. A special Government employee is one who is ''employed to perform * * * for a period not to exceed one hundred and thirty days during any period of three hundred and sixty five consecutive days, temporary duties either on a full-time or

intermittent basis * * * Status as a special Government employee is determined at the time of appointment.'' Section 202(a). The OGE Informal Advisory Letter also recognizes that individuals serving in the U.S. Military reserves as officers, are considered under the provisions of section 202(a) to be special Government employees unless they are called to active duty and serve for more than a specified threshold period. The OGE Informal Advisory Letter indicates that reservists in the enlisted ranks are not deemed subject to sections 203 or 205 when called to active duty.

In view of such provisions, the opinion of the Attorney General, and the OGE Informal Advisory Letter, the position of the Office would be that full-time and part-time U.S. Government employees other than special Government employees, may not solicit or accept private clients, or represent clients other than their agency before the Office. Accordingly, the Office of Enrollment and Discipline requires registered practitioners who are employed by the U.S. Government full-time or part-time to list their Government addresses as their official addresses of record.

Section 11.11 would continue the requirement under current § 10.11 that a registered practitioner notify OED of a change of address separately from any notice given in any patent applications.

Paragraph (a) of § 11.11, similarly to current § 10.11(a), would provide for requiring practitioners to notify the OED Director of their postal address and telephone number for his or her business, as well as every change thereto. Additionally, it would require practitioners to notify the OED Director of the e-mail address for their business and every change to the e-mail address. Notice of the change of address or telephone number would have to be given within thirty days of the date of the change. Practitioners will be encouraged to provide their business e-mail address to facilitate the Office's ability to communicate with the practitioners. A practitioner who is an attorney in good standing with the bar of the highest court of one or more states would also be required to provide the OED Director with the state bar identification number associated with each membership. This will enable the OED Director to distinguish between individual attorneys having the same or similar names. Further, the section identifies the information that the OED Director will routinely publish on the roster about each registered practitioner recognized to practice before the Office in patent cases.

Paragraph (b)(1) of § 11.11 would provide for administrative suspension for failure to comply with the payment of the annual fee required by § 11.8(d) or §§ 11.12(a) and (e). The OED Director would mail a notice to the practitioner advising of noncompliance, demanding compliance within sixty days, and payment of a delinquency fee for each rule violated.

Paragraph (b)(2) of § 11.11 would provide that upon failure to comply with the directive within the allowed time, the practitioner would be notified in writing that the practitioner has been administratively suspended and may no longer practice before the Office in patent matters, or hold himself or herself out as being registered or recognized to practice before the Office in patent matters. The OED Director would publish notice of the administrative suspension in the Official Gazette. The administrative suspension would not relieve the delinquent attorney or agent of his or her annual responsibility to pay his or her dues to the USPTO Director.

Paragraph (b)(4) of § 11.11 would provide that an administratively suspended attorney or agent would be responsible both for paying his or her annual fee required by § 11.8(d) and for completing the required continuing training programs.

Paragraph (b)(6) of § 11.11 would provide that administratively suspended practitioners cannot practice before the Office in patent cases while under administrative suspension.

Paragraph (c) of § 11.11 would provide for inactivation of a registered practitioner who becomes employed by the Office.

Paragraph (c)(1) of § 11.11 would provide that a registered practitioner, upon separating from the Office and seeking reactivation, must complete the required continuing training programs if the practitioner did not pass recertification tests required during the practitioner's employment at the Office and appropriate to practitioner's grade and position in the Office.

Paragraph (d) of § 11.11 would provide for voluntary inactivation of a registered practitioner. This section accommodates registered practitioners who are not active in representing clients before the USPTO, but still desire to maintain a recognized professional association with the USPTO. The USPTO will not inquire into reasons for seeking voluntary inactivation except that voluntary inactivation will be denied if the practitioner is delinquent on paying annual dues. Voluntary inactivation will not preclude the USPTO from inquiring or continuing to inquire into possible ethical violations by the practitioner. Reasons for seeking voluntary inactivation may include retirement, health condition of the practitioner (long-term illnesses), or a practitioner's decision to practice in another substantive area.

Paragraph (d)(1) of § 11.11 would provide that a registered practitioner may seek voluntary inactivation by filing a written request to be endorsed as inactive.

Paragraph (d)(2) of § 11.11 would provide that a registered practitioner whose status has been changed to a voluntary inactive status would be responsible both for paying his or her annual fee required by § 11.8(d) for such status and for completing the required continuing legal education programs while in such status. For purposes of this section, the annual fee for practitioners in inactive status is 25% of the fee for practitioners in active status.

Paragraph (d)(3) of § 11.11 would provide that a registered practitioner in inactive status is still subject to investigation or discipline for ethical violations during the period of inactivation.

Paragraph (d)(4) of § 11.11 would provide that a registered practitioner in arrears in dues or under administrative suspension for fee delinquency is ineligible to seek or enter into voluntary inactive status.

Paragraph (d)(5) of § 11.11 would provide that practitioners may not practice before the Office in patent cases while under inactive status.

Paragraph (d)(6) of § 11.11 would provide for restoration to active status of a registered practitioner who is in voluntary inactive status in accordance with § 11.11(d). The Office provides options for practitioners who are no longer attorneys in good standing at their state bars but seek active status before the USPTO. Since practitioners before the USPTO need not be attorneys, a practitioner who has ceased to be a member in good standing of the highest court of a state for reasons other than ethical grounds may still seek to represent clients before the USPTO as a patent agent. Generally, attorneys are held to the standard of ethics in effect at their respective state bars. It becomes necessary to ensure that attorneys who are no longer members in good standing in a state bar explain the basis of such status when seeking restoration to active status before the USPTO. This section seeks to avoid the possibility that an attorney under a disciplinary proceeding or investigation at his or her state bar does not circumvent the obligation of informing the USPTO of

any matter that detrimentally impacts the determination of the practitioner's moral character.

Any registered practitioner who is voluntarily inactivated pursuant to paragraph (d) of this section and who is an attorney may comply with the submission of information and material pertaining to the practitioner's moral character on proof of being a member in good standing with the highest court of a state. If the registered practitioner is no longer a member in good standing at the state bar, the practitioner must submit a signed declaration or affidavit explaining the circumstances surrounding their status at the state bar to the satisfaction of the OED Director that the reason for not being a member in good standing is not predicated on moral character. If the statement submitted is not to the satisfaction of the OED Director, the OED Director may decline restoration to active status on grounds of present lack of good moral character as set forth in § 11.7. Any adverse decision by the OED Director is reviewable under § 11.2. This does not preclude the practitioner from submitting additional evidence to establish the requisite moral character.

Paragraph (e) of § 11.11 would allow for resignation from practice before the Office of a registered practitioner who is neither under investigation under § 11.22 for a possible violation of the Rules of Professional Conduct, nor subject to an adverse probable cause determination by a panel of the Committee on Discipline under § 11.23(b).

Paragraph (f) of § 11.11 would establish a procedure for reinstatement of a registered practitioner who has been administratively suspended pursuant to § 11.11(b) or § 11.12(e), or who has resigned pursuant to § 11.11(d).

Section 11.12 would introduce mandatory continuing education for practitioners licensed to practice in patent cases before the Office. Such continuing education would apply to all licensed practitioners, whether they are registered patent attorneys, patent agents, or persons granted limited recognition. With two exceptions, all licensed practitioners are currently required to pass the registration examination. The registration examination may be waived for former patent examiners who actively served for at least four years in the patent examining corps and separate from the Office without an legal competence issue. Also, by long-standing custom, foreign patent agents who are registered under 37 CFR 10.7(c) on the basis of reciprocity with their foreign patent office have not been required to take and pass the registration examination. A licensed practitioner has been qualified through passing the registration examination. However, there is no requirement for periodic education to ensure that individuals maintain an expected level of competency in law, regulations, practices and procedures.

It is in the interest of the practitioner community, applicants and the efficiency of the USPTO that practitioners keep their legal knowledge current. In recent years there have been numerous changes to the Patent Act, and in the regulations governing the filing and prosecution of patent applications. After significant court decisions and other events, the Office has issued memoranda describing new procedures and policy to be followed by Office employees as well as registered practitioners and those granted limited recognition. Though licensed practitioners are ethically prohibited from handling a legal matter without preparation adequate in the circumstances, this has not prevented members of the public from criticizing the competence of practitioners. Such lapses can reflect adversely on the integrity of the intellectual property system, as well as on the reliability of practitioners as a whole. The ethics rules have not compelled practitioners to promptly become and remain familiar with changes to patent application practices and procedures.

A licensed practitioner's lack of currency with practice requirements impedes the efficiency and quality of the application process under current conditions. Within the USPTO, there is an office devoted to handling petitions, often by practitioners, seeking relief from some ''unintentional'' events, as well as ''unavoidable'' events, such as occur when new procedures and policies are not followed. Some petitions seeking relief from mistakes reflect an unawareness of the requirements of new rules, practices and procedures, as well as some well-established practices and procedures. This continual need for rework is an obstacle to improving pendency. Other mistakes may not be similarly curable.

The trend toward continuing legal education requirements by state bars is not sufficient to maintain the currency of knowledge among licensed practitioners regarding patent practice before the Office. First, while some attorneys may be required to take continuing legal education as a matter of state bar requirements, such requirements do not apply to patent agents and are not specific to obtaining additional patent education. The Office's licensing of patent agents who are not attorneys effectively preempts the states' restrictions on practicing law without a license. Thus it is incumbent on the Office to assure that agents are required to be kept up-to-date on legal matters in ways equivalent to the requirements now imposed by forty state bars on lawyers. The foreign patent agents also are not subject to the restrictions and continuing legal education requirements imposed by states. Similarly, although one state is now considering special certification for patent lawyers, its proposal defers to the Office's authority over licensing patent practitioners and thus imposes no certification requirements based on Office practice. None of the states mandating continuing legal education (CLE) require registered patent attorneys to receive updated education in new Office practices and procedures.

To assure the public that licensed practitioners maintain their competence and proficiency, the Office proposes to deliver required education materials via the Internet and otherwise to practitioners and to certify their scrutiny of those materials through an interactive computer-delivered examination. Alternatively, the Office would accept mandatory continuing education given by a pre-approved sponsor. Section 11.12 would apply only to licensed practitioners, not to inventors applying *pro se.* The availability of the education, however, will make the patent process more accessible to inventors, while helping the quality and efficiency of prosecution.

Delivery of mandatory continuing education by the USPTO meets the need for equal availability of the program worldwide. The Office can provide this service at a minimal cost because we are building on a program we conduct for examiners. The Office is going to seek CLE credits for the program from state bars requiring attorneys to meet certain continuing legal education requirements. However, the Office is not sure all state bars with the requirements will recognize the mandatory education program offered by the Office. Therefore, the Office believes that regular continuing education sponsors should be able to offer the program content in alternative formats that are acceptable to state bars.

It is anticipated that the Office would publish on the Internet written material followed by self-administered questions and answers that would be linked to Office publications on Office's Web site that would provide the answers. The publications would include new rules, policy announcements, rule packages, question and answer memoranda, the

Manual of Patent Examining Procedure, narrative guidelines, and other narratives containing new information the Office wants to deliver. The function of the program would be to assure that licensed practitioners, like patent examiners, have read and absorbed key content of these publications. The USPTO is planning to institute similar education of patent examiners.

Unlike traditional continuing legal education courses that must be taken at particular times and places, because the self-assessment update program would be available on the Internet, it could be taken when and where the practitioner selects. Paper copies of the questions and narratives would be made available to practitioners lacking access to the Internet. A licensed practitioner could take the program and complete it, or take part and store it until he or she has more time to complete it. The practitioner also would have the option to take it repeatedly and as often as desired until all questions are correctly answered. It would not be necessary for practitioners to take courses, such as continuing legal education courses offered by other parties, in order to complete the program.

A practitioner would have the option of obtaining the education from a USPTO pre-approved sponsor. The practitioner would be responsible for paying any fees charged by the sponsor for the program. The sponsor or the practitioner taking the program from the sponsor would be responsible for obtaining continuing legal education credit from a state bar. The Office would not seek such credit for the sponsor or the practitioner taking a course given by a sponsor.

The self-assessment program offered by the Office would include multiple choice and/or true/false questions. Narrative material, such as a guideline or policy announcement, would either precede the question, or links to the narrative material would be embedded in the questions. To complete a required education program, all questions must be correctly answered. A licensed practitioner would have to complete the program within the dates set by the USPTO Director. Taking a USPTO pre-approved course that is offered by a USPTO pre-approved sponsor providing comparable education also could complete the required education program. Licensed practitioners failing to complete the program would be administratively suspended from practice before the Office. The results from the USPTO Web-based program would be instantly available, and electronically recorded in the Office.

The education program requirement would not be onerous, since the self-assessment program would be self-administered and available on the Internet, and it would either contain or be linked to USPTO publications on its Web site that would provide the answers. Currently, forty states provide for or require continuing legal education for attorneys licensed in their respective jurisdictions. The Office will be communicating with the appropriate authorities in each of the states in an effort to have them accept the USPTO's education program as meeting their respective continuing legal education requirements.

Paragraph (c) of § 11.12 would provide four exemptions from completing the education. One exemption would be for newly registered practitioners during the fiscal year he or she is first registered. Another exemption would be for a practitioner who becomes inactive as a result of being employed by the Office if, while so employed, the practitioner passes all recertification programs required for patent examiners during the practitioner's employment at the Office and appropriate to practitioner's grade and position in the Office.

The same paragraph permits completion of the education to be delayed for a specified time for ''good cause shown.'' The cause may be shown in conjunction with illness, hospitalization, or such other matters as determined by the OED Director. Good cause would not be shown by representations that a medical condition makes attendance only difficult or uncomfortable, that a practitioner is outside the United States, that a practitioner finds it most difficult to complete the program, that the practitioner obtains education by observing other practitioners, or that a practitioner is in advanced years.

Paragraph (d)(1) of § 11.12 would provide that persons seeking reinstatement after they resigned pursuant to § 11.11(d), after their names were transferred to disability inactive status, or upon seeking reinstatement after being suspended or excluded must furnish the OED Director with proof that he or she has completed all education programs required by the USPTO Director during the fiscal year(s) the practitioner was inactive, suspended or excluded, or during the practitioner's resignation. Thereafter, the person would have the same education program requirement as other licensed practitioners.

Section 11.13 would provide procedures for sponsors to be approved as offering a pre-approved mandatory continuing education program, as well as for practitioners receiving credit for completing the pre-approved program offered by either the USPTO or by a USPTO pre-approved sponsor. Practitioners will not receive credit for completion of the required education by attending a program that is not pre-approved by the OED Director as providing the legal, procedural and policy subject matter identified by the USPTO Director as being required to satisfy the mandatory continuing education program.

Section 11.14, like current § 10.14, continues to set forth who may practice before the Office in trademark and other non-patent matters. The present procedure under § 10.14 would continue, except that the definition of attorney is changed. See the discussion above under § 11.1. The change in the definition of attorney is believed necessary in view of 5 U.S.C. 500(b), and the fact that an individual may be an attorney in good standing in a state even though suspended or disbarred in another state. In other non-patent matters, *e.g.,* disciplinary proceedings or *inter partes* or *ex partes* patent or trademark matters, a party could be represented only by an attorney.

Paragraph (a) of § 11.14(a) would contain a sentence making clear that registration as a patent attorney does not entitle an individual to practice before the Office in trademark matters. On occasion in the past, an attorney suspended or disbarred by the highest court of a state continued to practice before the Office in trademark matters. The sentence would provide such individuals with notice that they may not rely on registration as a patent attorney to practice in trademark matters.

Paragraph (f) of § 11.14 would provide that an individual seeking reciprocal recognition under paragraph (c) must apply in writing for the recognition, and pay the fees required by §§ 1.21(a)(1)(i) and (a)(6) of this subchapter.

Section 11.15 would provide that practitioners (individuals who practice before the Office in patent, trademark, or other non-patent matters) could be suspended or excluded. The USPTO Director has authority under 35 U.S.C. 32 to suspend or exclude practitioners registered to practice before the Office in patent matters. *See also* 5 U.S.C. 500(e). The USPTO Director also has authority to suspend or exclude practitioners who practice before the Office in trademark and other non-patent matters. *See* 5 U.S.C. 500(d)(2); *Herman* v. *Dulles,* 205 F.2d 715 (D.C. Cir. 1953); and Attorney General's

Manual on the Administrative Procedure Act, pp.65–66 (1947). *See also Harary* v. *Blumenthal,* 555 F.2d 1113 (2nd Cir. 1977) (certified public accountant disbarred from practice before IRS), and *Koden* v. *U.S. Department of Justice,* 564 F.2d 228 (7th Cir 1977) (suspending attorney from practice before INS).

Section 11.18, with one exception, would continue the provisions under current § 10.18 regarding who must sign documents filed in the Office, and responsibility for the content of documents filed in the Office. The exception is that the phrase ''claims and other'' found in § 10.18(b)(2)(ii) would not be carried forward into paragraph (b)(2)(ii) of § 11.18. The deletion is necessary inasmuch as § 11.18 is derived from Rule 11 of the Federal Rules of Civil Procedure, wherein a ''claim'' is not a patent claim. However, in the predecessor rule, § 10.18, it is possible to construe ''claim'' to be a patent claim. Clearly, a patent claim is not the same claim under the Rule 11 of the Federal Rules of Civil Procedure. The practice under § 11.18 is otherwise similar to that under Rule 11 of the Federal Rules of Civil Procedure.

Investigations and Disciplinary Proceedings

Section 11.19 would introduce a definition of the disciplinary jurisdiction of the Office.

Paragraph (a) of § 11.19 would provide that practitioners registered or recognized to practice before the Office, practitioners administratively suspended under § 11.11(b), practitioners disciplined by suspension or exclusion, as well as *pro se* patent applicants and any individual appearing in trademark or other non-patent case in his or her own behalf, are subject to the disciplinary jurisdiction of the Office. The inclusion of administratively suspended practitioners, and practitioners disciplined by suspension or exclusion would permit the Office to take further action where appropriate or necessary. Thus, for example, a suspended practitioner continuing to practice before the Office despite suspension may be further disciplined for unauthorized practice before the Office. Similarly, a practitioner continuing to practice before the Office despite removal of his or her name from the register should not be able to use administrative suspension as a shield to avoid discipline for misconduct occurring before or after removal of the practitioner's name from the register.

Paragraph (b) of § 11.19 would recognize the authority of state bars to discipline practitioners for misconduct involving or related to practice before the Office in any matter.

Paragraph (c)(1) of § 11.19 would set out grounds for disciplining a practitioner, or a suspended or excluded practitioner. Grounds would include conviction of a crime; discipline imposed in another jurisdiction; failure to comply with any order of a Court, the USPTO Director, or OED Director; or failure to respond to a written inquiry from a Court, the USPTO Director, or OED Director in the course of a disciplinary investigation or proceeding without asserting, in writing, the grounds for refusing to do so.

Paragraph (c)(2) of § 11.19 would set out grounds for disciplining a *pro se* applicant. Grounds include violation of §§ 11.303(a)(1), 11.304, 11.305(a), and 11.804. *Pro se* litigants in United States District Courts are subject to Rule 11 of the Federal Rules of Civil Procedure, which imposes sanctions for filing baseless or frivolous lawsuits wherein the pleadings are not well grounded in fact or in law, or in a good faith argument for extension, modification, or reversal of existing law, and had an improper purpose. By extension, comparable conduct before the Office would be subject to disciplinary action by the Office.

Paragraph (d) of § 11.19 would continue essentially the same procedure as current § 10.130(b) for handling petitions to disqualify a practitioner in *ex parte* or *inter partes* matters in the Office on a case-by-case basis. *See SEC* v. *Chenery Corp.,* 332 U.S. 194, 203 (1974).

Paragraph (e) of § 11.19 would make clear that the Office can refer unauthorized practice allegations and convictions to the jurisdiction(s) where the act(s) occur. This can apply to unregistered individuals, including unregistered attorneys practicing before the Office in patent matters by ghostwriting applications and/or replies to Office actions to be signed and filed by inventors.

Section 11.20 would continue the present procedure in current § 10.130(a) under which the USPTO Director imposes discipline. The statutory framework for practice before the Office in patent, trademark, and other non-patent law vests responsibility for discipline in the USPTO Director. 35 U.S.C. 2(b)(2)(c). The discipline imposed on practitioners includes reprimand, suspension or exclusion. Paragraph (a)(1) is based on 35 U.S.C. 32 and 5 U.S.C. 500(d). The term ''exclude,'' rather than ''disbar,'' is used throughout the proposed rules because ''exclude'' is used in 35 U.S.C. 32. Probation has been employed by OED pursuant to 35 U.S.C. 32 and 5 U.S.C. 500(d). *See Weiffenbach* v. *Lett,* 1101 Official Gazette 59 (April 25, 1989).

Paragraph (a)(2) of § 11.20 would permit sanctions to be imposed on patent applicants representing themselves or other applicants under § 1.31, a person or party representing themselves or others in a patent case pursuant to § 1.33(b)(4), or by a representative appearing in a trademark application pursuant to § 11.14(e). A variety of sanctions can be imposed on *pro se* litigants subject to Rule 11 of the Federal Rules of Civil Procedure. The sanctions usually imposed serve two main purposes: deterrence and compensation. Subsidiary goals include punishing prosecution/litigation abuse, and facilitating case management. *See Navarro-Ayala* v. *Nunez,* 968 F.2d 1421 (C.A. Puerto Rico 1992). Sanctions that may be imposed on *pro se* litigants may also be imposed on *pro se* applicants, including prohibition from commencing additional or continuing other proceedings before the Office without being represented by a licensed attorney or by leave of the Commissioner for Patents or the Commissioner for Trademarks to proceed *pro se. Accord, Schramek* v. *Jones,* 161 F.R.D. 119 (D.C. Fla. 1995); and *Ketchum* v. *Cruz,* 775 F. Supp. 1399 (D. Colo. 1991), *aff'd,* 961 F.2d 916 (1991).

Paragraph (b) of § 11.20 would provide for imposition of conditions with discipline as a condition of probation, to protect the public.

Section 11.21 would provide for issuing warnings alerting the practitioner that he or she could be subject to disciplinary action if corrective action is not taken to bring his or her conduct into conformity with the Office's Rules of Professional Conduct. 5 U.S.C. 558(c) authorizes warnings.

Section 11.22 would continue the OED Director's authority under current § 10.131(a) to investigate possible violations of Rules of Professional Conduct by practitioners. *See* § 11.2(b)(2).

Paragraph (b) of § 11.22 would continue the provisions of current § 10.131(a), under which a nonpractitioner can report to the OED Director a possible violation of Rules of Professional Conduct. The OED Director would be enabled to require that the report be presented in the form of an affidavit.

Paragraph (c) of § 11.22 would provide for initiating investigations upon complaint or information received from any source. The investigation would not be abated because of neglect by the complainant to prosecute a

charge, or in view of settlement, compromise, or restitution.

Paragraph (d) of § 11.22 would require a complaint alleging misconduct by a practitioner to be in writing and contain a brief statement of the facts upon which the complaint is based.

Paragraph (e) of § 11.22 would provide for screening complaints. Complaints would be docketed only if they are not unfounded on their face, if they contain allegations of conduct, that, if true, would constitute a violation of the practitioner's oath or the Rules of Professional Conduct that would merit discipline, and are within the jurisdiction of the Office.

Paragraph (f) of § 11.22 would provide for notifying the complainant when a complaint is not docketed, and giving the reasons therefor. This rule would provide that the OED Director's decision is not subject to review.

Paragraph (g) of § 11.22 would permit complainants to be advised of the docketing of the complaint.

Paragraph (h) of § 11.22 would provide for notifying a practitioner in writing when a formal investigation in the practitioner's conduct has been initiated.

Paragraph (i) of § 11.22 would provide for a practitioner to have 30 days to respond to an inquiry, and to allow only one 30-day extension of time. The response must set forth practitioner's position with respect to allegations contained in the complaint.

Paragraph (j) of § 11.22 would provide that the OED Director could request information from the complainant, practitioner, or any other person who may reasonably be expected to have information needed concerning the practitioner. A number of state bars were surveyed to identify whether a common practice existed on handling the issue of contacting a non-complaining client. Many states have no specific procedural rules but can and do contact the non-complaining client without the safeguards contained in proposed paragraph (j) of this section. For example, one state bar has no rule but contacts the attorney first, and then attempts to call the non-complaining client before the attorney communicates with the client. Another has no rule and does in fact contact the non-complaining client without first informing the attorney.

In the absence of a consistent practice among the various state bars, the USPTO is placing formal safeguards through Section 11.22(j). We recognize that such contact can create the possibility of conflicts with the attorney. At the same time, there are cases in which disciplinary action is most necessary and the non-complaining client is unknowingly being victimized. The USPTO needs the discretion to undertake the appropriate investigation without necessarily going through the attorney. The USPTO wants to be careful to balance the competing interests with the creation of a formal procedure that provides appropriate safeguards to the attorney-client relationship.

Paragraph (j) of § 11.22 would provide that the OED Director could request information from the complainant, practitioner, or any other person who may reasonably be expected to have information needed concerning the practitioner. The attorney will be contacted first unless there is good cause to believe that such contact would interfere with the gathering of relevant material from the client. If the OED Director believes that there is good cause for such interference or the attorney declines to consent, the OED Director will provide a showing including reasons to the USPTO Director for review and clearance.

Paragraph (k) of § 11.22 would permit the OED Director to examine financial books and records maintained by a practitioner reflecting his or her practice before the Office.

Paragraph (l) of § 11.22 would provide that a practitioner's failure to respond or evasive response to the OED Director's written inquiries during an investigation would permit the Committee on Discipline to enter an appropriate finding of probable cause.

Paragraph (m) of § 11.22 would allow the OED Director to dispose of investigations by closure without issuance of a warning, institution of formal charges, diversion, or exclusion on consent.

Paragraph (n) of § 11.22 would permit the OED Director to terminate an investigation and decline to refer a matter to the Committee on Discipline in a variety of circumstances, including where the complaint is unfounded, the matter is not within the jurisdiction of the Office, the questioned or alleged conduct does not constitute misconduct, the available evidence shows that the practitioner did not engage or willfully engage in the questioned or alleged misconduct, that there is no credible evidence to support any allegation of misconduct by the practitioner, or that the available evidence could not reasonably be expected to support any allegation of misconduct under a ''clear and convincing'' evidentiary standard.

Section 11.23 would continue the practice of current § 10.4 of providing for a Committee on Discipline.

Paragraph (a) of § 11.23 would describe the organization of the Committee on Discipline. The Committee would have two or more subcommittees having three members each to facilitate processing of the matters the OED Director refers to the Committee. The Committee would designate a Contact Member to review and approve or suggest modifications of recommendations by OED Director for dismissals, and warnings.

Paragraph (b) of § 11.23 would set forth the powers and duties of the Committee on Discipline. The Committee would designate a Contact Member to review, and approve or suggest modifications of, recommendations by OED Director of dismissals and warnings. The Committee would prepare and forward its own probable cause recommendations to the OED Director.

Paragraph (c) of § 11.23 would provide that no discovery could be had of deliberations of the Committee on Discipline. *See Morgan* v. *United States,* 313 U.S. 409, 422 (1941). Accordingly, under the proposed rules, a disciplinary proceeding would resolve whether a practitioner has or has not committed violations alleged in the complaint that the Committee authorized to be filed under § 11.26.

Section 11.24 would provide for interim suspension and discipline based on reciprocal discipline of a practitioner suspended or disbarred, or who resigns in lieu of discipline. The USPTO Director, upon being provided with a certified copy of a disciplinary court's record disciplining a practitioner, would suspend the practitioner in the interim. The practitioner would be provided with a forty-day period to show cause why reciprocal discipline should not be imposed. A certified copy of the record of suspension, disbarment, or resignation shall be conclusive evidence of the commission of professional misconduct. The practitioner may challenge imposition of reciprocal discipline on four specific grounds, *i.e.*, lack of notice or opportunity to be heard, infirmity of proof of establishing misconduct, grave injustice resulting from imposing the same discipline, or the misconduct warrants imposition of a different discipline.

Section 11.25 would provide for interim suspension and discipline of a practitioner convicted of committing a serious crime or other crime coupled with confinement or commitment to imprisonment. The USPTO Director, upon being provided with a certified copy of a court's record or docket entry, would suspend the practitioner from

practice before the Office in the interim until the conviction becomes final. Practitioners would be disqualified from practicing before the Office if confined or committed to prison. Upon the conviction becoming final, the practitioner would be provided with a forty-day period to show cause why discipline should not be imposed. A practitioner convicted of a serious crime involving moral turpitude *per se,* or a crime wherein the underlying conduct involved moral turpitude, would be excluded. The practitioner may challenge imposition of discipline if material facts are in dispute.

Section 11.26 would provide a program for diversion from a disciplinary proceeding.

Paragraph (a) of § 11.26 would permit the OED Director to offer diversion to a practitioner under investigation, subject to limitations.

Paragraph (b) of § 11.26 would make diversion available in cases of alleged minor misconduct. However, diversion would not be available when the alleged misconduct resulted in, or is likely to result in, prejudice to a client or another person; discipline was previously imposed, a warning previously issued, or diversion was previously offered and accepted (unless exceptional circumstances justify waiver of this limitation); the alleged misconduct involves fraud, dishonesty, deceit, misappropriation or conversion of client funds or other things of value, or misrepresentation; or the alleged misconduct constitutes a criminal offense under applicable law.

Paragraph (c) of § 11.26 would set forth procedures for diversion.

Paragraph (d) of § 11.26 would provide a diversion program that is designed to remedy the alleged misconduct of the practitioner. It may include participation in formal courses of education sponsored by a voluntary bar organization, a law school, or another organization; completion of an individualized program of instruction specified in the agreement or supervised by another entity; or any other arrangement agreed to by the parties which is designed to improve the ability of the practitioner or other individual to practice in accordance with the Rules of Professional Conduct.

Paragraph (e) of § 11.26 would close an investigation if the practitioner completes the diversion program. If the practitioner does not successfully complete the diversion program, the OED Director would be able to take such other action as is authorized and prescribed under section 11.32.

Section 11.27 would provide for excluding a practitioner on consent. This would be the sole manner for settling any disciplinary matter.

Paragraph (a) of § 11.27 would provide that a practitioner under investigation or the subject of a pending proceeding may consent to exclusion, but only by delivering to the OED Director an affidavit declaring the practitioner's consent to exclusion. The affidavit would state, *inter alia,* that the consent is freely and voluntarily rendered, that the practitioner is aware that there is currently pending an investigation into, or a proceeding involving, allegations of misconduct, the nature of which shall be specifically set forth in the affidavit; that the practitioner acknowledges that the material facts upon which the allegations of misconduct are predicated are true; and that the practitioner submits the consent because the practitioner knows that if disciplinary proceedings based on the alleged misconduct were brought, the practitioner could not successfully defend against them.

Paragraph (b) of § 11.27 would provide that the affidavit and any related papers are submitted to the USPTO Director for review and approval. The USPTO Director would enter an order excluding the practitioner on consent.

Paragraph (c) of § 11.27 would provide for informing the hearing officer of receipt of the required affidavit, and for transfer of the disciplinary proceeding to the USPTO Director.

Paragraph (d) of § 11.27 would proscribe a practitioner excluded by consent from petitioning for reinstatement for five years, require compliance with the provisions of § 11.58, and require reinstatement be sought in accordance with § 11.60.

Section 11.28 would provide procedures for addressing four broad groups of practitioners. The first are those judicially declared to be ''mentally incompetent'' or ''involuntarily committed to a mental hospital.'' The second are disabled practitioners who are mentally or physically infirm. The third are practitioners addicted to any chemical or having a psychological dependency upon intoxicants or drugs. The fourth are incapacitated practitioners who suffer from a disability or addiction of such nature as to cause the practitioner to be unfit to be entrusted with professional matters.

Definitions of ''mentally incompetent,'' ''involuntarily committed to a mental hospital,'' ''disability,'' ''addiction,'' ''incapacitated,'' ''significant evidence of rehabilitation,'' and ''disability matter'' would be found in § 11.1.

Paragraph (a) of § 11.28 would set forth the scope and purpose of disability proceedings. Such proceedings would determine whether a practitioner has been judicially declared to be mentally incompetent or involuntarily committed to a mental hospital as an inpatient; whether the hearing officer should apply to a court for an order requiring a practitioner to submit to an examination by qualified medical experts regarding an alleged disability or addiction; whether a practitioner is incapacitated from continuing to practice before the Office by reason of disability or addiction; whether the OED Director should hold in abeyance a disciplinary investigation, or a hearing officer should hold in abeyance a disciplinary proceeding, because of a practitioner's alleged disability or addiction; whether a practitioner (having previously been suspended solely on the basis of a judicial order declaring the practitioner to be mentally incompetent) has subsequently been judicially declared to be competent and is therefore entitled to have the prior suspension terminated; whether a practitioner (having previously been suspended solely on the basis of an involuntary commitment to a mental hospital as an inpatient) has subsequently been discharged from inpatient status and is therefore entitled to have the prior order of suspension terminated; and whether a practitioner (having previously acknowledged or having been found by the hearing officer or USPTO Director to have suffered from a prior disability or addiction sufficient to warrant suspension (whether or not any suspension has yet occurred)), has recovered to the extent, and for the period of time, sufficient to justify the conclusion that the practitioner is fit to resume or continue the practice before the Office and/or is fit to defend the alleged charges against the practitioner in a disciplinary investigation or disciplinary proceeding that has been held in abeyance pending such recovery.

Paragraph (b) of § 11.28 would provide that the hearing officer may authorize the OED Director to apply to a court of competent jurisdiction for an order appointing counsel to represent the practitioner whose disability or addiction is under consideration if it appears to the hearing officer's satisfaction, based on the practitioner's motion or notice of the OED Director, that otherwise the practitioner will appear *pro se* and may therefore be without adequate representation.

Paragraph (c) of § 11.28 would provide that all proceedings addressing disability matters before the hearing officer be initiated by motion. The motion would contain a brief statement of all material facts, a proposed petition and/or recommendation to be filed with the USPTO Director if the movant's request is granted by the hearing officer, and affidavits, medical reports, official records, or other documents setting forth or establishing any of the material facts on which the movant is relying. The non-moving party's reply would set forth all objections, an admission, denial or lack of knowledge with respect to each of the material facts in the movant's papers, and affidavits, medical reports, official records, or other documents setting forth facts on which the non-moving party intends to rely for purposes of disputing or denying any material fact set forth in the movant's papers.

Paragraph (d) of § 11.28 would provide a procedure addressing a practitioner judicially declared to be mentally incompetent or involuntarily committed to a mental hospital as an inpatient. The procedure would include action by the OED Director (paragraph (1)).

Paragraph (e) of § 11.28 would provide a procedure to address circumstances in which a practitioner is incapacitated from continuing to practice before the Office because of disability or addiction, but is nonetheless likely to offer or attempt to perform legal services while so incapacitated. The procedure would include action by the OED Director (paragraph (1)), and the required evidence (paragraph (2)).

Paragraph (f) of § 11.28 would locate in one paragraph the provision for further proceedings for paragraphs (d) and (e). The procedure would include action by the Committee on Discipline Panel (paragraph (1)), action by OED Director (paragraph (2)), response by Practitioner (paragraph (3)), initial decision by the hearing officer (paragraph (4)), appeal to the USPTO Director (paragraph (5)), and action by USPTO Director (paragraph (6)).

Paragraph (g) of § 11.28 would provide a procedure for the circumstance in which a practitioner files a motion requesting the hearing officer to enter an order holding a disciplinary proceeding in abeyance based on the contention that the practitioner is suffering from a disability or addiction that makes it impossible for the practitioner to adequately defend the charges in the disciplinary proceeding. The procedure would include the practitioner's motion (paragraph (1)), and disposition of the practitioner's motion (paragraph (2)).

Paragraph (h) of § 11.28 would provide a procedure for deciding allegations that a practitioner has recovered from a prior disability. This paragraph would apply to proceedings for reactivation as well as for resumption of disciplinary matters held in abeyance. Paragraphs (2) and (3) would pertain to reactivation, whereas paragraph (4) would apply to resumption of disciplinary proceedings held in abeyance. The regulation would limit an incapacitated practitioner suspended under this section to applying for reinstatement once a year, unless the USPTO Director orders shorter intervals. The practitioner may be required to undergo examination by a qualified medical expert, selected by the OED Director, at the practitioner's expense. The practitioner also may be required to establish his or her competence and learning in the law.

Paragraph (i) of § 11.28 would provide that a hearing officer may order resumption of a disciplinary proceeding against a practitioner upon determining that the practitioner is not incapacitated from defending himself or herself, or not incapacitated from practicing before the Office.

Section 11.32, like current § 10.132, would provide a procedure for initiating a disciplinary proceeding and for referring the proceeding to a hearing officer. Under paragraph (2) of § 11.32, when the OED Director is of the opinion that there is probable cause to believe that an imperative rule of the USPTO Rules of Professional Conduct has been violated, the OED Director would determine whether a practitioner should be given notice under 5 U.S.C. 558(c). Section 558(c) provides, in part, ''Except in cases of willfulness or those in which public health, interest, or safety requires otherwise, the withdrawal, suspension, revocation, or annulment of a license is lawful only if, before the institution of agency proceedings therefor, the licensee has been given (1) notice by the agency in writing of the facts or conduct which may warrant the action; and (2) opportunity to demonstrate or achieve compliance with all lawful requirements.'' The provisions of 5 U.S.C. 558(c) would apply to a registered patent practitioner who is investigated for possible misconduct occurring in connection with either a patent or a trademark matter. However, the provisions of 5 U.S.C. 558(c) do not apply to disciplinary proceedings in the Office involving practitioners who are not registered inasmuch as the Office does not issue a license to such practitioners. Nevertheless, OED customarily provides unregistered practitioners with the opportunity to demonstrate or achieve compliance with all lawful requirements. Where a practitioner willfully violates an imperative rule of the USPTO Rules of Professional Conduct, notice and opportunity to demonstrate compliance would not be required. In certain cases, the public interest may require suspension of an incompetent practitioner or a practitioner who has been found guilty of a crime and committed to the custody of the Attorney General or has otherwise been incarcerated.

After giving notice under 5 U.S.C. 558(c), or if no notice is needed, the OED Director would call a meeting of a panel of the Committee on Discipline. The Committee panel consisting of three USPTO employees, would determine by a majority vote whether there is probable cause to believe that a practitioner has violated an Office Rule of Professional Conduct. If the Committee determines that a violation has occurred, the OED Director would institute a disciplinary proceeding by filing a ''complaint'' under § 11.34. Upon the filing of a complaint, an attorney under the Office of General Counsel designated to represent the OED Director would prosecute the disciplinary proceeding on behalf of the OED Director. Upon the filing of the complaint, the disciplinary proceedings will be referred to a hearing officer.

A hearing officer would be used in disciplinary proceedings brought under 35 U.S.C. 32. The hearing officer may be an employee of the Office appointed by the USPTO Director, or an Administrative Law Judge (ALJ). The use of a hearing officer is not required to suspend or exclude a practitioner in trademark or other non-patent matters. *See Herman* v. *Dulles,* 205 F.2d 715 (D.C. Cir. 1958). Nevertheless, a hearing officer is qualified to handle disciplinary proceedings. Accordingly, as a matter of policy the Office is and will continue to use ALJ's, and take the opportunity to use Office employees as hearing officers.

Section 11.34, like current § 10.134, would set out the requirements of a complaint. A complaint would be deemed sufficient if it fairly informs the respondent of any violation of an imperative rule of the USPTO Rules of Professional Conduct which form the basis of the disciplinary proceeding so that the respondent is able to answer. *See In re Ruffalo,* 390 U.S. 540 (1968).

Section 11.35, like current § 10.135, would provide alternative methods for serving a complaint. Service of complaints by certified or registered

mail is not always available, because receipts are returned signed by individuals other than the respondent. Moreover, the Office may have to resort to proving who signed a particular receipt. Accordingly, § 11.35 provides that service may be accomplished by handing the complaint to the respondent. When service is by hand delivery, the party serving the respondent would file an affidavit with the OED Director. An alternative method for serving the complaint is to mail the complaint first-class mail or ''Express Mail'' to the last known address of the respondent. Although the proposed rule being considered does not so specify, under this rule the OED Director would probably attempt to contact the respondent shortly after mailing to determine whether the complaint had been received. A third method of service would be any method mutually agreeable to the OED Director and a respondent.

Paragraph (b) of § 11.35 would provide that if a complaint is returned by the Postal Service, a second complaint would be mailed. If the second complaint is returned, the respondent would be served by appropriate notice published in the Official Gazette for two consecutive weeks. Any time for answering would run from the second publication of the notice.

Section 11.36 would continue, in paragraphs (a) through (e), to provide the same procedure as in current § 10.136 for answering a complaint. For instance, under paragraph (a), an answer would be due within thirty days unless extended for up to no more than thirty additional days by the hearing officer. Paragraph (f) would provide procedures for giving notice of intent to raise an alleged disability in mitigation of the sanction that may be imposed. The regulation also would provide for appointment of monitor(s), and for suspension of respondent if the monitor reports violation of any terms or conditions under which the respondent continued to practice.

Section 11.37, like current § 10.137, would provide that false statements in an answer could be made the basis of supplemental charges.

Section 11.38, like current § 10.138, would provide that on filing of an answer, a disciplinary proceeding would become a contested case within the meaning of 35 U.S.C. 24. Evidence obtained by a subpoena issued under 35 U.S.C. 24 would not be admissible in evidence or considered unless leave to proceed under 35 U.S.C. 24 is first obtained from the hearing officer. Ordinarily, a subpoena under 35 U.S.C. 24 is needed when a witness will not voluntarily appear. Often, subpoenas are issued to be sure that a witness appears—particularly if both counsel and the hearing officer have to travel to hear the testimony of a witness. Approval by the hearing officer before a subpoena is issued is necessary. Initially, the hearing officer can determine whether the evidence is relevant and/or whether a third party should be subjected to the inconvenience of a subpoena. In this respect, if the hearing officer does not believe any proffered evidence is admissible, the hearing officer may refuse to permit any party to proceed under 35 U.S.C. 24. If a party nevertheless caused a subpoena to issue, a motion to quash the subpoena would lie in the District Court, which issued the subpoena. Moreover, evidence obtained by subpoena without leave of the hearing officer would not be admitted or considered in the disciplinary proceeding. The proposed rule would adopt the policy of *Sheehan* v. *Doyle,* 513 F.2d 895, 898, 185 USPQ 489, 492 (1st Cir.), *cert. denied,* 423 U.S. 874 (1975), and *Sheehan* v. *Doyle,* 529 F.2d 38, 40, 188 USPQ 545, 546 (1st Cir.), *cert. denied,* 429 U.S. 879 (1976), *rehearing denied,* 429 U.S. 987 (1976), while rejecting the policy announced in *Brown* v. *Braddick,* 595 F.2d 961, 967, 203 USPQ 95, 101–102 (5th Cir. 1979).

Section 11.39, like current § 10.139, would provide for an ALJ to conduct disciplinary proceedings. Additionally, a hearing officer appointed under 35 U.S.C. 32 also would be able to conduct the proceedings. Paragraph (b) of § 11.39 would set out the authority of the hearing officer.

Paragraph (2) of § 11.39(c) would provide for the hearing officer's ruling on motions. *See also* § 11.43. It should be noted that, under § 11.42(e), a hearing officer could require papers to be served by ''Express Mail.''

Paragraph (4) of § 11.39(c) would require the hearing officer to authorize the taking of depositions in lieu of personal appearance at a hearing. The hearing officer would have discretion to authorize the taking of depositions. If demeanor is an issue for a particular witness, the hearing officer could exercise discretion and deny a request to take a deposition in lieu of appearance. When the hearing officer would authorize a deposition, notice and taking of the deposition would be governed by § 11.51(a).

Paragraph (8) of § 11.39(c) would provide for the hearing officer adopting procedures for the orderly disposition of disciplinary proceedings. For example, the hearing officer could require the parties to file not only a pre-hearing exchange setting out the names of witnesses to be called, a summary of their expected testimony, and copies of exhibits to be used in their respective cases-in-chief; but also a pre-hearing brief discussing any disputed legal and factual issues.

Paragraph (d) of § 11.39 would provide for the hearing officer exercising such control over the disciplinary proceeding as to normally issue an initial decision within nine months from the filing of the complaint. The hearing officer, however, could issue an initial decision after nine months if in his or her opinion there exists unusual circumstances that preclude issuance of the initial decision within the nine-month period. The purpose of this provision would be to put parties on notice that the hearing officer has authority to complete his or her work within nine months, and that parties should plan to meet any time schedules set by the hearing officer. This paragraph would be designed to minimize delays. It is expected that the hearing officer would, as in the past, consult with the parties in setting times, and the nine-month provision will not set an undue hardship on either party.

Paragraphs (e) and (f) of § 11.39 would preclude interlocutory appeal by the OED Director or respondent from an order of the hearing officer except under limited circumstances. Under paragraph (d), the hearing officer could permit interlocutory review of his or her order when the interlocutory order involves a controlling question of procedure or law as to which there is a substantial ground for a difference of opinion and an immediate decision by the USPTO Director may materially advance the ultimate termination of the disciplinary proceeding or in an extraordinary situation where justice requires review. The standard would be the same as that of 28 U.S.C. 1292(b). Proceedings before the hearing officer would not be stayed for an interlocutory appeal unless the hearing officer or USPTO Director grants a stay. Under this section, stays would be granted only in the most compelling circumstances. The parties filing appeals or requests for review of interlocutory orders would not render the hearing officer ineffective.

Section 11.40, like current § 10.140, would provide for representation of respondent and the OED Director.

Section 11.41, like current § 10.141, would provide for the filing of papers. Under paragraph (a), the certificate of mailing practice under 37 CFR 1.8 and 1.10 is not applicable in disciplinary proceedings. Paragraph (b) would provide that papers filed after the

complaint and prior to entry of an initial decision would be filed with the hearing officer. The hearing officer would designate the address to which he or she would want papers mailed. The hearing officer, however, could require that papers be hand-delivered to his or her office. All papers filed after the initial decision would be filed with the OED Director, who would transmit to the USPTO Director any paper requiring action by the USPTO Director.

Section 11.42, like current § 10.142, would provide for the method of serving papers in disciplinary proceedings.

Section 11.43, like current § 10.143, would provide for filing of motions. No motion could be filed unless supported by a written statement that the moving party conferred with the opposing party for the purpose of resolving the issues raised by the motion and that agreement has not been reached. If the parties resolve the issue raised in the motion prior to a decision on the motion by the hearing officer, the parties would be required to notify the hearing officer.

Section 11.44, like current § 10.144, would provide for hearings before the hearing officer. Hearings would be transcribed and a copy of the transcript would be provided to the OED Director and the respondent at the expense of the Office. If the respondent fails to appear at the hearing, the hearing officer may proceed with the hearing in the absence of the respondent. Under paragraph (c), a hearing normally would not be open to the public. The need for closed hearings in matters involving patent applications is occasioned in part by 35 U.S.C. 122. Apart from the Office obligation to keep information concerning patent applications confidential, until a practitioner is disciplined, it is believed that opening hearings to the public would constitute a clearly unwarranted invasion of privacy. The closure of the hearing, however, would not preclude the OED Director and respondent from approaching witnesses and providing those witnesses with sufficient information to determine whether they can give relevant information.

Section 11.45, like current § 10.145, would provide a procedure for handling cases where there is variance between the allegations and in pleading and evidence. Any party would be given reasonable opportunity to meet any allegations in an amended complaint or answer. *See In re Ruffalo,* 390 U.S. 544 (1968). The section is modified to provide that the matter need not be referred back to the Committee on Discipline to amend the complaint.

Section 11.49, like current § 10.149, would provide that the OED Director would have the burden of proving a violation of the imperative USPTO Rules of Professional Conduct by clear and convincing evidence. The Respondent would have the burden of proving any affirmative defense by clear and convincing evidence.

It is reported that the USPTO is among a minority of agencies that apply the clear and convincing standard in their disciplinary proceedings. Agencies are not required to apply that standard to their disciplinary proceedings under the Administrative Procedure Act. *See Steadman* v. *SEC,* 450 U.S. 91 (1981); and *Checkosky* v. *SEC,* 23 F.3d 452, 475 (D.C. Cir. 1994). *See also* Rules Governing Misconduct by Attorneys or Party Representative, Final Rule, 61 Fed. Register 65323, 65328–29 (Dec 12, 1996). Comments are invited whether the USPTO should continue to use the ''clear and convincing'' standard, or adopt the preponderance of evidence standard established by the Administrative Procedure Act.

Section 11.50, like current § 10.150, would provide rules governing evidence. Under paragraph (a) of § 11.50, the rules of evidence prevailing in courts of law and equity would not be controlling. This provision is based on 5 U.S.C. 556(d), which provides, in part, that ''[a]ny oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence.'' Thus, evidence in a disciplinary proceeding is not controlled by the Federal Rules of Evidence. *See Klinestiver* v. *Drug Enforcement Administration,* 606 F.2d 1128, 1130 (D.C. Cir. 1979). While most evidence admissible under the Federal Rules of Evidence would be admissible in a disciplinary proceeding, there is evidence that is not admissible under the Federal Rules of Evidence, but which may be admissible in a disciplinary proceeding. Paragraph (b) of § 11.50 would provide for admission into evidence of depositions taken under § 11.51. Any deposition under § 11.51(a) would have prior approval of the hearing officer. A deposition under § 11.51(b) would not have prior approval, but may or may not be admissible. Admissibility of the latter deposition is within the discretion of the hearing officer. Under paragraph (c) of § 11.50, Office documents, records, and papers would not have to be certified to be admissible. Under paragraph (e) of § 11.50, objections to evidence would be in short form, all objections and rulings would be part of the record, and no exception to the ruling would be necessary to preserve the rights of the parties.

Section 11.51, like current § 10.151, would provide for depositions. Under paragraph (a) of § 11.51, either the OED Director or the respondent may move for leave to take a deposition of a witness in lieu of personal appearance of the witness before the hearing officer. The hearing officer is authorized to grant leave to take the deposition upon a showing of good cause. The taking of depositions under paragraph (a) would not be for the purpose of discovery. A deposition would be taken only when it is not possible or desirable for the hearing officer to hear the witness in person. Under paragraph (b) of § 11.51, the OED Director and the respondent could agree to take a deposition. Often depositions are desirable during settlement. The testimony of a witness may be ''locked-in'' through a deposition. The Office has settled several disciplinary matters in the past. However, under paragraph (b) of § 11.51, the parties could not take depositions for use at a hearing without prior approval of the hearing officer. This provision is necessary for the hearing officer to maintain control over the proceeding.

Section 11.52, like current § 10.152, would provide for limited discovery. There are cases holding that discovery is not necessary in disciplinary proceedings. *See In re Murray,* 362 N.E.2d 128 (Ind. 1977); and *In re Wireman,* 367 N.E.2d 1368 (Ind. 1977). However, the USPTO proposes to limit some discovery while seeking to avoid delays frequently experienced in the discovery permitted by the Federal Rules of Civil Procedure. Under § 11.52, the hearing officer could require parties to file and serve, prior to any hearing, a pre-hearing statement listing all proposed exhibits to be used in connection with the party's case-in-chief, a list of proposed witnesses, the identity of any Government employee who investigated the case, and copies of memoranda reflecting respondent's own statements. This provision is patterned after *Silverman* v. *Commodities Futures Trading Commission,* 549 F.2d 28 (7th Cir. 1977). The hearing officer could determine when discovery authorized by paragraph (a) of § 11.52 should be made.

Paragraphs (a) and (b) of § 11.52 would limit discovery to exhibits that a party intends to use as part of his or her case-in-chief. Exhibits not used in a party's case-in-chief, but which might be used to impeach or cross-examine the other party's witnesses, would not have to be produced. If a document were to

be used both in a case-in-chief and to impeach, it would have to be produced.

Paragraph (4) of § 11.52(e) would provide for identifying any Government witness who investigated the matter. Respondent could then call the Government witness. Paragraph (5) of § 11.52 would provide for producing copies of any statement made by the respondent.

Section 11.53, like current § 10.153, would afford the parties a reasonable opportunity to submit proposed findings and conclusions, and a post-hearing memorandum. *See* 5 U.S.C. 557(c).

Section 11.54, like current § 10.154, would provide for the hearing officer to file an ''initial decision.'' It would be expected that the hearing officer would make appropriate reference to the administrative record in explaining an initial decision. *See, e.g., Food Marketing Institute* v. *Interstate Commerce Commission,* 587 F.2d 1285, 1292, n.20 (D.C. Cir. 1978). In the absence of an appeal to the USPTO Director under § 11.55, the decision of the hearing officer would become the final decision in the disciplinary proceeding. *See* 5 U.S.C. 557(b).

Paragraph (b) of 11.54 would require the hearing officer to explain the reason(s) for any penalty. Four factors would guide the hearing officer and the USPTO Director in setting and approving penalties. The factors are the public interest, the seriousness of the violation of the imperative USPTO Rules of Professional Conduct, the deterrent effects deemed necessary, and the integrity of the bar. These factors are derived from numerous cases, including *Silverman* v. *Commodities Futures Trading Commission,* 562 F.2d 432, 439 (7th Cir. 1977); and *In re Merritt,* 363 N.E.2d 961, 971 (Ind. 1977). *See also Florida Bar* v. *Murrell,* 74 So.2d 221 (Fla. 1954). Under the proposed rules, a sanction would be a matter within the discretion of the hearing officer, with ultimate discretion in the USPTO Director. The discipline in each disciplinary case would be tailored for the individual case. *See In re Wines,* 660 P.2d 454 (Ariz. 1983). Manifestly, absolute uniformity or perfection would not be expected. *Id.* Likewise, relitigation of penalties imposed in prior cases would not be permitted. *Id.*

Section 11.55, like current § 10.155, would provide for an appeal from an initial decision of the hearing officer to the USPTO Director. Under paragraph (a) of § 11.55, any appeal would have to be taken within thirty days after the initial decision of the hearing officer. A cross-appeal would have to be filed fourteen days after the date of service of the appeal or thirty days after the initial decision, whichever is later. Under paragraph (c) of § 11.55, the USPTO Director may order reopening of a disciplinary proceeding in accordance with the principles that govern the granting of new trials based on newly discovered evidence that could not have been discovered by due diligence. Under paragraph (d) of § 11.55, if an appeal is not taken, the initial decision of the hearing officer would become the decision of the USPTO Director. *See* § 11.54(a).

Section 11.56, like current § 10.156, would provide for a decision by the USPTO Director. The USPTO Director could affirm, reverse, or modify an initial decision of a hearing officer, or remand the proceeding to the hearing officer for such further proceedings as the USPTO Director may deem appropriate. Under paragraph (c) of § 11.56, a respondent could make a single request for reconsideration or modification.

Section 11.57, like current § 10.157, would set out how judicial review could be obtained from a final decision of the USPTO Director. Judicial review must occur in the United States District Court for the District of Columbia in accordance with 35 U.S.C. 32, and Local Rule LCvR 83.7 of the United States District Court for the District of Columbia.

Section 11.58, like current § 11.158, would set out conditions imposed on a practitioner suspended or excluded from the practice of law before the Office. Paragraph (a) of § 11.58 would make clear that a practitioner suspended or excluded under § 11.56 will not be automatically reinstated. For example, a suspended or excluded practitioner would be required, *inter alia,* to comply with the provisions of §§ 11.12 and 11.60 to be reinstated.

Paragraph (b) of § 11.58 sets out what a suspended or excluded practitioner would be required to do. Paragraph (1) of § 11.58(b) would require the practitioner take a number of actions within twenty days after the date of entry of the order of suspension or exclusion. The actions include filing notices of withdrawal in pending patent and trademark applications, reexamination and interference proceedings, and every other matter pending before the Office within twenty days after the entry of the order. The practitioner would be required to notify affiliated bars, and all clients having business before the Office, of the discipline imposed and inability to act; notify practitioners for all opposing parties having business before the Office; deliver to all clients having business before the Office any papers or other property to which the clients are entitled; and refund any part of any fees paid in advance and unearned. A practitioner also would be required to remove from any telephone, legal, or other directory any advertisement, statement, or representation which would reasonably suggest that the practitioner is authorized to or does practice before the Office.

Paragraph (2) of § 11.58(b) would require the practitioner within 30 days after entry of the order of exclusion or suspension to file with the OED Director an affidavit certifying that the practitioner has fully complied with the provisions of the order, and with the Rules of Professional Conduct. Appended to the affidavit would be documents showing compliance with the suspension or exclusion order. The documents would include a copy of each form of notice, the names and addressees of the clients, practitioners, courts, and agencies to which notices were sent, and all return receipts or returned mail received up to the date of the affidavit. Also appended would be a schedule of all accounts where the practitioner holds or held as of the entry date of the order any client, trust, or fiduciary funds regarding practice before the Office, proof of the proper distribution of the client, trust and fiduciary funds; a list of all jurisdictions to which the practitioner is admitted to practice, and the steps taken to remove any advertisement or representation suggesting that the practitioner is authorized to or does practice before the Office.

Paragraph (c) of § 11.58 would require that an order of exclusion or suspension be effective immediately after entry except as provided in §§ 11.24, 11.25, and 11.28, where the order would be effective immediately. The excluded or suspended practitioner, after entry of the order, would not accept any new retainer regarding immediate, pending, or prospective business before the Office, or engage as a practitioner for another in any new case or legal matter regarding practice before the Office. However, the practitioner would be granted limited recognition for thirty days to conclude other work on behalf of a client on any matters that were pending before the Office on the date of entry. If such work cannot be concluded, the practitioner would have to so advise the client so that the client could make other arrangements.

Paragraph (d) of § 11.58 would provide for an excluded or suspended practitioner to keep and maintain records of the various steps taken under this section, so that in any subsequent

proceeding, proof of compliance with this section and with the exclusion or suspension order will be available. Proof of compliance will be required as a condition precedent to reinstatement. These provisions were derived from District of Columbia Appellate Rule XI, section 14.

Paragraph (e) of § 11.58, like § 10.158(c), would provide conditions under which a suspended or excluded practitioner could aid another practitioner in the practice of law before the Office. These provisions were derived from the same cases considered when current § 10.158(c) was proposed, including *In re Christianson,* 215 N.W. 2d 920 (N.D. 1974); *In re Hawkins,* 503 P.2d 95 (Wash. 1972); *Florida Bar* v. *Thomson,* 354 So.2d 3000 (Fla. 1975); *In re Kraus,* 670 P.2d 1012 (Ore. 1983); *In re Easler*, 272 S.E.2d 32 (S.C. 1980); *Crawford* v. *State Bar of California,* 7 Cal. Rptr. 746 (Cal. 1960); and *Ohio State Bar Ass'n.* v. *Hart,* 375 N.E.2d 1246 (Ohio 1978). Like a suspended or disbarred attorney, who ''is not the same as a layman,'' *In re Christianson,* 215 N.W.2d at 925, the same would obtain for a practitioner suspended or excluded from practice before the Office. Thus, while a suspended or excluded practitioner would be permitted to be employed by a practitioner, the suspended or excluded practitioner would have to be a salaried employee of the practitioner for whom he or she works and could not share profits from practice before the Office. A suspended or excluded practitioner could not communicate directly with clients, render legal advice, or meet with witnesses regarding prospective or immediate business before the Office. A suspended or excluded practitioner could research the law, write patent or trademark applications (provided he or she did not interview clients or witnesses, the practitioner reviewed the application, and the practitioner signed the papers filed in the Office), or conduct patent or trademark searches. The provisions of § 11.58 are considered necessary if suspension or exclusion is to have any significance.

Paragraph (f) of § 11.58, like current § 10.158(d), would proscribe reinstatement of a suspended or excluded practitioner who has acted as paralegal or performed other services assisting another practitioner before the Office, unless an affidavit is filed explaining the nature of all paralegal and other services performed, and showing that the suspended or excluded practitioner complied with the provisions of this section and the imperative USPTO Rules of Professional Conduct.

Comment is invited whether the USPTO should delete the provisions of § 10.58(c) and (d), and not adopt proposed paragraphs (e) and (f) of § 11.58. Permitting the suspended or excluded practitioner to aid another practitioner places at least some suspended or excluded practitioners in conflict with state laws or court orders. For example, a number of states' disciplinary jurisdictions prohibit suspended or excluded attorneys from acting as paralegals. Also, permitting a suspended or excluded practitioner to aid another practitioner provides the former with an opportunity to continue serving the same clients from whose cases the practitioner was required to withdraw. This can be not only confusing for the clients, but also provides the suspended or excluded practitioner with an opportunity to maintain some appearance of a continued practice. Further, the USPTO is and will continue to reciprocally discipline attorneys suspended or disbarred by state disciplinary authorities. Permitting the practitioner reciprocally disciplined by the USPTO to engage in conduct proscribed by state laws or court orders, such as aiding a practitioner by preparing patent or trademark applications, leads to conflicting circumstances. The same conflicts can arise if a state disciplines an attorney following discipline imposed by the USPTO. Accordingly, the USPTO wishes to consider comments favoring or disagreeing with such a change to the current practice.

Section 11.59, like current § 10.159, would provide for notice of suspension or exclusion. Under paragraph (a) of § 11.59, upon issuance of an unfavorable final decision, the OED Director would give appropriate notice to employees of the Office, United States courts, the National Discipline Data Bank maintained by the American Bar Association Standing Committee on Professional Discipline and the appropriate authorities of any State in which a suspended or excluded practitioner is known to be a member of the bar. If a practitioner is registered under § 11.6(c), the OED Director would also notify the patent office of the country where the practitioner resides. Under paragraph (b) of § 11.59, the OED Director would publish an appropriate notice in the Official Gazette and the Office Web site. Under paragraph (c) of § 11.59, the OED Director would maintain records that would be available to the public concerning disciplinary proceedings. The files of most disciplinary proceedings resulting in imposition of a public reprimand, suspension, or exclusion are presently available to the public for inspection in the Office of Enrollment and Discipline. Public availability would continue under the proposed rules being considered subject to the removal of any information required by law to be maintained in confidence or secrecy. Under paragraph (e) of § 11.59, the order of exclusion when a practitioner is excluded on consent would be accessible, but the affidavit under paragraph (a) of § 11.27 would not be accessible except upon order of the USPTO Director or on consent of the practitioner.

Section 11.60, like current § 10.160, would provide for a petition for reinstatement. Under paragraph (a) of § 11.60 an excluded or suspended practitioner would not be permitted to resume practice of patent, trademark, or other non-patent law before the Office until reinstated by order of the OED Director or the USPTO Director. An excluded practitioner not otherwise ineligible for reinstatement may not apply for reinstatement until the expiration of at least five years from the effective date of the exclusion. Under paragraph (b) of § 11.60, a practitioner suspended indefinitely because of disability may seek reinstatement, but reinstatement would not be ordered except on a showing by clear and convincing evidence that the disability has ended, that the practitioner has complied with § 11.12, and that the practitioner is fit to resume the practice of law.

Paragraph (c) of § 11.60, like current §§ 10.160(a) and (d), would proscribe a suspended practitioner from being eligible for reinstatement until a period of the time equal to the period of suspension elapses following compliance with § 11.58, and an excluded practitioner would not be eligible for reinstatement until five years elapses following compliance with § 11.58.

Paragraph (d) of § 11.60 would require a petition for reinstatement to include proof of rehabilitation. If the practitioner is not eligible for reinstatement apart from rehabilitation, or the petition is insufficient or defective on its face, the OED Director may dismiss the petition. Otherwise the OED Director would consider a petitioner's attempted showing of rehabilitation. The practitioner would have the burden of proof by clear and convincing evidence. The proof would establish that the practitioner has the moral character qualifications, competency, and learning in law required under § 11.7 for readmission, and that resumption of practice before

the Office would not be detrimental to the administration of justice, or subversive to the public interest.

Paragraph (e) of § 11.60 would provide that if the petitioner is found fit to resume practice before the Office, the OED Director will order reinstatement, which may be conditioned upon the making of partial or complete restitution to persons harmed by the misconduct that led to the suspension or exclusion, upon the payment of all or part of the costs of the disciplinary and reinstatement proceedings, or any combination thereof.

Paragraph (f) of § 11.60 would provide that if the petitioner is unfit to resume practice before the Office, the petitioner is provided an opportunity to show cause in writing why the petition should not be denied. If unpersuaded by the showing, the petition would be denied. The suspended or excluded practitioner may be required to take and pass an examination under § 11.7(b), ethics courses, and/or the Multistate Professional Responsibility Examination.

Paragraph (g) of § 11.60 would proscribe filing a further petition for reinstatement if the petition is denied until the expiration of at least one year following the denial unless the order of denial provides otherwise.

Paragraph (h) of § 11.60, like § 10.160(e), would open to the public proceedings on any petition for reinstatement.

Section 11.61 would have savings clauses.

Section 11.62 would express a policy that if a practitioner dies, disappears, or is suspended for incapacity or disability, and there is no partner, associate, or other responsible practitioner capable of conducting the practitioner's affairs, a court of competent jurisdiction may appoint a registered practitioner to make appropriate disposition of any patent application files. All other matters would be handled in accordance with the laws of the local jurisdiction.

Rules of Professional Conduct

The following comments contain several references to invention promotion companies (invention promoters). At the outset, the Office wishes to make clear that neither the current Disciplinary Rules nor the proposed Rules of Professional Conduct prohibit a practitioner from associating with an invention promoter. Moreover, neither the current Disciplinary Rules nor the proposed Rules of Professional Conduct prevent a practitioner from having an arrangement with an invention promoter, or from providing professional services in compliance with the rules. However, practitioners having arrangements with invention promoters face the same scrutiny that attorneys having arrangements with non-lawyer parties that market legal service (marketers) have faced. The arrangements with promoters have faced intense scrutiny throughout the country by ethics committees, courts, and disciplinary authorities. Decisions and opinions in other jurisdictions hold the arrangements unethical on a variety of bases. Practitioners should carefully examine their participation in any arrangement of this sort with a promoter.

There is reasonable cause to scrutinize the arrangements with invention promoters. For more than two decades, the Federal Trade Commission (FTC) has investigated, and absent a settlement, has sought injunctive and other equitable relief against invention promoters for violations of § 5 of the Federal Trade Commission Act, 15 U.S.C. 45. The FTC has investigated whether or alleged that in one manner or another a promoter has engaged in unfair or deceptive acts or practices, in or affecting commerce, with customers who contracted with the promoter for invention development services. *See Raymond Lee Organization, Inc.*, 92 F.T.C. 489 (1978), *aff'd sub nom. Raymond Lee* v. *FTC*, 679 F.2d 905 (D.C. Cir. 1980); *FTC* v. *Invention Submission Corp.*, 1991–1 Trade Cases § 69,338, 1991 WL 47104 (D.D.C 1991); *FTC* v. *American Institute for Research and Development*, 219 B.R. 639 (D Mass. 1998), *modified sub nom. FTC* v. *American Inventors Corporation*, 1996 WL 641642 (D. Mass 1996); and *FTC* v. *National Invention Services, Inc.*, 1997 WL 718492 (D.N.J. 1997). Each promoter offered the services of a registered patent attorney. A patent attorney associated with one promoter was indicted on five counts of conspiracy to commit mail fraud and mail fraud, and a warrant for his arrest was issued in 1999 by the U.S. Postal Inspection Service. Inasmuch as equitable relief was obtained in each instance, it would be appropriate for the Rules of Professional Conduct to address the conduct that practitioners must address upon agreeing to accept referrals from promoters.

Section 11.100 would provide guidance for interpreting the Office Rules of Professional Conduct. In interpreting these Rules, the specific would control the general in the sense that any rule that specifically addresses conduct would control the disposition of matters and the outcome of such matters would not turn upon the application of a more general rule that arguably also applies to the conduct in question. In a number of instances, there are specific rules that address specific types of conduct. The rule of interpretation expressed here is meant to make it clear that the general rule does not supplant, amend, enlarge, or extend the specific rule. So, for instance, the general terms of proposed rule 11.103 are not intended to govern conflicts of interest, which are particularly discussed in proposed rules 11.107, 11.108, and 11.109. Thus, conduct that is proper under the specific conflict rules is not improper under the more general rule of proposed rule 11.103. Except where the principle of priority is applicable, however, compliance with one rule does not generally excuse compliance with other rules. Accordingly, once a practitioner has analyzed the ethical considerations under a given rule, the practitioner must generally extend the analysis to ensure compliance with all other applicable rules.

Sections 11.100 through 11.901 are proposed to establish Office Rules of Professional Conduct. Presently, practitioners representing parties in patent, trademark and other non-patent matters are required to conform to the Code of Professional Responsibility set forth in 37 CFR 10.20 through 10.112. The Office believes that it would be more desirable to bring the Office disciplinary rules into greater conformity with the Rules of Professional Conduct followed by a majority of the states. Such conformity would provide not only consistency in practicing law before the Office as well as in the states, but also a body of precedent already developed in the states having ethics opinions and disciplinary results based on the Model Rules of Professional Conduct.

The proposed Office Rules of Professional Conduct, in large part, follow the Model Rules of Professional Conduct of the American Bar Association. The concordance between the rules is based on two factors. First, many registered patent attorneys are members of bars that have adopted the Model Rules or a modified version thereof. Accordingly, they already would be subject to substantially the same Model Rules for conduct in connection with their practice. Rule 8.5. Second, adopting USPTO Rules of Professional Conduct that follow, in many respects, the Model Rules of Professional Conduct adopted in more than 40 jurisdictions, facilitates both compliance with the rules, and the ability of practitioners to move between the employment by the Office, other

Government agencies, and the private sector.

Several of the proposed Office Rules of Professional Conduct do not conform to the Model Rules of Professional Conduct of the American Bar Association. For example, the Rules of Professional Conduct of the Bar of the District of Columbia would be the source of proposed §§ 1.101(b), 11.102(f), 11.104(c), 11.105(e)(2)–(4), 11.106(a)(2)–(3), 11.106(d)–(g), 11.601, and 11.701(b)(1)–(4) and (c). The Rules of Professional Responsibility of the Virginia State Bar would be the source of proposed §§ 11.115(a), and (c) through (g). The source of the provisions in proposed § 1.806 are the Court Rules of the New York Appellate Division, Second Department. Other proposed rules, addressing relations with invention promoters, would be original. Still other proposed rules would conform to disciplinary rules previously adopted by the USPTO or other Federal agencies, such as § 11.804(h). It is necessary to diverge from the Model Rules of Professional Conduct of the American Bar Association. The Rules of Professional Conduct of the District of Columbia tend to address responsibilities of Government attorneys in greater depth than the Model Rules of Professional Conduct of the American Bar Association, particularly in connection with ''revolving door'' issues. This is appropriate inasmuch as numerous registered practitioners are employees of the United States Government and are admitted to practice law in the District of Columbia. Upon practicing before the Office, they are subject to the USPTO Rules of Professional Conduct adopted by the Office, as well as the Rules of Professional Conduct of the Bar of the District of Columbia. A detailed concordance between the proposed rules and the divergent sources can be found in Table 3, ''Principal Source of Sections 11.100 through 11.806,'' *infra*. Further, unlike the Model Rules that require consent of a client following consultation, the proposed rules would require the client give informed consent in writing after full disclosure. Compare, for example, Model Rule 1.6(a) with proposed rule 11.106(a). This departure is intended to provide both the client and practitioner with certainty regarding communication, and a stronger record.

Section 11.100 would provide interpretive guidance of the proposed Rules of Professional Conduct. Some of the Rules are imperatives, cast in the terms ''shall'' or ''shall not.'' These define proper conduct for purposes of professional discipline. Other Rules, generally cast in the term ''may,'' are permissive and define areas under the Rules in which the practitioner has professional discretion. No disciplinary action should be taken when the practitioner chooses not to act, or acts, within the bounds of such discretion. Inasmuch as the Rules of Professional Conduct in many jurisdictions have the same or similar Rules, it is appropriate for the Office to adopt the same standards where such acts or conduct, in practice before the Office, would not be inconsistent with the protection of the public interest.

Other Rules define the nature of relationships between the practitioner and others. The latter Rules are partly obligatory and disciplinary, and partly constitutive and descriptive in that they define a lawyer's professional role.

Inasmuch as the rules pertain to practice before the Office, they do not address criminal or domestic relations practices addressed in the Rules of Professional Conduct adopted by the states. A practitioner engaging in criminal or domestic relations practice is subject to the state ethics rules. A practitioner disqualified from practicing elsewhere for misconduct should not be trusted or permitted to practice before the Office. Misconduct elsewhere should also be misconduct for purposes of practicing before the Office. *See* §§ 11.25 and 11.803(f)(1). Practitioners have been disciplined by the Office for conduct arising in the practice of law other than intellectual property. For example, the USPTO Director excluded an attorney after disbarment in Virginia following a criminal conviction for conduct arising from representing a client in a domestic relations matter. *See In re Hodgson*, 1023 Off. Gaz. 13 (Oct. 12, 1982).

Section 11.101 would continue the present practice of 37 CFR 10.77(a) and (b) requiring a practitioner to provide competent representation to a client. Paragraph (a) of § 11.101 would specify that such competence requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation. The Office has disciplined practitioners lacking competence. *See In re Wyden*, 973 Off. Gaz. 40 (Aug. 22 1978) (suspending agent for general incompetence in handling patent applications); and *In re Paley*, 961 Off. Gaz. 48 (Aug. 30, 1977) (suspending agent for improper handling of application).

Legal knowledge and skill. In determining whether a practitioner employs the requisite knowledge and skill in a particular matter, relevant factors include the relative complexity and specialized nature of the matter, the practitioner's general experience, the practitioner's training and experience in the field in question, the preparation and study the practitioner is able to give the matter, and whether it is feasible to refer the matter to, or associate or consult with, a practitioner of established competence in the field in question. In some instances, the required proficiency is that of a general patent practitioner. Expertise in a particular field of patent law, science, engineering, or technology may be required in some circumstances. One such circumstance would be where the practitioner, by representations made to the client, has led the client reasonably to expect a special level of expertise in the matter undertaken by the practitioner.

A practitioner need not necessarily have special legal training or prior legal experience to handle legal problems of a type with which the practitioner is unfamiliar. However, basic training in scientific and technical matters is required for registration as a patent attorney or agent to provide a client with valuable service, advice and assistance in the presentation and prosecution of their patent applications before the Office. 35 U.S.C. 2(b)(2)(D). A newly admitted practitioner can be as competent as a practitioner with long experience. Some important legal skills, such as the analysis of precedent, the evaluation of evidence, and legal drafting, are required in all legal problems. Perhaps the most fundamental legal skill consists of determining what kind of legal problems a situation may involve, a skill that necessarily transcends any particular specialized knowledge. A practitioner can provide adequate representation in a wholly novel field through necessary study. Competent representation can also be provided through the association of a practitioner of established competence in the field in question.

In an emergency a practitioner may give advice or assistance in a matter in which the practitioner does not have the skill ordinarily required where referral to or consultation or association with another practitioner would be impractical. Even in an emergency, however, assistance should be limited to that reasonably necessary in the circumstances, for ill-considered action under emergency conditions could jeopardize the client's interest.

A practitioner may accept representation where the requisite level of competence can be achieved by reasonable preparation. A registered patent agent registered after January 1, 1957, who is not an attorney is not

authorized to, and cannot accept representation in trademark and other non-patent law. This applies as well to a practitioner who is appointed as counsel for an unrepresented person. *See also* § 11.602.

Thoroughness and preparation. Competent handling of a particular patent, trademark, or other non-patent matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners. It also includes adequate preparation, and continuing attention to the needs of the representation to assure that there is no neglect of such needs. The required attention and preparation are determined in part by what is at stake; like major litigation, complex transactions or inventions ordinarily require more elaborate treatment than matters of lesser consequence.

Maintaining competence. To maintain the requisite knowledge and skill, a practitioner should engage in such continuing study and education as may be necessary to maintain competence, taking into account that the learning acquired through a practitioner's practical experience in actual representations may reduce or eliminate the need for special continuing study or education. If a system of peer review has been established, the practitioner should consider making use of it in appropriate circumstances.

Paragraph (c) of § 11.101 would define some, but not all, acts that would constitute violations of paragraphs (a) or (b) of this section. The USPTO believes that it would be helpful to practitioners if some specific prohibitions were set out in the rules. The prohibitions set out in paragraphs (1) through (8) of § 11.101(c) represent violations that have occurred in the past or that the Office specifically seeks to prevent. The specific acts set out in paragraph (c) would not constitute a complete description of all acts in violation of paragraphs (a) or (b).

Paragraph (1) of § 11.101(c) would include as misconduct knowingly withholding from the Office information identifying a patent or patent application of another from which one or more claims have been copied. *See* §§ 1.604(b) and 1.607(c) of this subpart.

Section 11.102 would address the scope of representation. Both practitioner and client have authority and responsibility in the objectives and means of representation. The client has ultimate authority to determine the purposes to be served by legal representation, within the limits imposed by law and the practitioner's professional obligations. Within those limits, a client also has a right to consult with the practitioner about the means to be used in pursuing those objectives. At the same time, a practitioner is not required to pursue objectives or employ certain means simply because the client may wish that a practitioner do so. A clear distinction between objectives and means sometimes cannot be drawn, and in many cases the client-practitioner (including client-lawyer or client-agent) relationship partakes of a joint undertaking. In questions of means, the practitioner should assume responsibility for technical and legal tactical issues, but should defer to the client regarding such questions as the expense to be incurred and concern for third persons who might be adversely affected. Law defining a lawyer's scope of authority in litigation varies among jurisdictions.

An agreement concerning the scope of representation must accord with the Rules of Professional Conduct and other law. Thus, the client may not be asked to agree to representation so limited in scope as to violate proposed § 11.101, to surrender the client's right to terminate the practitioner's services, or the client's right to settle litigation that the practitioner might wish to continue.

Unlike Rule 1.2(a) of the Model Rules of Professional Conduct, paragraph (a) of § 11.102 would not address an attorney's duty in a criminal case to abide by the client's decision. Inasmuch as practice before the Office does not involve criminal proceedings, the portion of Model Rule 1.2(a) addressing a criminal case is not being proposed. Nevertheless, an attorney who practices both before the Office and in criminal cases would be subject to both the Office and State professional conduct rules. If, in the course of a criminal proceeding, the attorney violates the state's professional conduct rules and is disciplined by the state authorities, the attorney could be subject to discipline under the proposed rules. *See* §§ 11.24 and 11.803(f)(5).

Paragraph (e) of § 11.102 would continue a practitioner's responsibility to give an honest opinion about the actual consequences that appear likely to result from a client's conduct. The fact that a client uses advice in a course of action that is criminal or fraudulent does not, of itself, make a practitioner a party to the course of action. However, as in current § 10.85(a)(8), a practitioner may not knowingly assist a client in criminal or fraudulent conduct. There is a critical distinction between presenting an analysis of legal aspects of questionable conduct, and recommending the means by which a crime or fraud might be committed with impunity.

When the client's course of action has already begun and is continuing, the practitioner's responsibility is especially delicate. The practitioner is not permitted to reveal the client's wrongdoing, except where permitted by proposed § 11.102(g) and proposed § 11.106. Moreover, the practitioner is required to avoid furthering the purpose, for example, by suggesting how it might be concealed. A practitioner may not continue assisting a client in conduct that the practitioner originally supposes is legally proper, but then discovers is criminal or fraudulent. Withdrawal from the representation, therefore, may be required.

Where the client is a fiduciary, the practitioner may be charged with special obligations in dealings with a beneficiary.

Paragraph (e) of § 11.102 would apply whether or not the defrauded party is a party to the transaction. Hence, a practitioner should not participate in a sham transaction; for example, a transaction to effectuate fraudulent acquisition of a patent or trademark. Paragraph (e) would not preclude undertaking a defense incident to a general retainer for legal services to a lawful enterprise. The last clause of paragraph (e) recognizes that determining the validity or interpretation of a statute or regulation may require a course of action involving disobedience of the statute or regulation or of the interpretation placed upon it by governmental authorities.

In a case in which the client appears to be suffering mental disability, the practitioner's duty to abide by the client's decisions is to be guided by reference to proposed rule 11.114.

Paragraph (b) of § 11.102 would provide that representing a client does not constitute approval of the client's views or activities. By the same token, legal representation should not be denied to people, including applicants, who are unable to afford legal services, or whose cause is controversial or the subject of popular disapproval. Unlike Rule 1.2(b) of the Model Rules of Professional Conduct, proposed § 11.102(b) would not provide for practitioner's being appointed to represent any party. Inasmuch as the Office does not appoint practitioners to represent persons having business before the Office, the provision is believed to be unwarranted.

Paragraph (c) of § 11.102, would provide that the objectives or scope of services provided by the practitioner may be limited by agreement with the

client or by terms under which the practitioner's services are made available to the client. For example, a retainer may be for a specifically defined purpose, such as a utility patent application for an article of manufacture. The terms upon which representation is undertaken may exclude specific objectives or means. Such limitations may exclude objectives or means that the practitioner regards as repugnant or imprudent, or which the practitioner is not competent to handle. For example, a patent agent who is not an attorney should exclude services beyond the scope authorized by registration as a patent agent, such as preparing and prosecuting trademark and copyright registrations, patent validity or infringement opinions, or drafting or selecting contracts, including assignments. Practitioners taking referrals from invention promoters must assure that the promoter has not limited or attempted to limit by agreement with the inventor-client the scope of services the practitioner provides, and that the agreement is in compliance with § 11.504(c). *See* § 11.804(a).

Paragraph (g) of § 11.102, like current § 10.85(b)(1), would require that a practitioner reveal to the Office a fraud that the client has perpetrated on the Office after calling upon the client to rectify the same, and the client refuses or is unable to do so.

Section 11.103 would require a practitioner to act with diligence and zeal. Paragraphs (a), (b), and (c) of § 11.103 would continue the policy in current § 10.84(a).

Paragraph (a) of § 11.103 would continue to recognize that a practitioner has a duty, to both the client and to the legal system, to represent the client before the Office zealously within the bounds of the law, including the proposed Office Rules of Professional Conduct and other enforceable professional regulations. This duty requires the practitioner to pursue a matter on behalf of a client despite opposition, obstruction, or personal inconvenience to the practitioner, and to take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A practitioner should act with commitment and dedication to the interests of the client. However, a practitioner is not bound to press for every advantage that might be realized for a client. A practitioner has professional discretion in determining the means by which a matter should be pursued. See proposed § 11.102. A practitioner's workload should be controlled so that each matter can be handled adequately.

This duty derives from the practitioner's recognition to practice in a profession that has the duty of assisting members of the public to secure and protect available legal rights and benefits. In our government of laws and not of individuals, each member of our society is entitled to have such member's conduct judged and regulated in accordance with the law; to seek any lawful objective through legally permissible means; and to present for adjudication any lawful claim, issue, or defense.

Where the bounds of law are uncertain, the action of a practitioner may depend on whether the practitioner is serving as advocate or adviser. A practitioner may serve simultaneously as both advocate and adviser, but the two roles are essentially different. In asserting a position on behalf of a client, an advocate for the most part deals with past conduct and must take the facts as the advocate finds them. By contrast, a practitioner serving as adviser primarily assists the client in determining the course of future conduct and relationships. While serving as advocate, a practitioner should resolve in favor of the client doubts as to the bounds of the law, but even when acting as an advocate, a practitioner may not institute or defend a proceeding unless the positions taken are not frivolous. *See* proposed § 11.301. In serving a client as adviser, a practitioner, in appropriate circumstances, should give a practitioner's professional opinion as to what the ultimate decisions of the Office and courts would likely be as to the applicable law.

In the exercise of professional judgment, a practitioner should always act in a manner consistent with the best interests of the client. However, when an action in the best interests of the client seems to be unjust, a practitioner may ask the client for permission to forgo such action. If the practitioner knows that the client expects assistance that is not in accord with the proposed Rules of Professional Conduct or other law, the practitioner must inform the client of the pertinent limitations on the practitioner's conduct. *See* proposed §§ 11.102(e) and (f). This is believed to be entirely consistent with *Link* v. *Wabash R.R.,* 370 U.S. 626, 633–34 (1962); *Johnson* v. *Department of the Treasury,* 721 F.2d 361 (Fed Cir. 1983). Similarly, the practitioner's obligation not to prejudice the interests of the client is subject to the duty of candor toward the tribunal under proposed § 11.303 and the duty to expedite litigation under proposed § 11.302.

The duty of a practitioner to represent the client before the Office with zeal does not militate against the concurrent obligation to treat with consideration all persons involved in the legal process and to avoid the infliction of needless harm. Thus, the practitioner's duty to pursue a client's lawful objectives zealously does not prevent the practitioner from acceding to reasonable requests of opposing counsel, *e.g.*, in an interference or reexamination, that do not prejudice the client's rights, from being punctual in fulfilling all professional commitments, from avoiding offensive tactics, or from treating all persons involved in the legal process with courtesy and consideration.

Perhaps no professional shortcoming is more widely resented by clients than procrastination. A client's interests, including patent rights, often can be adversely affected by the passage of time or the change of conditions; in extreme instances, as when a practitioner overlooks a statute of limitations under 35 U.S.C. 102(b), the client's legal position may be destroyed. Even when the client's interests are not affected in substance, however, unreasonable delay can cause a client needless anxiety and undermine confidence in the practitioner's trustworthiness. Neglect of client matters is a serious violation of the obligation of diligence.

Unless the relationship is terminated as provided in proposed § 11.116, a practitioner should carry through to conclusion all matters undertaken for a client. If a practitioner's employment is limited to a specific matter, the relationship terminates when the matter has been resolved. If a practitioner has served a client over a substantial period in a variety of matters, the client sometimes may assume that the practitioner will continue to serve on a continuing basis unless the practitioner gives notice of withdrawal. Doubt about whether a client-practitioner relationship still exists should be eliminated by the practitioner, preferably in writing, so that the client will not mistakenly suppose the practitioner is looking after the client's affairs when the practitioner has ceased to do so. For example, if a practitioner has prosecuted a patent application that has become abandoned for failure to respond to an Office action having a final rejection, but the practitioner has not been specifically instructed concerning pursuit of an appeal, the practitioner should advise the client of the possibility of appeal before relinquishing responsibility for the matter.

Paragraph (c) of § 11.103 would define some, but not all, acts that would constitute violations of paragraphs (a) or

(b) of this section. The USPTO believes that it would be helpful to practitioners if some specific prohibitions were set out in the rules. The prohibitions set out in paragraphs (1) through (3) of § 11.103(c) represent violations that have occurred in the past or that the Office specifically seeks to prevent. The specific acts set out in paragraph (c) would not constitute a complete description of all acts in violation of paragraphs (a) or (b).

Section 11.103 is a rule of general applicability, and it is not meant to enlarge or restrict any specific rule. In particular, § 11.103 is not meant to govern conflicts of interest, which are addressed by proposed §§ 11.107, 11.108, and 11.109.

Section 11.104 would provide in paragraph (a) that a practitioner shall communicate with a client regarding the status of a matter, respond to a client's reasonable requests for information, sufficiently explain matters to permit the client to make informed decisions, and inform the client of settlement offers.

The client should have sufficient information to participate intelligently in decisions concerning the objectives of the representation before the Office, and the means by which they are to be pursued, to the extent the client is willing and able to do so. For example, a practitioner prosecuting an application should provide the client with facts relevant to the matter, promptly inform the client of communications received from and sent to the Office and take other reasonable steps that permit the client to make a decision regarding the course of prosecution. Thus, a registered practitioner failing to timely communicate with one or more clients could be subject to discipline under this section. *See In re Barndt,* 27 USPQ2d 1749 (Comm'r Pat. 1993); *Weiffenbach* v. *Logan,* 27 USPQ2d 1870 (Comm'r Pat. 1993), *aff'd. sub nom., Logan* v. *Comer,* No. 93–0335 (D.D.C. 1994), *aff'd. sub nom., Logan* v. *Lehman,* No. 95–1216 (Fed. Cir. 1995). A practitioner who receives from opposing counsel an offer of settlement in an interference is required to inform the client promptly of its substance. *See* proposed rule 11.101(a). Even when a client delegates authority to the practitioner, the client should be kept advised of the status of the matter.

A client is entitled to whatever information the client wishes about all aspects of the subject matter of the representation unless the client expressly consents not to have certain information passed on. The practitioner must be particularly careful to ensure that decisions of the client are made only after the client has been informed of all relevant considerations. The practitioner must initiate and maintain the consultative and decision-making process if the client does not do so, and must ensure that the ongoing process is thorough and complete.

Adequacy of communication depends in part on the kind of advice or assistance involved. The guiding principle is that the practitioner should fulfill reasonable client expectations for information consistent with (1) the duty to act in the client's best interests, and (2) the client's overall requirements and objectives as to the character of representation.

Maintenance Fees, and Section 8 and Section 15 Affidavits. Some practitioners maintain a long-term docket and periodically send communications to parties they may view as being former clients, regarding possible need for further action regarding a completed matter, such as payment of maintenance fees for patents. Whether, absent a specific agreement, the practitioners continue to have an attorney-client or agent-client relationship with the parties depends on the facts, such as the reasonable expectations or intent of the putative clients, evidence of objective facts supporting the existence of the expectation or intent, and evidence placing the practitioner on notice of the putative client's expectation or intent. A formal agreement to pay fees is not necessary. A recipient of a periodic notice, absent any other facts, may well have the subjective belief, supported by objective evidence they are receiving legal advice from the practitioner, that the practitioner and recipient continue to be in an attorney-client or agent-client relationship. A practitioner desiring to terminate an attorney-client or agent-client relationship upon completion of legal services should make the termination clear to the client, *e.g.*, by sending a termination letter to the client upon issuance of a patent or registration of a mark, and advising the recipient of the notices, and that the communication is not for the offering of advice, but as a reminder. *See* Formal Opinion No. 1996–146, Legal Ethics Committee of the Oregon State Bar. The practitioner should also withdraw from representation in accordance with 37 CFR 1.36 and proposed rule 11.116.

Responsibility to a Former Client. Even though a practitioner may have terminated any attorney-client or agent-client relationship with a client, the practitioner nevertheless would continue to have certain obligations to a former client. The proposed rules would continue the practice of placing certain obligations on the practitioner. For example, a practitioner's obligation to preserve in confidence information relating to representation of a client would continue after termination of the practitioner's employment. Section 11.106(g). Under § 11.804(i)(8), practitioners would have a duty to inform a former client or timely notify the Office of an inability to notify a former client of certain correspondence received from the Office. The obligation is necessarily imposed for the proper conduct of proceedings before the Office, such as receipt of notices regarding maintenance fees, reexamination proceedings, and institution of inter partes patent and trademark proceedings.

Practitioners not wishing to receive notices regarding maintenance fees may file a change of correspondence address under 37 CFR 1.33 without filing a request to withdraw, or provide a fee address pursuant to 37 CFR 1.363 to which maintenance fee correspondence should be sent. Since § 1.33(c) requires that all notices, official letters, and other communications for the patent owner(s) in reexamination proceedings will be directed to the attorney or agent of record in a patent file, a request for permission to withdraw under §§ 1.36 and 11.116 would have to be filed if a practitioner does not wish to receive correspondence regarding reexaminations.

Invention promoters. A Commissioner published two notices in the Official Gazette, 1086 OG 457 (December 10, 1987), and 1091 OG 26 regarding the ''Responsibilities of Practitioners Representing Clients in Proceedings Before The Patent and Trademark Office'' (Notices). The Notices address agency relationships between practitioners and intermediaries. For example, the Notices, *inter alia,* address the use of corporate liaisons to obtain instructions. The notices do not specifically refer to invention promoters. Nevertheless, some practitioners associated with invention promoters have relied upon the Notices to accept the invention promoter as the inventor's agent, take instructions from the agent, and conduct all communications through the agent. There are numerous ethics opinions and cases where attorneys have been warned or found to have aided the unauthorized practice of law by permitting a marketer to communicate directly with the client. For example, Formal Opinion 87, Ethics Committee of the Colorado Bar Association (1995), advises that an attorney aids the unauthorized practice of law where a non-lawyer markets a

living trust, gathers information from a consumer, forwards the information to a ''factory,'' where the lawyer may assist in preparing and reviewing living trust documents, and the non-lawyer delivers the documents to the consumer, but the attorney has no personal contact with the consumer. An attorney was found to have aided the unauthorized practice of law to process workmen's compensation claims by permitting a disbarred attorney to obtain clients' signatures on retainer agreements, gather factual information from clients, and have the clients execute medical authorization forms, and it was inferred that the disbarred attorney was called upon to explain the retainer agreement and other legal documents. *See In re Discipio,* 645 N.E.2d 906 (Ill. 1994). *See also Wayne County Bar Ass'n.* v. *Naumoff,* 660 N.E.2d (Ohio 1996); *Comm. On Professional Ethics & Conduct* v. *Baker,* 492 N.W.2d 695 (Iowa 1992); and *In re Komar,* 532 N.E.2d 801(Ill. 1988). The situations are analogous to invention promoters entering into agreements with inventors to engage a practitioner to prepare and prosecute a patent application for the inventor's invention, the promoter gathers information from the inventor for an application, then forwards the information and drawings to the practitioner to prepare an application, and thereafter secures the inventor's signature on the application. There is no direct communication between the practitioner and inventor.

Clearly, the Office does not desire to have practitioners aiding non-lawyers and non-practitioners in the unauthorized practice of law. Section 11.505 would proscribe a practitioner from aiding in the unauthorized practice of law. Accordingly, adoption of proposed rule § 11.104(a)(1) would require a practitioner, receiving clients from an invention promoter, to communicate directly with the client, and promptly report each Office action directly to the client.

Further, the Director found that the guidance in the second of the two Notices was not ''intended to significantly extend the coverage of the first Notice to practitioners using invention developers as intermediaries, and concluded that the omission of invention developers from the Notices supports the inference that invention developers were not intended to be included as permissible intermediaries. *Moatz* v. *Colitz,* 2002 WL 32056607, (Com'r. Pat. & Trademarks Dec 03, 2002). With the adoption of the proposed rules, the Notices (Official Gazette, 1086 OG 457 (December 10, 1987), and 1091 OG 26 regarding the ''Responsibilities of Practitioners Representing Clients in Proceedings Before The Patent and Trademark Office'') would be withdrawn and superseded by these comments.

Practitioners Must Maintain a Direct Relationship With Their Clients. Some practitioners relied upon promoters to obtain from the inventor all information used to prepare the patent application. In obtaining information for preparation of patent applications, the promoter may be a barrier to a direct relationship between the practitioner and the client-inventor. The barrier arises, for example, where the promoter instructs the inventor to communicate with the promoter and suggests that the inventor may incur additional charges if the inventor communicates directly with the practitioner. The barrier also might arise where the promoter provides the practitioner with a description of the invention that differs from or alters the inventor's description of the invention. For example, the information and drawings furnished by some promoters to the practitioner change an invention to have one or more surface indicia or elements not described by the inventor. Some unsophisticated inventors first learn of the changes when they receive their applications for review and signature. The inventors, being cautioned by a promoter that the inventors may incur additional costs by communicating with the practitioner, direct their questions to the promoter about the changes. The promoters advise the inventors that the changes were provided to improve the invention's potential to succeed in the market, and that the inventors should sign the declaration.

A promoter also can interfere with communications when the practitioner relies on the promoter to convey communications, including the collection of Office fees. For example, some promoters have delayed or failed to forward to the inventor-clients copies of Office actions the promoter receives from the practitioner, or requests for funds. As a result of the delay or lack of communication with the inventor-client, if the Office action is reported to the inventor-client, it may not be reported until after the period of response has expired. The patent application may become abandoned in these circumstances. Alternatively, a promoter may interfere with communications by instructing the inventor-clients to make their checks for filing or issue fees payable to the USPTO Director, deposit the checks in the promoter's own account, and issue their own checks that are sometimes returned to the Office unpaid. In these situations, the patent application becomes abandoned. It is problematic whether the funds delivered to the promoter may be recoverable.

A practitioner receiving referrals from a promoter may be motivated to provide the shortest and least expensive reply to an Office action. Such practitioners can receive a relatively small, set fee from the promoter for a reply to the Office action, regardless of the length or complexity needed to respond. Minimizing communication with the inventor-client reduces overhead costs, and maximizes time available to produce responses for multiples of such clients. It also can avoid providing the inventor-client with an opportunity to suggest presentation of affidavit, *e.g.*, an antedating affidavit under 37 CFR 1.131, or comparative test results under 37 CFR 1.132. Accordingly, the practitioner may not report an Office action to the inventor-client until after a response has been prepared and filed. This deprives the unsophisticated inventor-client of the opportunity to contribute to the response.

Paragraph (1) of § 11.104(a) would require practitioners receiving clients from an invention promoter to communicate directly with the client, and promptly report Office actions and replies directly to the client.

Paragraph (2) of § 11.104(a) would provide that a practitioner accepting referrals from a foreign attorney or foreign agent located in a foreign country may, with the written consent of a client located in a foreign country, conduct said communications with the client through said foreign attorney or agent. It is common for instructions relating to the application of a foreign patent and trademark owner, who is the practitioner's client, to be given to the practitioner through a foreign attorney or foreign patent agent. The fact that a practitioner receives instructions from an invention or trademark owner through a foreign attorney or agent does not change the fact that the client is still the foreign invention or trademark owner. *See Strojirensti* v. *Toyoda,* 2 USPQ2d 1222 (Comm'r Pat. 1986), which at 1223 cited *Toulmin* v. *Becker,* 105 USPQ 511 (Ohio Ct. App. 1954) for the principle that ''foreign patent agents or attorneys were not clients of U.S. patent attorney.''

A practitioner would be permitted to communicate through, rely on instructions of, and accept payment from the foreign attorney or agent only if the practitioner has obtained the consent of the client after full disclosure in accordance with the provisions of §§ 11.106(a)(1) and (d), 11.107(a) and (b), and 11.108(f). An agreement between the client and the foreign

attorney or agent may establish an agency relationship between the foreign attorney or agent and the client such that the practitioner may obtain instructions from the foreign attorney or agent, except if the instructions are adverse to the client's interests. For example, if the foreign attorney or agent instructs the practitioner to abandon the application because the client had not paid the foreign attorney or agent, the practitioner should consult with the client directly before acting on the instructions.

Ordinarily, the information to be provided is that appropriate for a client, who is a comprehending and responsible adult. This should obtain in all instances involving filing replies to Office actions. However, fully informing the client according to this standard may be impracticable, for example, where the client is a child or suffers from mental disability. *See* proposed rule 11.114. When the client is an organization or group, it is often impossible or inappropriate to inform every one of its members about its legal affairs; ordinarily, the practitioner should address communications to the appropriate officials of the organization. *See* proposed rule 11.113. Where many routine matters are involved, a system of limited or occasional reporting may be arranged with the client. Such communications as Office actions, notices of abandonment, and notices of allowance are not routine matters for a client. Practical exigency may also require a practitioner to act for a client without prior consultation. When the practitioner is attending an appeal hearing, for example, it is often not possible for the practitioner to consult with the client and obtain the client's acquiescence in tactical matters arising during the course of the hearing. It is sufficient if the practitioner consults with the client in advance of the hearing on significant issues that can be anticipated as arising during the course of the hearing, and consults after the hearing.

In rare circumstances, a practitioner may be justified for humanitarian reasons, in delaying or not conveying transmission of information, for example, where the information would merely be upsetting to a terminally ill client. A practitioner may not withhold information to serve the practitioner's own interest or convenience, *e.g.,* to conceal abandonment of an application. *See Weiffenbach* v. *Logan,* 27 USPQ2d 1870 (Comm'r Pat. 1993)*, aff'd. sub nom., Logan* v. *Comer,* No. 93–0335 (D.D.C. 1994), *aff'd. sub nom., Logan* v. *Lehman,* 73 F.3d 379 (Fed. Cir. 1995). No Office rules governing practice before the Office justify withholding information from a client to serve a practitioner, or to keep the client uninformed about an Office action.

Paragraph (d) of § 11.104 would define some, but not all, acts that would constitute violations of paragraph (a) of this section. The USPTO believes that it would be helpful to practitioners if some specific prohibitions were set out in the rules. The prohibitions set out in paragraph (1) of § 11.104(d) represents violations that have occurred in the past or that the Office specifically seeks to prevent. The specific acts set out in paragraph (d) would not constitute a complete description of all acts in violation of paragraph (a).

Paragraph (1) of § 11.104(d) would address failure to inform a client or former client, or failure to timely notify the Office of an inability to notify a client or former client, of correspondence received from the Office or the client's or former client's opponent in an *inter partes* proceeding before the Office when the correspondence (i) could have a significant effect on a matter pending before the Office, (ii) is received by the practitioner on behalf of a client or former client and (iii) is correspondence of which a reasonable practitioner would believe under the circumstances the client or former client should be notified.

Section 11.105 would continue to require fees be reasonable, and would introduce a requirement for written fee agreements.

Basis or rate of fee. Paragraph (a) of § 11.105 would continue the present practice for determining reasonableness of basis or rate of fees. When a practitioner has regularly represented a client, they ordinarily will have evolved an understanding concerning the basis or rate of the fee. In a new client-practitioner relationship, however, an understanding as to the fee should be promptly established. It is not necessary to recite all the factors that underlie the basis of the fee, but only those that are directly involved in its computation. It is sufficient, for example, to state that the basic rate is an hourly charge or a fixed amount or an estimated amount, or to identify the factors that may be taken into account in finally fixing the fee. When developments occur during the representation that render an earlier estimate substantially inaccurate, a revised estimate should be provided to the client. A written statement concerning the fee reduces the possibility of misunderstanding. Furnishing the client with a simple memorandum or a copy of the practitioner's customary fee schedule is usually sufficient if the basis or rate of the fee is set forth.

Paragraph (b) of § 11.105(b) would introduce a new requirement. A written statement concerning the fee, required to be furnished in advance in most cases by this section, would reduce the possibility of misunderstanding. In circumstances in which paragraph (b) requires that the basis for the practitioner's fee be in writing, an individualized writing specific to the particular client and representation is generally not required. Unless there are unique aspects of the fee arrangement, the practitioner may utilize a standardized letter, memorandum, or pamphlet explaining the practitioner's fee practices, and indicating those practices applicable to the specific representation. Such publications would, for example, explain applicable hourly billing rates, if billing on an hourly rate basis is contemplated, and indicate what charges (such as filing fees, Office fees, transcript costs, duplicating costs, and long-distance telephone charges) are imposed in addition to hourly rate charges.

Where the services to be rendered are covered by a fixed-fee schedule that adequately informs the client of the charges to be imposed, a copy of such schedule may be utilized to satisfy the requirement for a writing. Such services as patentability opinions, for example, may be suitable for description in such a fixed-fee schedule.

Written fee agreement. If a practitioner has not regularly represented a client, *e.g.,* an inventor, the basis or hourly rate of the fee must be communicated directly to the client, in writing. The written communication must distinguish between the fees charged for preparing and filing a patent application, and the fee(s) for prosecuting a patent application. A clearly written communication regarding fees can avoid confusion regarding whether a fee for an application includes fees for prosecuting an application.

A practitioner may require advance payment of a fee, but would be obliged to return any unearned portion. *See* proposed rule 11.116(d). A practitioner may accept property in payment for services, such as an ownership interest in an enterprise. However, a fee paid in property instead of money may be subject to special scrutiny. For example, it involves questions concerning both the value of the services and the practitioner's special knowledge of the value of the property. *See* Formal Opinion 300, Legal Ethics Committee of the District of Columbia (2000) (addressing ethical considerations when

a practitioner is asked to accept stock in lieu of legal fees). Further, a fee paid in property, such as acquisition of ownership of a percentage of the rights to an invention, would require compliance with § 11.108. *See Rhodes* v. *Buechel,* 685 N.Y.S.2d 65, 1999 N.Y. App. Div. LEXIS 904 (1999), *appeal denied,* 711 N.E.2d 984, 689 N.Y.S.2d 708, 1999 N.Y. LEXIS 1206 (NY 1999).

An agreement would not be made whose terms might induce the practitioner improperly to curtail services for the client or perform them in a way contrary to the client's interest. For example, a practitioner should not enter into an agreement or arrangement with an invention promoter to provide limited services, such as only up to a stated amount, only for a particular type of patent application, such as a design application, only so long as a promoter pays the practitioner, or only for one application or one type of application when it is foreseeable that more extensive services or the continuation of services may be required, unless the situation is fully disclosed to and consent is obtained from the client. Otherwise, the client might have to bargain for further assistance in the midst of a proceeding before the Office. However, it is proper to define the extent of services in light of the client's ability to pay. A practitioner should not, by using wasteful procedures, exploit a fee arrangement based primarily on an hourly charge.

Paragraph (c) of § 11.105 would continue the current practice regarding contingent fees. Generally, contingent fees are permissible in all civil cases, including patent and trademark registration applications.

Under paragraph (c) of § 11.105, the contingent fee arrangement would be required to be in writing. This writing must explain the method by which the fee is to be computed. The practitioner must also provide the client with a written statement at the conclusion of a contingent fee matter, stating the outcome of the matter and explaining the computation of any remittance made to the client. Consistent with paragraph (a) of § 11.105, the contingent fee must be reasonable.

Paragraph (d) of § 11.105 would permit the practice of dividing a fee with another practitioner. A division of fee would be a single billing to a client covering the fee of two or more practitioners who are not in the same firm. A division of fee facilitates association of more than one practitioner in a matter in which neither alone could serve the client as well, and most often is used when the fee is contingent and the division is between a referring practitioner and a trial specialist.

Under paragraph (d) of § 11.105, the practitioners would be permitted to divide a fee either on the basis of the proportion of services they render or by agreement between the participating practitioners if all assume responsibility for the representation as a whole. Attorneys who are not registered as patent attorneys or agents are not authorized to render services in patent matters before the Office. Accordingly, before assuming responsibility for the representation as a whole, the attorneys would be advised to inquire of their insurance carrier regarding malpractice coverage in patent matters, and seek expert legal advice regarding whether the rendition of services in patent application matters involves unauthorized practice of law. Joint responsibility for the representation would entail the obligations stated in proposed rule 11.105 for purposes of the matter involved. Permitting a division on the basis of joint responsibility, rather than on the basis of services performed, would represent a change from the basis for fee divisions allowed under the prior Office Code of Professional Responsibility. The change is intended to encourage practitioners to affiliate other registered patent counsel, who are better equipped by reason of experience or specialized (scientific or technical) background, to serve the client's needs, rather than to retain sole responsibility for the representation in order to avoid losing the right to a fee.

The concept of joint responsibility would not, however, be merely a technicality or incantation. For example, the registered practitioner who refers the client to another registered practitioner, or affiliates another registered practitioner in the representation, would remain fully responsible to the client, and is accountable to the client for deficiencies in the discharge of the representation by the registered practitioner who has been brought into the representation. If a practitioner wishes to avoid such responsibility for the potential deficiencies of another practitioner, the matter must be referred to the other practitioner without retaining a right to participate in fees beyond those fees justified by services actually rendered.

The concept of joint responsibility would not require the referring practitioner to perform any minimum portion of the total legal services rendered. The referring practitioner may agree that the practitioner to whom the referral is made will perform substantially all of the services to be rendered in connection with the representation, without review by the referring practitioner. Thus, the referring practitioner would not be required to review replies to Office actions, appeal briefs, or other documents, attend hearings or depositions, or otherwise participate in a significant and continuing manner. The referring practitioner would not, however, by avoiding direct participation, escape the implications of joint responsibility.

When fee divisions are based on assumed joint responsibility, the requirement of paragraph (a) that the fee be reasonable would apply to the total fee charged for the representation by all participating practitioners.

Paragraph (d) of § 11.105 would require that the client be advised, in writing, of the fee division and states that the client must affirmatively consent to the proposed fee arrangement. This provision would not require disclosure to the client of the share that each practitioner is to receive but would require that the client be informed of the identity of the practitioners sharing the fee, their respective responsibilities in the representation, and the effect of the association of practitioners outside the firm on the fee charged.

Paragraph (e) of § 11.105 would provide a new policy for determining unreasonableness of a fee. If a state bar has established a procedure for resolution of fee disputes, such as an arbitration or mediation, the practitioner who is an attorney should conscientiously consider submitting to it. Law may prescribe a procedure for determining a practitioner's fee, for example, in representation of an executor or administrator of the estate of a deceased registered practitioner. The practitioner entitled to such a fee and a practitioner representing another party concerned with the fee should comply with the prescribed procedure. The Office does not provide facilities or proceedings for fee dispute resolution.

Section 11.106 would address a practitioner's responsibilities regarding information provided by a client. A practitioner practicing before the Office is a participant in a quasi-judicial and administration system, and as such is responsible for upholding the law. One of the practitioner's functions is to advise clients so that they avoid any violation of the law in the proper exercise of their rights.

Paragraph (a)(1) of § 11.106 would require that a practitioner not reveal information relating to representation of a client unless the client consents after consultation. There would be exceptions for disclosures that are

impliedly authorized in order to carry out the representation, and exceptions as stated in paragraph (b).

Under paragraph (a)(1) of § 11.106, practitioner-client confidentiality obtains upon commencement of the practitioner-client relationship. Principles of substantive law external to these proposed rules determining when an attorney-client or agent-client relationship exists also determines whether a client-practitioner relationship exists. Although most of the duties flowing from the practitioner-client relationship attach only after the client has requested the practitioner to render legal services and the practitioner has agreed to do so, the duty of confidentiality imposed by this section attaches when the practitioner agrees to consider whether an attorney-client or agent-client relationship shall be established. Thus, a practitioner may be subject to a duty of confidentiality with respect to information disclosed by a client to enable the practitioner to determine whether representation of the potential client would involve a prohibited conflict of interest under proposed rules 11.107, 11.108, or 11.109.

The observance of the ethical obligation of a practitioner to hold inviolate confidential information of the client not only facilitates the full development of facts essential to proper representation of the client but also encourages people to seek early legal assistance. Almost without exception, clients come to practitioners in order to determine what their rights are and what is, in the maze of laws and regulations, deemed to be legal and correct. The common law recognizes the client's confidences must be protected from disclosure. Based upon experience, practitioners know that almost all clients follow the advice given, and the law is upheld.

There would be a difference between § 11.106 and attorney-client evidentiary privilege and the work product doctrine. The principle of confidentiality is given effect in two related bodies of law: the attorney-client privilege and the work product doctrine in the law of evidence and the rule of confidentiality established in professional ethics. The attorney-client privilege and the work product doctrine apply in judicial and administrative proceedings in which a practitioner may be called as a witness or otherwise required to produce evidence concerning a client. Section 11.106 would not be intended to govern or affect judicial or administrative application of the attorney-client privilege or work product doctrine. The privilege and doctrine were developed to promote compliance with law and fairness in litigation. In reliance on the attorney-client privilege, clients are entitled to expect that communications within the scope of the privilege will be protected against compelled disclosure. The attorney-client privilege is that of the client and not of the practitioner. The fact that in exceptional situations the practitioner under § 11.106 would have limited discretion, and pursuant to § 1.56, a requirement, to disclose a client confidence does not vitiate the proposition that, as a general matter, the client has a reasonable expectation that information relating to the client will not be voluntarily disclosed and that disclosure of such information may be judicially compelled only in accordance with recognized exceptions to the attorney-client privilege and work product doctrine. The privilege is applicable in certain cases to communications between registered patent agents and their clients. *See, e.g., In re Ampicillin Antitrust Litigation*, 81 F.R.D. 377, 392–394 (D.D.C. 1978).

A fundamental principle in the client-lawyer or client-agent relationship is that the practitioner maintain confidentiality of information relating to the representation. The client is thereby encouraged to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter. The principle of confidentiality is given effect in two related bodies of law, the attorney-client privilege in the law of evidence and the rule of confidentiality established in professional ethics. The attorney-client privilege applies in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client. The rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law. The confidentiality rule applies not merely to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source. A practitioner would not be permitted to disclose such information except as authorized or required by the Rules of Professional Conduct or other law.

In addition to prohibiting the disclosure of a client's confidences and secrets, paragraph (a)(2) provides that a practitioner may not use the client's confidences and secrets to the disadvantage of the client. For example, a practitioner who has learned of the abandonment or allowance of a client's patent application may not file a patent application in the practitioner's own name on a variation or an improvement of the client's invention if doing so may adversely affect the client's ability to market the invention or patent rights. Similarly, information acquired by the practitioner in the course of representing a client may not be used to the disadvantage of that client even after the termination of the practitioner's representation of the client. However, the fact that a practitioner has once served a client does not preclude the practitioner from using generally known information about the former client when later representing another client. Under proposed rules (a)(3) and (d)(2), a practitioner may use a client's confidences and secrets for the practitioner's own benefit or that of a third party only after the practitioner has made full disclosure to the client regarding the proposed use of the information and obtained the client's affirmative consent to the use in question.

Implied authorized disclosure. A practitioner is impliedly authorized to make disclosures about a client when appropriate in carrying out the representation, except to the extent that the client's instructions or special circumstances limit that authority. In patent prosecution, for example, a practitioner and applicant must disclose information material to the patentability of the pending claims. In another example, in litigation a practitioner may disclose information by admitting a fact that cannot properly be disputed, or in negotiation by making a disclosure that facilitates a satisfactory conclusion.

Practitioners in a firm may, in the course of the firm's practice, disclose to each other information relating to a client of the firm, unless the client has instructed that particular information be confined to specified practitioners.

Paragraph (b) of § 11.106 would provide for disclosures adverse to the client. The confidentiality rule is subject to limited exceptions. In becoming privy to information about a client, a practitioner may foresee that the client intends serious harm to another person.

However, to the extent a lawyer is required or permitted to disclose a client's purposes, the client will be inhibited from revealing facts which would enable the practitioner to counsel against a wrongful course of action. The public is better protected if full and open communication by the client is encouraged than if it is inhibited.

Several situations must be distinguished. First, the practitioner may not counsel or assist a client in conduct that is criminal or fraudulent. *See* proposed § 11.102(d). *See also Kingsland* v. *Dorsey*, 338 U.S. 318

(1949) (sustaining disbarment of attorney for deceiving Office as to real author of article presented in support of pending application, and misrepresenting that the article was the work of a ''reluctant witness''). Similarly, a practitioner has a duty under proposed § 11.303(a)(4) not to use false evidence. *See* proposed §§ 11.303(a)(4) and (b). This duty is essentially a special instance of the duty prescribed in proposed § 11.102(d) to avoid assisting a client in criminal or fraudulent conduct.

Further, the practitioner may have been innocently involved in past conduct by the client that was criminal or fraudulent. In such a situation the practitioner has not violated proposed § 11.102(d), because to ''counsel or assist'' criminal or fraudulent conduct requires knowing that the conduct is of that character.

Still further, the practitioner may learn that a client intends prospective conduct that is criminal and likely to result in imminent death or substantial bodily harm. As stated in paragraph (b)(1), the practitioner has professional discretion to reveal information in order to prevent such consequences. The practitioner may make a disclosure in order to prevent homicide or serious bodily injury, which the practitioner reasonably believes is intended by a client.

It is very difficult for a practitioner to be certain when such a heinous purpose will actually be carried out, for the client may have a change of mind. The practitioner's exercise of discretion requires consideration of such factors as the nature of the practitioner's relationship with the client and with those who might be injured by the client, the practitioner's own involvement in the transaction and factors that may extenuate the conduct in question. Where practical, the practitioner should seek to persuade the client to take suitable action. In any case, a disclosure adverse to the client's interest should be no greater than the practitioner reasonably believes necessary to the purpose. A practitioner's decision not to take preventive action permitted by paragraph (b)(1) would not violate this Rule.

Withdrawal. If the practitioner's services will be used by a client in materially furthering a course of criminal or fraudulent conduct, the practitioner must withdraw, as stated in proposed § 11.116(a)(1).

After withdrawal the lawyer is required to refrain from disclosing the client's confidences, except as otherwise provided in §§ 11.106(c) and (d). Neither §§ 11.106(c) and (d), nor § 11.108(b), nor § 11.116(d) prevent the practitioner from giving notice of the fact of withdrawal, and the practitioner may also withdraw or disaffirm any opinion, document, affirmation, or the like. Giving notice of withdrawal, without elaboration, is not a disclosure of a client's confidences. Furthermore, a practitioner's statement to the Office that withdrawal is based upon ''irreconcilable differences between the practitioner and the client'' is not elaboration. Similarly, after withdrawal under either proposed § 11.116(a)(1) or proposed §§ 11.116(b)(1) or (2), the practitioner may retract or disaffirm any opinion, document, affirmation, or the like that contains a material misrepresentation by the practitioner that the practitioner reasonably believes will be relied upon by others to their detriment.

Where the client is an organization, the practitioner may be in doubt whether contemplated conduct will actually be carried out by the organization. Where necessary to guide conduct in connection with § 11.106, the practitioner may make inquiry within the organization as indicated in proposed § 11.113(b).

Dispute Concerning Lawyer's Conduct. Where a legal claim or disciplinary charge alleges complicity of the practitioner in a client's conduct or other misconduct of the practitioner involving representation of the client, the practitioner may respond to the extent the practitioner reasonably believes necessary to establish a defense. The same is true with respect to a claim involving the conduct or representation of a former client. The practitioner's right to respond arises when an assertion of such complicity has been made. Paragraph (b)(2) of § 11.106 does not require the practitioner to await the commencement of an action or proceeding that charges such complicity, so that the defense may be established by responding directly to a third party who has made such an assertion. The right to defend, of course, applies where a proceeding has been commenced. Where practicable and not prejudicial to the practitioner's ability to establish the defense, the practitioner should advise the client of the third party's assertion and request that the client respond appropriately. In any event, disclosure should be no greater than the practitioner reasonably believes is necessary to vindicate innocence, the disclosure should be made in a manner which limits access to the information to the tribunal or other persons having a need to know it, and appropriate protective orders or other arrangements should be sought by the practitioner to the fullest extent practicable.

If the practitioner is charged with wrongdoing in which the client's conduct is implicated, the rule of confidentiality should not prevent the practitioner from defending against the charge. Such a charge can arise in a civil, criminal or professional disciplinary proceeding, and can be based on a wrong allegedly committed by the practitioner against the client, or on a wrong alleged by a third person; for example, a person claiming to have been defrauded by the practitioner and client acting together. A practitioner entitled to a fee is permitted by paragraph (b)(2) of § 11.106 to prove the services rendered in an action to collect it. This aspect of the rule expresses the principle that the beneficiary of a fiduciary relationship may not exploit it to the detriment of the fiduciary. As stated above, the practitioner must make every effort practicable to avoid unnecessary disclosure of information relating to a representation, to limit disclosure to those having the need to know it, and to obtain protective orders or make other arrangements minimizing the risk of disclosure.

Paragraphs (c) and (d) of § 11.106—Disclosures otherwise required or authorized. The attorney-client or agent-client privilege is differently defined in various jurisdictions. If a practitioner is called as a witness to give testimony concerning a client, absent waiver by the client, paragraph (a) of § 11.106 requires the practitioner to invoke the privilege when it is applicable. The practitioner must comply with the final orders of a court or other tribunal of competent jurisdiction requiring the practitioner to give information about the client.

The proposed Office Rules of Professional Conduct in various circumstances permit or require a practitioner to disclose information relating to the representation. See proposed §§ 11.202, 11.203, 11.303, and 11.401.

In addition to these provisions, a practitioner may be obligated or permitted by other provisions of law to give information provided in confidence by the client. Paragraph (c) of § 11.106 would require disclosure necessary to comply with 37 CFR 1.56 requiring a practitioner to disclose information material to patentability of pending claims. The practitioner may learn that a client intends to engage in conduct or is involved in conduct constituting fraud on the Office. As stated in proposed § 11.106(d), the practitioner has professional duty to comply with

§ 1.56 by submitting all information known to be material to the patentability of any existing claim. The USPTO has disciplined practitioners for failing to reveal evidence required by law to be disclosed. *See In re Milmore*, 196 USPQ 628 (Comm'r Pat. 1977) (suspending practitioner for not calling a reference to the examiner's attention). To address situations wherein practitioners are found by a court of record to have engaged in inequitable conduct, the proposed rules would provide that such a finding is cause for concluding that the practitioner violated the Rules of Professional Conduct. *See* § 11.804(h)(7).

The obligation to protect confidences and secrets obviously does not preclude a practitioner from revealing information when the client consents after full disclosure, when necessary to perform the professional employment, when permitted or required by these proposed rules (*e.g.*, to comply with § 1.56), or when required by law. Unless the client otherwise directs, a practitioner may disclose the affairs of the client to partners or associates of the practitioner's firm.

It is a matter of common knowledge that the normal operation of a law office exposes confidential professional information to non-practitioner employees of the office, particularly secretaries and those having access to the files; and this obligates a practitioner to exercise care in selecting and training employees so that the sanctity of all confidences and secrets of clients may be preserved. If the obligation extends to two or more clients as to the same information, a practitioner should obtain the permission of all before revealing the information. A practitioner must always be sensitive to the rights and wishes of the client and act scrupulously in the making of decisions that may involve the disclosure of information obtained in the course of the professional relationship. Thus, in the absence of consent of the client after full disclosure, a practitioner should not associate another practitioner in the handling of a matter; nor should the practitioner, in the absence of consent, seek counsel from another practitioner if there is a reasonable possibility that the identity of the client or the client's confidences or secrets would be revealed to such practitioner. Proper concern for professional duty should cause a practitioner to shun indiscreet conversations concerning clients.

Invention promoter—Full Disclosure—Informed Consent. Likewise, a practitioner should not communicate a confidence from the inventor-client to an invention promoter without first obtaining the inventor-client's consent to disclose the confidences after full disclosure. Full disclosure is defined in § 11.1(n). Confidence can include patentability opinions, patent applications, Office actions, amendments, appeal briefs, and notices or allowance or abandonment. Information communicated between the practitioner and inventor-client through an invention promoter may not be privileged. *Denver Tramway Co.* v. *Owens*, 36 P. 848 (Colo. 1894) (information gathered from client in presence of third party is not privileged). Consent of an inventor-client would necessitate full disclosure that the client would be waiving any attorney-client or agent-client privilege attached to the confidence by permitting the confidence to be communicated to the promoter, as well as waiving confidential status for the information.

Paragraph (c)(3)(B) and paragraph (d) of § 11.106 would address the unique circumstances raised by attorney-client relationships within the Government.

Paragraph (c)(3)(B) of proposed § 11.106 would apply only to practitioners employed by the Government who are representing Government interests when appearing before the USPTO. It is designed to permit disclosures that are not required by law or court order under proposed § 11.106(c)(3)(A), but which the Government authorizes its attorneys to make in connection with their professional services on behalf of the Government. Such disclosures may be authorized or required by statute, executive order, or regulation, depending on the constitutional or statutory powers of the authorizing entity. If so authorized or required, paragraph (c)(3)(B) of proposed § 11.106 governs.

The term ''agency'' in paragraph (d) includes, *inter alia*, executive and independent departments and agencies, special commissions, committees of the legislature, agencies of the legislative branch such as the Office, General Accounting Office, and the courts to the extent that they employ practitioners (*e.g.*, staff counsel) to counsel them. The employing agency has been designated the client under this rule to provide a commonly understood and easily determinable point for identifying the Government client.

Government practitioners may also be assigned to provide an individual with counsel or representation in circumstances that make clear that an obligation of confidentiality runs directly to that individual and that paragraph (d)(2)(A), not (d)(2)(B), of proposed § 11.106 applies. It is, of course, acceptable in this circumstance for a Government practitioner to make disclosures about the individual representation to supervisors or others within the employing governmental agency so long as such disclosures are made in the context of, and consistent with, the agency's representation program. *See, e.g.*, 28 CFR 50.15 and 50.16. The relevant circumstances, including the agreement to represent the individual, may also indicate the extent to which the individual client to whom the Government practitioner is assigned will be deemed to have granted or denied consent to disclosures to the practitioner's employing agency. Examples of such representation include representation by a public defender, a Government practitioner representing a defendant sued for damages arising out of the performance of the defendant's Government employment, and a military practitioner representing a court-martial defendant.

Paragraph (g) of § 11.106 —Former client. The duty of confidentiality would continue after the client-lawyer or client-agent relationship has terminated.

Paragraph (h) of § 11.106. There are circumstances in which a person who ultimately becomes a practitioner provides assistance to a practitioner while serving in a nonpractitioner capacity. The typical situation is that of the law clerk or summer associate in a law firm or Government agency. Paragraph (h) of proposed § 11.106 would address the confidentiality obligations of such a person after becoming a member of a Bar or becoming registered; the same confidentiality obligations are imposed as would apply if the person had been a member of a Bar at the time confidences or secrets were received. For a related provision dealing with the imputation of disqualifications arising from prior participation as a law clerk, summer associate, or in a similar position, *see* proposed § 11.110(b).

Section 11.107 is intended to provide clear notice of circumstances that may constitute a conflict of interest. Loyalty to a client is an essential element in the practitioner's relationship to a client. An impermissible conflict of interest may exist before representation is undertaken, in which event the representation should be declined. The practitioner should adopt reasonable procedures, appropriate for the size and type of firm and practice, to determine in both litigation and non-litigation matters, including patent and trademark matters before the Office, the parties and issues involved and to determine

whether there are actual or potential conflicts of interest.

If such a conflict arises after representation has been undertaken, the practitioner should withdraw from the representation. *See* proposed § 11.116. Where more than one client is involved and the practitioner withdraws because a conflict arises after representation, whether the practitioner may continue to represent any of the clients is determined by proposed § 11.109. *See also* proposed § 11.202(c). As to whether a client-lawyer or client-agent relationship exists or, having once been established, is continuing, see the comments to proposed § 11.103

Paragraph (a) of § 11.107 would express the general rule that loyalty to a client prohibits undertaking representation directly adverse to that client without that client's consent. Thus, a practitioner ordinarily may not act as advocate against a person the practitioner represents in some other matter, even if it is wholly unrelated. On the other hand, simultaneous representation in unrelated matters of clients whose interests are only generally adverse, such as competing economic enterprises, does not require consent of the respective clients. Paragraph (a) applies only when the representation of one client would be directly adverse to the other.

The prohibition of paragraph (a) of § 11.107 would relate only to actual conflicts of positions, not to mere formalities. For example, a practitioner would not be absolutely forbidden to provide joint or simultaneous representation if the clients' positions are only nominally but not actually adverse. Joint representation is commonly provided to joint inventors, to incorporators of a business, to parties to a contract, in formulating estate plans for family members, and in other circumstances where the clients might be nominally adverse in some respect but have retained a practitioner to accomplish a common purpose. If no actual conflict of positions exists with respect to a matter, the absolute prohibition of paragraph (a) does not come into play.

Paragraph (b) of 11.107 would address situations where loyalty to a client can be impaired when a practitioner cannot consider, recommend or carry out an appropriate course of action for the client because of the practitioner's other responsibilities or interests. The conflict in effect forecloses alternatives that would otherwise be available to the client. Paragraph (b) addresses such situations. A possible conflict does not itself preclude the representation. The critical questions are the likelihood that a conflict will eventuate and, if it does, whether it will materially interfere with the practitioner's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client. Consideration should be given as to whether the client wishes to accommodate the other interest involved.

Full disclosure and consent. A client may consent to representation notwithstanding a conflict. However, as indicated in paragraph (a)(1) with respect to representation directly adverse to a client, and paragraph (b)(1) with respect to material limitations on representation of a client, when a disinterested practitioner would conclude that the client should not agree to the representation under the circumstances, the practitioner involved cannot properly ask for such agreement or provide representation on the basis of the client's consent. When more than one client is involved, the question of conflict would have to be resolved as to each client. Moreover, there may be circumstances where it is impossible to make the disclosure necessary to obtain consent. For example, when the practitioner represents different clients in related matters and one of the clients refuses to consent to the disclosure necessary to permit the other client to make an informed decision, the practitioner cannot properly ask the latter to consent.

Full Disclosure. Disclosure and consent are not mere formalities. Full disclosure is defined in § 11.1(n). As defined therein, full disclosure requires a clear explanation of the differing interests involved in a transaction, the advantages of seeking independent legal advice, and a detailed explanation of the risks and disadvantages to the client entailed in any agreement or arrangement, including not only any financial losses that will or may foreseeably occur to the client, but also any liabilities that will or may foreseeably accrue to the client.

Proposed § 11.107 would not require that disclosure be in writing or in any other particular form in all cases. Nevertheless, it should be recognized that the form of disclosure sufficient for more sophisticated business clients may not be sufficient to permit less sophisticated clients to provide fully informed consent. Moreover, it would be prudent for the practitioner to provide potential joint clients with at least a written summary of the considerations disclosed, and to request and receive a written consent. This can reduce the opportunity for dispute regarding the scope and content of the disclosure.

Consent. The term ''consent'' is defined in § 11.1(e). As indicated there, a client's consent must not be coerced either by the practitioner or by any other person. In particular, the practitioner should not use the client's investment in previous representation by the practitioner as leverage to obtain or maintain representation that may be contrary to the client's best interests. If a practitioner has reason to believe that undue influence has been used by anyone to obtain agreement to the representation, the practitioner should not undertake the representation.

When a practitioner has two clients, the clients might have potential conflicts. In circumstances having potential conflicts, the circumstances would trigger § 11.107(a) and (b). Potential conflicts between an inventor and invention promoter may arise from a contract between them providing for the promoter to obtain a practitioner to represent the inventor in obtaining a patent. The practitioner engaged by the promoter may have a lawyer-client or agent-client relationship with both the inventor and promoter. For example, if the contract provides for the promoter to pay the practitioner, the practitioner may regard the promoter as a client, while the practitioner obtains a power of attorney from the inventor to prosecute the latter's patent application. Another potential conflict may arise regarding funds advanced by the inventor for the practitioner's legal services. Normally, when a client advances legal fees, the funds are received by a practitioner, who places the funds in an escrow account. *See* § 11.115(a). In such circumstances, the client is entitled to a refund of unearned fees. *See* proposed §§ 11.115(d)(4), and 11.116(d). If, however, in accordance with the contract between the promoter and inventor, the inventor delivers the funds to the promoter, the promoter may place the funds in its own account(s). The funds are then subject to the promoter's control. The inventor may expect the practitioner to deliver legal services inasmuch as the funds have been advanced. There is a potential for the promoter going out of business, or the inventor being dissatisfied with the services from the promoter and practitioner. The client may desire to discharge the practitioner. In such circumstances, the inventor might be unable to recover the unearned advanced legal fees held by the promoter, and there is a potential conflict between the inventor and promoter regarding the advanced legal

fees. In a variation on the same example, a potential conflict exists if the inventor, although permitted to discharge the practitioner, may view the situation as compelling him or her to remain with the practitioner selected by the promoter inasmuch as the promoter holds the inventor's funds. The circumstances and differing interests of an inventor-client and a promoter-client may create at least potential conflicts requiring consent under § 11.107(a). *Accord*, Formal Opinion 1997–148, Standing Committee on Professional Responsibility and Conduct (California).

Further, to the extent the practitioner's relationship with one client affects the practitioner's loyalty and independent judgment on behalf of the other client, an actual conflict of interest exists. This can occur when the practitioner receives conflicting instructions from the clients, or is called upon to advance inconsistent objectives of two clients. For example, if an inventor-client insists that the practitioner pursue a utility patent application, and the promoter client will pay for only a design patent application, the practitioner is receiving conflicting instructions and is being called upon to advance inconsistent objectives. Such circumstances require a practitioner to obtain further consent under § 11.107(b). *Accord*, Formal Opinion 1997–148, Standing Committee on Professional Responsibility and Conduct (California).

If joint representation of inventor and an invention promoter involves potential conflicts, it is necessary to obtain consent of both clients after full disclosure. This obtains if the clients have different objectives that are implicated by a decision made by the practitioner. For example, differing interests are implicated if an inventor-client expects the several thousand dollars paid to the promoter to be used to obtain the broadest patent protection available, and the invention promoter would be satisfied with any patent protection, including narrowest patent protection. A practitioner, receiving numerous referrals from the promoter and being paid a relatively low fee for each application, knowingly provides only narrow, even ''picture'' claims. The practitioner's action accommodates processing of the referrals, and facilitates continued receipt of referrals, whereas broader patent protection was available. The practitioner's action may be satisfactory for the promoter-client, whereas the inventor-client expects broad patent protection. There is at least a potential conflict of interest.

Also, where an inventor-client delivers to an invention promoter-client all funds advanced for legal fees to pay the practitioner, full disclosure of all risks and consent from both clients would be required by § 11.107(b). For example, the inventor must be fully informed of the consequences if the invention promoter goes out of business or declares bankruptcy, and does not pay the practitioner. The inventor may be unable to obtain from the promoter a refund of the unearned funds advanced for legal services, whereas the practitioner, if he or she had received the funds and declined to provide legal services, would be required to refund the unearned advanced funds. Moreover, there may be circumstances where it is impossible to make the disclosure necessary to obtain consent. For example, when the practitioner represents different clients in related matters and one of the clients refuses to consent to the disclosure necessary to permit the other client to make an informed decision, the practitioner cannot properly ask the latter to consent.

Practitioner's interests. The practitioner's own interests should not be permitted to have an adverse effect on representation of a client. For example, a practitioner's need for income should not lead the practitioner to undertake matters that cannot be handled competently and at a reasonable fee. *See* proposed §§ 11.101 and 11.105. If the probity of a practitioner's own conduct in a transaction is in serious question, it may be difficult or impossible for the practitioner to give a client detached advice. A practitioner may not allow related business interests to affect representation, for example, by referring clients to an enterprise in which the practitioner has an undisclosed interest.

There can be circumstances where an invention promoter refers inventors to a practitioner, and the practitioner has an attorney-client or agent-client relationship with the inventor-client, and a business or financial relationship exists between the practitioner and an invention promoter. When the promoter compensates the practitioner, they may have a business and financial relationship like a third-party payor relationship between an attorney and insurer. The practitioner and invention promoter also may have a business and financial relationship because the practitioner obtains employment (*e.g.*, referrals) through the promoter. For example, this can occur where the practitioner provides legal services at reduced fees, paid by the promoter, in expectation of receiving numerous referrals from the promoter. The volume of referrals and rapid production of patent applications may make up for the reduction in the fees. The inventor-client may expect the practitioner to provide extensive attentiveness to his or her needs, and zealous efforts to obtain the broadest patent protection at the least cost. If the practitioner regards the invention promoter as his or her client, the full disclosure requirements of § 11.107(b) are triggered. Even in the absence of any attorney-client or agent-client relationship between the practitioner and promoter, the existence of the business or financial relationship between them requires disclosure obligations by the practitioner under § 11.108(f). *Accord*, Formal Opinion 1997–148, Standing Committee on Professional Responsibility and Conduct (California). The business dealings between a lawyer and an invention promoter have been recognized as giving rise to conflicts between the lawyer's duty to furnish independent legal counsel to another client, and the business interests of the lawyer acting in the capacity of representing the invention promoter. *See* Informal Opinion 1482, American Bar Association (1982).

In another example, if a practitioner depends on receiving referrals from an organization the practitioner regards as the client, and not the individuals purchasing legal services (trusts, patent applications) offered by the organization and referred to the practitioner, representation of the individual implicates at least potential conflicts of interest in violation of § 11.107(b). *See In re R.W. Hodgson*, 721 Off. Gaz. 414 (Aug. 20, 1957) (rejecting patent agent's argument that invention promoter holding 10% interest in each application of numerous applications, as opposed to the patent applicant, was his client, and pointing out that Rule 32 (37 CFR 1.32) does not confer on an assignee of partial interest in an application the right to conduct the prosecution of an application); *People* v. *Volk*, 805 P.2d 1116, 1117 (Colo. 1991) (holding attorney suffered from conflict of interest for ''consider[ing] the corporation to be her client, not the individual purchasers of the trusts''). Consent, after full disclosure, must be obtained to provide representation.

The foregoing situations are to be distinguished from those commonly experienced when an inventor, employed by a corporation to invent, is represented by a practitioner who is employed by the corporation. For example, the inventor has signed an employment contract that contains a provision whereby the inventor agrees to assign to the corporation all inventions conceived during

employment. The attorney is employed either in-house by the corporation, or is a member of a firm and is retained to represent the corporation. Following the inventor's discovery and disclosure to the corporation of a new and useful invention, the attorney prepares a patent application. The attorney's actual client is the corporation, and the attorney has not made any representations to the inventor that he or she represents the inventor or the inventor's interests. It would be prudent, before filing the application, to secure from the inventor, the inventor's signature on a combined declaration and power of attorney, as well as on assignment of the patent rights to the corporation. The attorney also would be acting prudently to clearly inform the inventor before signing the documents that the attorney represents only the corporation. Upon obtaining the signed combined declaration and power of attorney, and the assignment, these documents can be filed in the USPTO, and the assignment recorded. The corporation may then revoke all previous powers of attorney, and give its own power of attorney in favor of the attorney.

Conflicts in litigation and administrative proceedings. Paragraph (a) of § 11.107 would prohibit representation of opposing parties in litigation and administrative proceedings. Simultaneous representation of parties whose interests in litigation or an interference in the Office may conflict, such as coplaintiffs or codefendants, or opposing parties in an interference is governed by paragraph (b). An impermissible conflict may exist by reason of substantial discrepancy in the parties' testimony, or incompatibility in positions in relation to an opposing party in an interference. On the other hand, common representation of persons having similar interests, such as joint applicants, is proper if the risk of adverse effect is minimal and the requirements of paragraph (b) are met. Compare proposed § 11.202 involving intermediation between clients.

Ordinarily, a practitioner may not act as advocate against a client the practitioner represents in some other matter, even if the other matter is wholly unrelated. However, there are circumstances in which a practitioner may act as an advocate against a client. For example, a practitioner representing an enterprise with diverse operations may accept employment as an advocate against the enterprise in an unrelated matter if doing so will not adversely affect the practitioner's relationship with the enterprise or conduct of the suit and if both clients consent upon full disclosure. The propriety of concurrent representation can depend on the nature of the litigation. For example, a suit charging fraud entails conflict to a degree not involved in a suit for a declaratory judgment concerning statutory interpretation.

Interest of third person paying for a practitioner's service. A practitioner may be paid from a source other than the client, if the client consents after full disclosure and the arrangement does not compromise the practitioner's duty of loyalty to the client. *See* proposed § 11.108(f). Full disclosure is defined in § 11.1(n), and consent is defined in § 11.1(e). For example, when an invention promoter and inventor have conflicting interests in a matter arising from an invention marketing agreement, and the promoter is required to provide a patent practitioner to file and prosecute a patent application for the inventor, the arrangement should assure the practitioner professional independence. Thus, the arrangement should assure that the practitioner's professional independence permits him or her to zealously pursue the inventor's patent rights, including any necessary appeal or covering an interference.

Other Conflict Situations. Conflicts of interest in contexts other than litigation sometimes may be difficult to assess. Relevant factors in determining whether there is potential for adverse effect include the duration and intimacy of the practitioner's relationship with the client or clients involved, the functions being performed by the practitioner, the likelihood that actual conflict will arise and the likely prejudice to the client from the conflict if it does arise. The question is often one of proximity and degree.

For example, a practitioner may not represent multiple parties to a negotiation whose interests are fundamentally antagonistic to each other, but common representation is permissible where the clients are generally aligned in interest even though there is some difference of interest among them.

A practitioner for a corporation or other organization who is also a member of its board of directors should determine whether the responsibilities of the two roles may conflict. The lawyer may be called on to advise the corporation in matters involving actions of the directors. Consideration should be given to the frequency with which such situations may arise, the potential intensity of the conflict, the effect of the practitioner's resignation from the board and the possibility of the corporation's obtaining legal advice from another practitioner in such situations. If there is material risk that the dual role will compromise the practitioner's independence of professional judgment, the practitioner should not serve as a director.

Conflict charged by an opposing party. Resolving questions of conflict of interest is primarily the responsibility of the practitioner undertaking the representation. As in litigation, where a court may raise the question of conflicting interests when there is reason to infer that the practitioner has neglected the responsibility, the same may obtain in *inter parte* practice before the Office. Where the conflict is such as clearly to call in question the fair or efficient administration of justice, opposing counsel may properly raise the question. Such an objection should be viewed with caution, however, for it can be misused as a technique of harassment.

Withdrawal. It is much preferred that a representation that is likely to lead to a conflict be avoided before the representation begins, and a practitioner should bear this fact in mind in considering whether disclosure should be made and consent obtained at the outset. If, however, a conflict only arises after a representation has been undertaken, and the conflict falls within § 11.107(a), or if a conflict arises under § 11.107(b), then the practitioner should withdraw from the representation, complying with § 11.106. Where a conflict is not foreseeable at the outset of representation and arises only under § 11.107, a practitioner would have to seek consent to the conflict at the time that the actual conflict becomes evident. Where the conflict is such as clearly to call in question the fair or efficient administration of justice, opposing counsel may properly raise the question. Such an objection should be viewed with caution, however, because it can be misused as a technique of harassment. In determining whether a conflict is reasonably foreseeable, the test is an objective one, *i.e.*, that which a lawyer of reasonable prudence and competence would ascertain in regard to the matter in question. In determining the reasonableness of a practitioner's conduct, such factors as whether the practitioner (or practitioner's firm) has an adequate conflict-checking system in place, must be considered. Where more than one client is involved and the practitioner must withdraw because a conflict arises after representation has been undertaken, the question of whether the practitioner may continue to represent any of the clients would be determined by § 11.109.

Imputed Disqualification. All of the references in § 11.107 and this

accompanying comment to the limitation upon a ''practitioner'' must be read in light of the imputed disqualification provisions of § 11.110, which affect practitioners practicing in a firm.

In the Government-practitioner context, § 11.107(b) is not intended to apply to conflicts between agencies or components of Government (Federal, state, or local) where the resolution of such conflicts has been entrusted by law, order, or regulation to a specific individual or entity.

Businesses Affiliated with a Practitioner or Firm. Practitioners, either alone or through firms, may have interests in enterprises that do not or would not be authorized to practice law but that, in some or all of their work, become involved with practitioners or their clients either by assisting the practitioner in providing legal services or by providing related services to the client. Examples of such enterprises are accounting firms, consultants, invention promoters, and the like. The existence of such interests would raise several questions under § 11.107. First, a practitioner's recommendation, as part of legal advice, that the client obtain the services of an enterprise with which the practitioner is affiliated implicates § 11.107(b)(4). The practitioner should not make such a recommendation unless able to conclude that the practitioner's professional judgment on behalf of the client will not be adversely affected. Even then, the practitioner should not make such a recommendation without full disclosure to the client so that the client can make a fully informed choice. Such disclosure should include the nature and substance of the practitioner's or the firm's interest in or relation with the enterprise, alternative sources for the non-legal services in question, and sufficient information so that the client understands that the related enterprise's services are not legal services, and the client's relationship to the enterprise will not be that of client to attorney. Second, such an affiliated enterprise may refer a potential client to the practitioner; the practitioner should take steps to assure that the related enterprise will inform the practitioner of all such referrals. The practitioner should not accept such a referral without full disclosure of the nature and substance of the practitioner's interest in the related enterprise, including the number of clients annually referred. *See also* § 11.701(b). Third, the practitioner should be aware that the relationship of the enterprise to its own customer may create a significant interest in the practitioner in the continuation of that relationship. The substantiality of such an interest may be enough to require the practitioner to decline a proffered client representation that would conflict with that interest; at least §§ 11.107(b)(4) and (c) may require the prospective client to be informed and to consent before the representation could be undertaken. Fourth, a practitioner's interest in an affiliated enterprise that may also serve the practitioner's clients would create a situation in which the practitioner must take unusual care to fashion the relationship among practitioner, client, and enterprise to assure that confidences and secrets are properly preserved pursuant to § 11.106 to the maximum extent possible. *See* § 11.503.

Section 11.108—Transactions Between Client and Practitioner. As a general principle, all transactions between client and practitioner should be fair and reasonable to the client. In such transactions a review by independent counsel on behalf of the client is often advisable. Section 11.108(a) does not, however, apply to standard commercial transactions between the practitioner and the client for products or services that the client generally markets to others; for example, banking or brokerage services, medical services, products manufactured or distributed by the client, and utility services. In such transactions, the practitioner has no advantage in dealing with the client, and the restrictions in § 11.108(a) are unnecessary and impracticable.

A practitioner may accept a gift from a client, if the transaction meets general standards of fairness. For example, a simple gift such as a present given at a holiday or as a token of appreciation is permitted. If effectuation of a substantial gift requires preparing a legal instrument such as a will or conveyance, however, the client should be advised by the practitioner to obtain the detached advice that another practitioner can provide. Section 11.108(c) recognizes an exception where the client is a relative of the donee or the gift is not substantial.

Proposed § 11.108 does not prevent a practitioner from entering into a contingent fee arrangement with a client in a civil case, if the arrangement satisfies all the requirements of § 11.105(c).

Literary Rights. An agreement by which a practitioner acquires literary or media rights concerning the conduct of the representation creates a conflict between the interests of the client and the personal interests of the practitioner. Measures that might otherwise be taken in the representation of the client may detract from the publication value of an account of the representation. Section 11.108(d) would not prohibit a practitioner representing a client in a transaction concerning literary property from agreeing that the practitioner's fee shall consist of a share in ownership in the property, if the arrangement conforms to § 11.105.

Patent Rights. An agreement whereby a practitioner acquires patent rights or an inventor assigns patent rights to an enterprise funded by the practitioner, but equally owned by the practitioner and the inventor, also creates a conflict between the interests of the client and the personal interests of the practitioner. A practitioner must do more than advise the client to seek the advice of independent counsel in the transaction. Full disclosure requires the practitioner to advise the client of all options or alternatives, including advising the client to consult with independent counsel, and potential conflicts between the practitioner and client. *See Monco* v. *Janus,* 583 N.E.2d 575 (Ill. 1991); *Rhodes* v. *Buechel,* 685 N.Y.S.2d 65, 1999 N.Y.App. Div. LEXIS 904 (1999), appeal denied, 711 N.E.2d 984, 689 N.Y.S.2d 708, 1999 N.Y. LEXIS 1206 (NY 1999). A practitioner should advise a client, before entering into an agreement, of the alternatives to assigning all patent rights to the enterprise. For example, one alternative is to lease the rights to the company. The conflict is evident when following a lack of success, the practitioner seeks to dissolve the enterprise due to a deadlock with client, and the client expects the practitioner to exercise professional judgment on the client's behalf.

Paying Certain Administrative Proceeding or Litigation Costs and Client Expenses. Historically, under the Code of Professional Responsibility, practitioners could only advance the costs of litigation. The client remained ultimately responsible, and was required to pay such costs even if the client lost the case. That rule was modified by the USPTO in 1985 by adoption of 37 CFR 10.64(b), that eliminated the requirement for the client to remain ultimately liable for all costs of patent prosecution by permitting the practitioner to advance any fee required to prevent or remedy abandonment by reason of an act or omission attributable to the practitioner. The provisions of § 11.108(e) would continue the provisions of current § 10.64(b), but go further by providing that a practitioner may also pay certain expenses of a client that are not patent prosecution or litigation expenses. Thus, under § 11.108(e), a practitioner may pay medical or living expenses of

a client to the extent necessary to permit the client to continue patent or trademark prosecution, or litigation. The payment of these additional expenses is limited to those strictly necessary to sustain the client during patent prosecution or the litigation, such as medical expenses and minimum living expenses. Permitting such payments would bring the proposed rules in conformity with the Rules of Professional Conduct adopted for many state bars. The purpose of permitting such payments is to avoid situations in which a client is compelled by exigent financial circumstances to continue patent prosecution, or settle a claim on unfavorable terms in order to receive the immediate proceeds of settlement. This provision does not permit practitioners to ''bid'' for clients by offering financial payments beyond those minimum payments necessary to sustain the client until the patent prosecution or litigation is completed. Regardless of the types of payments involved, assuming such payments are proper under § 11.108(e), client reimbursement of the practitioner is not required. However, no practitioner is required to pay litigation or other patent costs to a client. Section 11.108 would merely permit such payments to be made without requiring reimbursement by the client.

Paragraph (e)(3) of § 11.108 would continue the present practice of permitting a practitioner to advance any fee required to prevent or remedy an abandonment of a client's application by reason of an act or omission attributable to the practitioner and not to the client, whether or not the client is ultimately liable.

Paragraph (f) of § 11.108—Person Paying for Practitioner's Services. Section 11.108(f) would require full disclosure and client consent before the practitioner's services can be paid for by a third party. Such an arrangement would also have to conform to the requirements of § 11.106 concerning confidentiality and § 11.107 concerning conflict of interest and risks. Where the client is a class, consent may be obtained on behalf of the class by court-supervised procedure. The disclosure and consent must be in writing.

The only interest of some of third parties that offer a practitioner's legal service may be a financial one: closing the sale of a legal service, such as a living trust or patent application, to the individual. Such a party, *e.g.,* an invention promoter, facilitates the practitioner's access to such individuals. The practitioner may depend upon the promoter for employment, and even compensation in these circumstances. In such situations, the promoter can control the engagement of the practitioner. Potential conflicts may arise where the practitioner permits the third party, with whom the practitioner has a business or financial relationship, to perform the essential planning tasks, including fact-finding without supervision. The practitioner should be exercising independent professional judgment.

In order to create an appropriate patent application, relevant information must be ascertained from the inventor. The practitioner must, with the inventor's input, determine the proper type of patent application to prepare, the facts to be included, and the scope of protection to be sought. The practitioner must counsel an inventor regarding all of the options that are appropriate and the pros and cons of each option. After such counseling, the participant (*e.g.,* an inventor) must decide if a patent application, or some other arrangement should be the cornerstone of the intellectual property plan. If a practitioner permits an invention promoter to assume this function, the practitioner allows a third party to interfere with the practitioner's independence of professional judgment. *See* § 11.107(b). *Accord,* Formal Opinion No. 1997–148, Standing Committee on Professional Responsibility and Conduct (California).

Accordingly, in matters involving an invention promoter paying the practitioner, proposed paragraph (f) would require practitioners to fully disclose all involved conflicts of interest and risks. The duty of full disclosure includes informing the inventor of reasonably foreseeable adverse consequences if the inventor advances or has advanced legal fees or expenses to the promoter. Thus, the practitioner would have to inform the client of the full extent to which the advanced funds are or would be at risk of being lost by being placed with the promoter, as opposed to being delivered directly to the practitioner. The risks could include, but are not limited to, the loss of the funds if the promoter ceases doing business, declares bankruptcy, or is otherwise unable to obtain a refund of unearned advanced legal fees. In contrast, the client could obtain the refund if the funds are delivered to the practitioner. For example, if delivered to the practitioner, the advanced legal fees should be deposited in the practitioner's escrow account. *See* § 11.115. Unearned funds would be refundable to the client, even if the practitioner ceases to continue practicing, and may not be subject to bankruptcy. Another risk in the event the promoter ceases to do business, or declares bankruptcy is the possibility that the practitioner will refuse to provide legal services for the client unless the client again provides funds to pay for legal services for which the client previously paid.

Paragraph (f)(1)(ii) of § 11.108 would provide if the client is an inventor who advances legal fees and costs to an invention promoter, and the promoter compensates the practitioner, the practitioner has a duty to disclose to the client all conflicting interests and risks in writing.

Paragraph (2) of § 11.108(f) would require a practitioner to avoid interference with his or her independence of professional judgment if a third party is paying for the practitioner's services. Thus, a practitioner must avoid relying on a contract or other agreement between a client/inventor and an invention promoter as limiting his or her professional services rendered to a particular number of applications, *e.g.,* a provisional application, or to a particular type of invention for which an application will be filed, *e.g.,* a design patent application.

An invention promoter can interfere with the attorney-client or agent-client relationship between the practitioner and inventor-client in several ways. First, the promoter can interfere with the attorney-client or agent-client relationship between the practitioner and inventor. For example, this can occur if the promoter determines the legal protection that the practitioner will seek for the inventor. These situations obtain where a promoter enters into a contract with its patron, the inventor, using its standard contract form to provide only design patent protection, or only utility patent protection. If the practitioner permits the promoter's contract to control the extent to which legal services are provided for the fee paid by the inventor, the practitioner permits the promoter to direct or regulate the practitioner's professional judgment.

The invention promoter also may interfere with the relationship by collecting the legal fees to be paid for the practitioner's legal services. For example, if the promoter deposits the funds in its own bank account, and does not pay the practitioner, the promoter interferes with the relationship to the extent the practitioner refuses to provide legal services unless or until paid. A practitioner may be willing to continue representation only if the inventor-client again pays for the legal services, but only if legal fees are now paid directly to the practitioner. Inasmuch as the practitioner undertook

to represent the client under the circumstances where the company collects the legal fees, it is believed that the practitioner should provide the legal services, and pursue his or her legal recourse against the company for recovery of the fees.

Similarly, invention promoters may interfere with the relationship if they go out of business. Practitioners employed by such promoters may leave the inventor-client's files behind the promoter's closed doors, and abandon the inventors to their own resources. Section 11.108(f)(2) would require a practitioner to avoid interference with his or her independence of professional judgment if third party payment for a practitioner's services is to be permitted.

Sections 11.108(f)(2) and 11.504(c) would proscribe a practitioner from permitting an invention promoter to direct or regulate the practitioner's professional judgment in rendering legal services.

Family Relationships Between Practitioners. Paragraph (i) of § 11.108 would apply to related practitioners who are in different firms. Related practitioners in the same firm would be governed by §§ 11.107, 11.109, and 11.110. Pursuant to the provisions of § 11.110, the disqualification stated in paragraph (i) is personal and is not imputed to members of firms with whom the practitioners are associated. Since each of the related practitioners is subject to § 11.110(i), the effect is to require the consent of all materially affected clients.

Practitioner's Liens. Paragraph (j) of § 11.108 would be substantially the same as the provisions of current § 10.64(a). The substantive law of each state and territory differs regarding whether practitioners are permitted to assert and enforce liens against the property of clients. In the District of Columbia, an attorney's lien is permitted. *See, e.g., Redevelopment Land Agency* v. *Dowdey,* 618 A.2d 153, 159–60 (D.C. 1992), and cases cited therein. *See also Beardsley* v. *Cockerell,* 240 F.Supp 845 (D.D.C. 1965) (attorney retaining lien applied to legal patent work, legal non-patent work, and other property for payment for services). Whether a practitioner may legally have a lien on money or property belonging to a client is generally a matter of substantive law. Exceptions to which the common law might otherwise permit are made with respect to contingent fees and retaining liens. *See,* respectively, § 11.105(c) and § 11.108(i). Exceptions regarding retention of papers relating to a client are addressed in § 11.116(d).

Paragraph (d) of § 11.116 would require a practitioner to surrender papers and property to which the client is entitled when representation of the client terminates. Section 11.108(j) would state a narrow exception to § 11.116(d): a practitioner may retain anything the law permits—including property—except for files. As to files, a practitioner may retain only the practitioner's own work product, and then only if the client has not paid for the work. However, if the client has paid for the work product, the client is entitled to receive it, even if the client has not previously seen or received a copy of the work product. Furthermore, the practitioner may not retain the work product for which the client has not paid, if the client has become unable to pay or if withholding the work product might irreparably harm the client's interest.

Under paragraph (d) of § 11.116, for example, it would require a practitioner to return all papers received from a client, such as birth certificates, invention disclosures, or invention prototypes. Section 11.116(d) would prohibit retention of such papers to secure payment of any fee due. Only the practitioner's own work product—results of factual investigations, legal research and analysis, and similar materials generated by the practitioner's own effort—could be retained (the term ''work product'' as used herein is limited to materials falling within the ''work product doctrine,'' but includes any material generated by the practitioner that would be protected under that doctrine whether or not created in connection with pending or anticipated litigation). Office actions would not be considered work product. A practitioner could not, however, withhold all work product merely because a portion of the practitioner's fees had not been paid. *See* § 11.116(d).

There are situations in which withholding work product would not be permissible because of irreparable harm to the client. The possibility of involuntary incarceration or criminal conviction constitutes one category of irreparable harm. *See* Formal Opinion 1690, Legal Ethics Committee of the Virginia State Bar (1997). The realistic possibility that a client might irretrievably lose a significant right, *e.g.*, patent rights, or become subject to a significant liability because of the withholding of the work product constitutes another category of irreparable harm. On the other hand, the mere fact that the client who can afford to might have to pay another practitioner to replicate the work product does not, standing alone, constitute irreparable harm. These examples are merely indicative of the meaning of the term ''irreparable harm,'' and are not exhaustive.

Taking an interest in a client's patent. Paragraph (j)(3) of § 11.108 would be substantially the same as the provisions of current § 10.64(a)(3), in permitting a practitioner to take an interest in a patent or in the proceeds from a patent as part of his or her fee. However, consistent with § 11.105(a), the fee obtained by the interest may not exceed an amount that is reasonable. The paragraph adds information that a practitioner who is or has been an officer or employee of the Office has an additional legal issue to consider. The latter practitioner is ineligible during the period of the practitioner's appointment and for one year thereafter from acquiring, directly or indirectly, except by inheritance or bequest, any right or interest in any patent, issued or to be issued by the Office. *See* 35 U.S.C. 4. In the year following separation from the Office, a practitioner who has been an officer or employee of the Office may acquire an interest in a client's patent only at such time and insofar as is permitted by § 4.

Paragraph (k) of 11.108 would address situations wherein a practitioner acquires access to inventor-clients through an invention promoter. A promoter's interests may be served merely if the inventor accepts a marketing plan. The plan often includes protection of the inventor-client's invention with a patent. However, the best interests of the inventor may mean that no patent is necessary, or both utility and design patents should be considered an integral part of the plan. The practitioner's duty to the participant includes educating the inventor as to the available options and not simply following the sole patent plan format offered by the promoter which all must use. The practitioner in these situations is attempting to serve two masters, the inventor and the invention promoter.

A lawyer-client or agent-client relationship can exist between the practitioner and the inventor at least when representation before the Office occurs. A business and professional relationship can exist between the practitioner and the invention promoter whereby the practitioner acquires inventor-clients through the promoter. The practitioner and the promoter have a business and financial relationship because the practitioner obtains employment or compensation through the promoter.

Paragraph (k) of § 11.108 would address situations in which a

practitioner's relationship with another party could interfere with a practitioner's loyalty and independent professional judgment on an inventor-client's behalf. The practitioner's relationship with the invention promoter here creates the possibility of a conflict of interest that warrants disclosure under the rule. The inventor-client and the promoter may have differing interests in the engagement. The best interests of the inventor may mean that a patent should not be an integral part of the marketing plan. The best interest of the promoter, however, is most often served only if the inventor's plan includes a patent. The practitioner's duty to the inventor-client includes educating the inventor as to the available options to protect the invention, including patent rights, and not simply presenting one patent format offered by the promoter which all must use. The practitioner's duty of loyalty flows from his other client.

Here, the practitioner's judgment may be influenced by the practitioner's relationship with the promoter, who is a ''party'' as the facilitator of the transaction, or perhaps as a partial assignee of the invention. This relationship would trigger § 11.108(k)(1). Additionally, the promoter profits from the sale of the marketing plan, and receives the opportunity to market other products or services to the inventor and this would trigger § 11.108(k)(2). Accordingly, under either paragraph (1) or (2) of § 11.108(k), the practitioner would be barred from representing the inventor unless the practitioner makes the required full written disclosure and receives the consent of the inventor. Section 11.1(n) defines ''full disclosure'' as a ''clear explanation of the differing interests involved in a transaction, * * * and detailed explanation of the risks and disadvantages to the client entailed in any agreement or arrangement, including not only any financial loses that will or may foreseeably occur to the client, but also any liabilities that will or may foreseeably accrue to the client.''

In this situation, a practitioner has a duty to inform the inventor-client in writing of the full extent of the practitioner's and client's differing interests. For example, the duty would require full disclosure of the practitioner's business and financial relationship with the promoter, and the differing interests of the practitioner, the promoter, and inventor in the transaction. The practitioner's duty of ''full disclosure'' includes informing the inventor-client of reasonably foreseeable adverse consequences and includes informing the inventor in writing about how these relationships could cause the practitioner to favor the interests of the promoter and influence the practitioner's advice to the client. *See* Opinion No. 1997–148, Standing Committee on Professional Responsibility and Conduct (California).

Section 11.109. After termination of a client-practitioner relationship, a practitioner may not represent another client except in conformity with proposed § 11.109. The principles in § 11.107 would determine whether the interests of the present and former client are adverse. Thus, a practitioner could not properly seek to rescind on behalf of a new client a contract drafted on behalf of the former client. So also a practitioner who prosecutes a patent application for joint inventors, and has an attorney-client relationship with each joint inventor could not properly represent one joint inventor in breach of contract suit against the other joint inventor while the patent application was pending where each joint inventor agreed to pay half of the legal fees, and the practitioner is aware that each applicant would benefit directly from successful prosecution of the application. *See Henry Filters, Inc.* v. *Peabody Barnes, Inc.,* 611 N.E.2d 873 (Ohio 1992).

The scope of a ''matter'' for purposes of § 11.109 may depend on the facts of a particular situation or transaction. The practitioner's involvement in a matter can also be a question of degree. For example, a practitioner previously and currently served as local counsel in several patent applications for a Czechoslovakian agency that acted as an inventor's foreign attorney in prosecution of U.S. patent applications and that serves as Czechoslovakian representative for all Czechoslovakian patent applicants. The practitioner represented a client from Japan in an interference with another client of the Czechoslovakian agency. The practitioner was found not to be disqualified from representing a client adverse to the Czechoslovakian agency's other client. No evidence was adduced showing that the practitioner represented the agency's other client, or that the subject matter in the patents of the agency's client or any other Czechoslovakian application handled by the practitioner was substantially related to the subject matter of the practitioner's client. *See Strojirenstvi* v. *Toyada,* 2 USPQ2d 1222 (Comm'r Pat. 1986). In another example, attorneys in a firm representing an accused patent infringer, as well as the firm, were disqualified where one of the firm's partners worked directly for the patent owner in a substantially related case, and the other firm partner, designated as the lead counsel for the accused infringer, was an associate in the firm that represented the patent owner in the prior related case. The two suits involved the same adversaries. In both suits, the accused infringer filed antitrust counterclaims alleging the same improper marketing practices. Both suits involve the same technology, and were found to be ''substantially related'' actions. *See W.L. Gore & Associates, Inc.* v. *International Medical Prosthetics Research Associates, Inc.,* 223 USPQ 884 (Fed. Cir. 1984). When a practitioner has been directly involved in a specific transaction, subsequent representation of other clients with materially adverse interests clearly is prohibited. On the other hand, a practitioner who recurrently handled a type of problem for a former client is not precluded from later representing another client in a wholly distinct problem of that type even though the subsequent representation involves a position adverse to the prior client. Similar considerations can apply to the reassignment of Government practitioners between defense and prosecution functions. The underlying question is whether the practitioner was so involved in the matter that the subsequent representation can be justly regarded as a changing of sides in the matter in question. Section 11.109 is intended to incorporate Federal case law defining the ''substantial relationship'' test. *See, e.g., T.C. Theatre Corp.* v. *Warner Brothers Pictures,* 113 F.Supp. 265 (S.D.N.Y. 1953), and its progeny; *see also Conflicts of Interest in the Legal Profession,* 94 Harv. L. Rev.1244, 1315–34 (1981).

Disqualification from subsequent representation is for the protection of clients and can be waived by them. A waiver is effective only if there is full disclosure of the circumstances, including the practitioner's intended role in behalf of the new client. The question of whether a practitioner is personally disqualified from representation in any matter on account of successive Government and private employment would be governed by proposed § 11.111 rather than by § 11.109.

With regard to an opposing party's raising a question of conflict of interest, see the comment to § 11.107. With regard to disqualification of a firm with which a practitioner is associated, see §§ 11.110 and 11.111.

Practitioners moving between firms. When practitioners have been associated within a firm but then end their association, the question of

whether a practitioner should undertake representation is more complicated. There are several competing considerations. The client previously represented by the former firm must be reasonably assured that the principle of loyalty to the client is not compromised. The rule should not be so broadly cast as to preclude other persons from having reasonable choice of legal counsel. The rule also should not unreasonably hamper practitioners from forming new associations and taking on new clients after having left a previous association. In this connection, it should be recognized that today many practitioners practice in firms, that many practitioners to some degree limit their practice to one field or another, and that many move from one association to another several times in their careers. If the concept of imputation were applied with unqualified rigor, the result would be radical curtailment of the opportunity of practitioners to move from one practice setting to another and of the opportunity of clients to change counsel.

Reconciliation of these competing principles in the past has been attempted under two rubrics. One approach has been to seek *per se* rules of disqualification. For example, it has been held that a partner in a law firm is conclusively presumed to have access to all confidences concerning all clients of the firm. Under this analysis, if a practitioner has been a partner in one law firm and then becomes a partner in another law firm, there may be a presumption that all confidences known by the partner in the first firm are known to all partners in the second firm. This presumption might properly be applied in some circumstances, especially where the client has been extensively represented, but may be unrealistic where the client was represented only for limited purposes. Furthermore, such a rigid rule exaggerates the difference between a partner and an associate in modern law firms.

The other rubric formerly used for dealing with disqualification is the appearance of impropriety proscribed in Canon 9 of the ABA Model Code of Professional Responsibility. This rubric has a two-fold problem. First, the appearance of impropriety can be taken to include any new client-lawyer or agent-client relationship that might make a former client feel anxious. If that meaning were adopted, disqualification would become little more than a question of subjective judgment by the former client. Second, since ''impropriety'' is undefined, the term ''appearance of impropriety'' is question-begging. It therefore has to be recognized that the problem of disqualification cannot be properly resolved either by simple analogy to a practitioner practicing alone or by the very general concept of appearance of impropriety.

The standard that would be followed by the Office is addressed in the following paragraphs styled Confidentiality and Adverse positions.

Confidentiality. Preserving confidentiality is a question of access to information. Access to information, in turn, is essentially a question of fact in particular circumstances, aided by inferences, deductions or working presumptions that reasonably may be made about the way in which practitioners work together. A practitioner may have general access to files of all clients of a law firm and may regularly participate in discussions of their affairs; it should be inferred that such a practitioner in fact is privy to all information about all the firm's clients. In contrast, another practitioner may have access to the files of only a limited number of clients and participate in discussions of the affairs of no other clients; in the absence of information to the contrary, it should be inferred that such a practitioner in fact is privy to information about the clients actually served but not confidences of other clients.

Paragraph (b) of § 11.109. Application of paragraph (b) of § 11.109 would depend on a situation's particular facts. In such an inquiry the burden of proof should rest upon the firm whose disqualification is sought.

Paragraph (b) of § 11.109 would operate to disqualify the practitioner only when the practitioner involved has actual knowledge of information protected by §§ 11.106 and 11.109(b). Thus, if a practitioner while with one firm acquired no confidential knowledge or information relating to a particular client of the firm, and that practitioner later joined another firm, neither the practitioner individually nor the second firm is disqualified from representing another client in the same or a related matter even though the interests of the two clients conflict. *See* § 11.110(b) for the restrictions on a firm once a practitioner has terminated association with the firm.

Independent of the question of disqualification of a firm, a practitioner changing professional association has a continuing duty to preserve confidentiality of information about a client formerly represented. *See* §§ 11.106 and 11.109.

Adverse positions. The second aspect of loyalty to a client is the practitioner's obligation to decline subsequent representations involving positions adverse to a former client arising in substantially related matters. This obligation requires abstention from adverse representation by the individual practitioner involved, but does not properly entail abstention of other practitioners through imputed disqualification. Hence, this aspect of the problem is governed by § 11.109(a). Thus, if a practitioner left one firm for another, the new affiliation would not preclude the firms involved from continuing to represent clients with adverse interests in the same or related matters, so long as the conditions of paragraphs (b) and (c) concerning confidentiality have been met.

Confidential information acquired by the practitioner in the course of representing a client may not subsequently be used or revealed by the practitioner to the disadvantage of the client. However, the fact that a practitioner has once served a client does not preclude the practitioner from using generally known information about that client when later representing another client.

Disqualification from subsequent representation is for the protection of former clients and can be waived by them. A waiver is effective only if there is full disclosure of the circumstances, including the practitioner's intended role in behalf of the new client.

With regard to an opposing party's raising a question of conflict of interest, see comment to § 11.107. With regard to disqualification of a firm with which a practitioner is or was formerly associated, *see* § 11.110.

Section 11.110 would provide a general rule for disqualification. For purposes of the USPTO Rules of Professional Conduct, the term ''firm'' includes practitioners in a private firm, and practitioners employed in the legal department of a corporation or other organization, or in a legal services organization, but does not include a Government agency or other Government entity. Whether two or more practitioners constitute a firm within this definition can depend on the specific facts. For example, two practitioners who share office space and occasionally consult or assist each other ordinarily would not be regarded as constituting a firm. However, if they present themselves to the public in a way suggesting that they are a firm or conduct themselves as a firm, they should be regarded as a firm for purposes of the Rules. The terms of any formal agreement between associated practitioners are relevant in determining whether they are a firm, as is the fact

that they have mutual access to confidential information concerning the clients they serve. Furthermore, it is relevant in doubtful cases to consider the underlying purpose of the Rule that is involved. A group of practitioners could be regarded as a firm for purposes of the Rule that the same practitioner should not represent opposing parties in litigation, while it might not be so regarded for purposes of the Rule that information acquired by one practitioner is attributed to another.

With respect to the law department of an organization, there ordinarily would be no question that the members of the department constitute a firm within the meaning of the Rules of Professional Conduct. However, there can be uncertainty as to the identity of the client. For example, it may not be clear whether the law department of a corporation represents a subsidiary or an affiliated corporation, as well as the corporation by which the members of the department are directly employed. A similar question can arise concerning an unincorporated association and its local affiliates.

Similar questions can also arise with respect to practitioners in legal aid organizations. Practitioners employed in the same unit of a legal service organization constitute a firm, but not necessarily those employed in separate units. As in the case of independent practitioners, whether the practitioners should be treated as associated with each other can depend on the particular Rule that is involved, and on the specific facts of the situation.

Where a practitioner has joined a private firm after having represented the Government, the situation would be governed by § 11.111. The individual practitioner involved is bound by these rules generally, including §§ 11.106, 11.107, and 11.109.

Different provisions are thus made for movement of a practitioner from one private firm to another and for movement of a practitioner from the Government to a private firm. The Government is entitled to protection of its client confidences, and therefore to the protections provided in §§ 11.106 and 11.111. However, if the more extensive disqualification in § 11.110 were applied to former Government practitioners, *e.g.,* patent examiners, the potential effect on the Government would be unduly burdensome. The Government deals with all private citizens and organizations, and thus has a much wider circle of adverse legal interests than does any private law firm. In these circumstances, the Government's recruitment of practitioners would be seriously impaired if § 11.110 were applied to the Government. On balance, therefore, the Government, including the USPTO, is better served in the long run by the protections stated in § 11.111.

Paragraph (a) of § 11.110 would address principles of imputed disqualification. The rule of imputed disqualification stated in § 11.110(a) gives effect to the principle of loyalty to the client as it applies to practitioners who practice in a law firm. Such situations can be considered from the premise that a firm of practitioners is essentially one practitioner for purposes of the rules governing loyalty to the client, or from the premise that each practitioner is vicariously bound by the obligation of loyalty owed by each practitioner with whom the practitioner is associated. Section 11.110(a) would govern only among the practitioners currently associated in a firm. When a practitioner moves from one firm to another, the situation would be governed by §§ 11.109 and 11.110(b).

Paragraph (b) of § 11.110 would operate to permit a law firm, under certain circumstances, to represent a person with interests directly adverse to those of a client represented by a practitioner who formerly was associated with the firm. This section would apply regardless of when the formerly associated practitioner represented the client. However, the law firm may not represent a person with interests adverse to those of a present client of the firm, which would violate § 11.107. Moreover, the firm may not represent the person where the matter is the same or substantially related to that in which the formerly associated practitioner represented the client and any other practitioner currently in the firm has material information protected by §§ 11.106 and 11.109(c).

Section 11.111 would address practitioners who leave public office, such as resigning or retiring from the USPTO as a patent examiner, and enter other employment, *e.g.,* becoming a patent searcher, or registered practitioner. It applies to judges and their law clerks as well as to practitioners who have acted in other public capacities. It is a counterpart of § 11.110(b), which applies to practitioners moving from one firm to another.

This section would prohibit a practitioner from exploiting his or her former association with a public office for the advantage of a private client. It is a counterpart of § 11.110(b), which applies to practitioners moving from one firm to another.

A practitioner representing a Government agency or section within the agency, whether employed or specially retained by the Government, is subject to the Rules of Professional Conduct, including the prohibition against representing adverse interests stated in § 11.107 and the protections afforded former clients in § 11.109. In addition, such a practitioner is subject to this § 11.111 and to statutes and Government regulations concerning conflict of interest. In the metropolitan Washington, DC area, where there are so many practitioners for the Federal Government agencies, a number of whom are leaving Government and accepting other employment, particular heed must be paid to the Federal conflict-of-interest statutes. *See, e.g.,* 18 U.S.C. Chapter 11 and regulations and opinions thereunder. In applying § 11.111, the Office would continue to follow the principles announced in *AH JU Steel Co., Ltd.* v. *Armco, Inc.,* 680 F.2d 751 (CCPA 1982); *Sierra Vista Hospital, Inc.,* v. *United States,* 639 F.2d 749 (Ct.Cla.1981); *Armstrong* v. *McAlpin,* 625 F.2d 433 (2nd Cir. 1980) (*en banc*) *vacated,* 449 U.S. 1106 (1981); *General Electric Co.* v. *United States,* 215 Ct.Cl. 928 (1977); and *Kesselhaut* v. *United States,* 555 F.2d 791 (Ct.Cl. 1977).

Where the successive employment is a private client and a public agency, the risk exists that power or discretion vested in public authority might be used for the special benefit of a private client. A practitioner should not be in a position where benefit to a private client might affect performance of the lawyer's professional functions on behalf of public authority. Thus, a registered practitioner should not be in a position as a patent examiner to be influenced by any loyalty to a former client. Also, unfair advantage could accrue to the private client by reason of access to confidential Government information about the client's adversary obtainable only through the practitioner's Government service. However, the rules governing practitioners presently or formerly employed by a Government agency should not be so restrictive as to inhibit transfer of employment to and from the Government. The Government has a legitimate need to attract qualified practitioners as well as to maintain high ethical standards. The provisions for screening and waiver are necessary to prevent the disqualification rule from imposing too severe a deterrent against entering public service.

When the client is an agency of one Government, that agency should be treated as a private client for purposes of this section if the practitioner thereafter represents an agency of another Government, as when a lawyer

represents a city and subsequently is employed by a Federal agency.

Paragraph (a) of § 11.111, like current § 10.111(b), flatly forbids a practitioner to accept other employment in a matter in which the practitioner participated personally and substantially as a public officer or employee; participation specifically includes acting on a matter in a judicial capacity. There is no provision for waiver of the individual practitioner's disqualification. The USPTO has disciplined a practitioner for accepting private employment in a matter in which he had personal responsibility while a public employee. *See Friedman* v. *Lehman,* 40 USPQ2d 1206 (D.D.C. 1996) (reprimanding attorney who, as an examiner signed a restriction requirement in a patent application, and in retirement gave expert testimony by deposition about the patent that issued on a continuation application of application wherein he signed the restriction requirement).

''Matter'' is defined in § 11.1(w) so as to encompass only matters that are particular to a specific party or parties. The making of rules of general applicability and the establishment of general policy will ordinarily not be a ''matter'' within the meaning of § 11.111. When a practitioner is forbidden by paragraph (a) to accept private employment in a matter, the partners and associates of that practitioner are likewise forbidden, by paragraph (b), to accept the employment unless the screening and disclosure procedures described in paragraphs (c) through (f) are followed.

Section 11.111 forbids practitioners to accept other employment in connection with matters that are the same as or ''substantially related'' to matters in which they participated personally and substantially while serving as public officers or employees. The leading case defining ''substantially related'' matters in the context of former Government employment is *Brown* v. *District of Columbia Board of Zoning Adjustment,* 486 A.2d 37 (D.C. 1984) (*en banc*). There the D.C. Court of Appeals, en banc, held that in the ''revolving door'' context, a showing that a reasonable person could infer that, through participation in one matter as a public officer or employee, the former Government practitioner ''may have had access to information legally relevant to, or otherwise useful in'' a subsequent representation, is *prima facie* evidence that the two matters are substantially related. If this prima facie showing is made, the former Government practitioner must disprove any ethical impropriety by showing that the practitioner ''could not have gained access to information during the first representation that might be useful in the later representation.'' *Id.* at 49–50. In *Brown,* the Court of Appeals announced the ''substantially related'' test after concluding that, under former DR 9–101(B), *see* ''Revolving Door,'' 445 A.2d 615 (D.C. 1982) (*en banc*) (*per* curiam), the term ''matter'' was intended to embrace all matters ''substantially related'' to one another—a test that originated in ''side-switching'' litigation between private parties. *See* § 11.109; *Brown,* 486 A.2d at 39–40 n.1, 41–42 & n.4. Accordingly, the words ''or substantially related to'' in paragraph (a) are an express statement of the judicial gloss in *Brown* interpreting ''matter.''

Paragraph (a)'s absolute disqualification of a practitioner from matters in which the practitioner participated personally and substantially carries forward a policy of avoiding both actual impropriety and the appearance of impropriety that is expressed in the Federal conflict-of-interest statutes and was expressed in the former Code of Professional Responsibility.

Paragraph (c) requires the screening of a disqualified practitioner from such a matter as a condition to allowing any practitioners in the disqualified practitioner's firm to participate in it. This procedure is permitted in order to avoid imposing a serious deterrent to practitioners' entering public service. Governments have found that they benefit from having in their service younger persons who do not intend to devote their entire careers to public service, as well as more experienced practitioners. Some practitioners might not enter into short-term public service if they thought that, as a result of their active governmental practice, a firm would hesitate to hire them because of a concern that the entire firm would be disqualified from matters as a result.

There is no imputed disqualification and consequently no screening requirement in the case of a judicial law clerk. But such clerks are subject to a personal obligation not to participate in matters falling within paragraph (a) of § 11.111, since participation by a law clerk is within the term ''judicial or other adjudicative capacity.''

''Other employment,'' as used in paragraph (a) of § 11.111, would include the representation of a governmental body other than an agency of the Government by which the practitioner was employed as a public officer or employee. In the case of a move from one Government agency to another, however, the prohibition provided in paragraph (a) might be waived by the Government agency with which the practitioner was previously employed. As used in paragraph (a), it would not be ''other employment'' for a practitioner who has left the employment of a particular Government agency and taken employment with another Government agency (*e.g.,* the Department of Justice) or with a private law firm to continue or accept representation of the same Government agency with which the practitioner was previously employed.

Paragraph (c) of § 11.111 would permit a practitioner to receive a salary or partnership share established by prior independent agreement, while prohibiting the attorney's compensation from being directly related in any way to the fee in the matter in which the practitioner is disqualified.

Section 11.112 would extend the basic requirements of § 11.111(a) to privately employed arbitrators. Section 11.112(a) is substantially similar to § 11.111(a), except that it allows an arbitrator to represent someone in connection with a matter with which the practitioner was substantially involved while serving as an arbitrator if the parties to the arbitration consent. Section 11.112(b) makes it clear that the prohibition set forth in § 11.112(a) does not apply to partisan arbitrators serving on a multimember arbitration panel.

Section 11.113 would address situations where the client is an entity, as opposed to a person. An organizational client is a legal entity, which cannot act except through its officers, directors, employees, shareholders, and other constituents. The duties defined herein apply equally to corporations and unincorporated associations. ''Other constituents'' as used herein means the positions equivalent to officers, directors, employees, and shareholders held by persons acting for organizational clients that are not corporations. Customers of an organizational client are not constituents.

When one of the constituents of an organizational client communicates with the organization's practitioner in that person's organizational capacity, the communication is protected by § 11.106. Thus, by way of example, if an organizational client requests its attorney to investigate allegations of wrongdoing, interviews made in the course of that investigation between the attorney and the client's employees or other constituents are covered by § 11.106. This does not mean, however, that constituents of an organizational client are the clients of the practitioner. The practitioner may not disclose to such constituents information relating to the representation except for

disclosures explicitly or impliedly authorized by the organizational client in order to carry out the representation or as otherwise permitted by § 11.106.

When constituents of the organization make decisions for it, the practitioner ordinarily must accept the decisions even if their utility or prudence is doubtful. The organization's constituents make decisions concerning policy and operations, including ones entailing serious risk. However, different considerations arise when the practitioner knows that the organization may be substantially injured by tortuous or illegal conduct by a constituent member of an organization that reasonably might be imputed to the organization or that might result in substantial injury to the organization. In such a circumstance, it may be reasonably necessary for the practitioner to ask the constituent to reconsider the matter. If that fails, or if the matter is of sufficient seriousness and importance to the organization, it may be reasonably necessary for the practitioner to take steps to have the matter reviewed by a higher authority in the organization. Clear justification should exist for seeking review over the head of the constituent normally responsible for it. The stated policy of the organization may define circumstances and prescribe channels for such review, and a practitioner should encourage the formulation of such a policy. Even in the absence of organization policy, however, the practitioner may have an obligation to refer a matter to a higher authority, depending on the seriousness of the matter and whether the constituent in question has apparent motives to act at variance with the organization's interest. Review by the chief executive officer or by the board of directors may be required when the matter is of importance commensurate with their authority. At some point it may be useful or essential to obtain an independent legal opinion.

In an extreme case, it may be reasonably necessary for the practitioner to refer the matter to the organization's highest authority. Ordinarily, that is the board of directors or similar governing body. However, applicable law may prescribe that under certain conditions highest authority reposes elsewhere; for example, in the independent directors of a corporation.

Relation to Other Rules. Section 11.113 would not limit or expand the practitioner's responsibility under §§ 11.106, 11.108, 11.116, 11.303, and 11.401. If the practitioner's services are being used by an organization to further a crime or fraud by the organization, § 11.102(d) can be applicable.

Government Agency. Because the Government agency that employs the Government practitioner is the practitioner's client, the practitioner represents the agency or section within the agency acting through its duly authorized constituents. Any application of proposed § 11.113 to Government practitioners must, however, take into account the differences between Government agencies and other organizations. For example, statutes and regulation may define duties of lawyers employed by the Government or lawyers in military service. Therefore, defining precisely the identity of the client and prescribing the resulting obligations of such lawyers may be more difficult in the Government context. Although in some circumstances the client may be a specific agency, it is generally the Government as a whole. For example, if the action or failure to act involves the head of a bureau, either the department of which the bureau is a part or the Government as a whole may be the client for the purpose of this Rule. Moreover, in a matter involving the conduct of Government officials, a Government lawyer may have authority to question such conduct more extensively than that of a lawyer for a private organization in similar circumstances. This Rule does not limit that authority.

Clarifying the Practitioner's Role. There are times when the organization's interest may differ from those of one or more of its constituents. This can occur, for example, where a constituent believes, incorrectly, that a practitioner is representing the constituent's interests, whereas the practitioner represents the interests of the organization. In such circumstances the practitioner should advise any constituent whose interest the practitioner finds differs from that of the organization, of the conflict or potential conflict of interest, that the practitioner's representation is limited to the client cannot permit the practitioner to represent such constituent, and that the constituent may wish to obtain independent representation. Care must be taken to assure that the individual understands that, when there is such divergent interest, the practitioner for the organization cannot provide legal representation for that constituent individual, and that discussions between the practitioner for the organization and the individual may not be privileged.

Whether the practitioner for the organization prudently should give such a warning to any constituent individual will turn on the facts of each case.

Dual Representation. Paragraph (c) of § 11.113 recognizes that a practitioner for an organization may also represent a principal officer or major shareholder.

Derivative Actions. Under generally prevailing law, the shareholders or members of a corporation may bring suit to compel the directors to perform their legal obligations in the supervision of the organization. Members of unincorporated associations have essentially the same right. Such an action may be brought nominally by the organization, but usually is, in fact, a legal controversy over management of the organization.

The question can arise whether counsel for the organization may defend such an action. The proposition that the organization is the practitioner's client does not alone resolve the issue. Most derivative actions are a normal incident of an organization's affairs, to be defended by the organization's practitioner like any other suit. However, if the claim involves serious charges of wrongdoing by those in control of the organization, a conflict may arise between the practitioner's duty to the organization and the practitioner's relationship with the board. In those circumstances, § 11.107 governs whether practitioners who normally serve as counsel to the corporation can properly represent both the directors and the organization.

Section 11.114 would introduce rules to address circumstances when a client is under a disability. The normal client-practitioner relationship is based on the assumption that the client, when properly advised and assisted, is capable of making decisions about important matters. When the client is a minor or suffers from a mental disorder or disability, however, maintaining the ordinary client-practitioner relationship may not be possible in all respects. In particular, an incapacitated person may have no power to make legally binding decisions. Nevertheless, a client lacking legal competence often has the ability to understand, deliberate upon, and reach conclusions about matters affecting the client's own well-being. Furthermore, to an increasing extent the law recognizes intermediate degrees of competence. For example, the Patent Statute draws no distinction based on age as to entitlement to a patent. Also, children as young as five or six years of age, and certainly those of ten or twelve, have been regarded as having opinions that are entitled to weight in legal proceedings concerning their custody. Conversely, it is recognized that some persons of advanced age can be quite

capable of handling routine financial matters while needing special legal protection concerning major transactions.

The fact that a client suffers a disability does not diminish the practitioner's obligation to treat the client with attention and respect. If the person has no guardian or legal representative, the practitioner may need to act as de facto guardian. Even if the person does have a legal representative, the practitioner should as far as possible accord the represented person the status of client, particularly in maintaining communication.

If a legal representative has already been appointed for the client, the practitioner should ordinarily look to the representative for decisions on behalf of the client. If a legal representative has not been appointed, the practitioner should see to such an appointment where it would serve the client's best interests. Thus, if a disabled client has substantial property that should be sold for the client's benefit, effective completion of the transaction ordinarily requires appointment of a legal representative. In many circumstances, however, appointment of a legal representative may be expensive or traumatic for the client. Evaluation of these considerations is a matter of professional judgment on the practitioner's part.

Disclosure of the Client's Condition. Rules of procedure in litigation generally provide that a guardian or next friend shall represent minors or persons suffering mental disability if they do not have a general guardian. Practitioners occasionally file patent applications for child inventors whose parents act as general guardians. However, disclosure of a client's disability can adversely affect the client's interests. For example, raising the question of disability could, in some circumstances, lead to proceedings for involuntary commitment. The practitioner's position in such cases is an unavoidably difficult one. The practitioner may seek guidance from an appropriate diagnostician.

Section 11.115 would continue the policies regarding the safeguarding of a client's property. A practitioner should hold property of others with the care required of a professional fiduciary. Securities should be kept in a safe deposit box, except when some other form of safekeeping is warranted by special circumstances. All property that is the property of clients or third persons should be kept separate from the practitioner's business and personal property and, if monies, in one or more trust accounts. Separate trust accounts may be warranted when administering estate monies or acting in similar fiduciary capacities.

Paragraph (a) of § 11.115 would be substantially the same as current § 10.112(a). Separation of the funds of a client from those of the practitioner not only serves to protect the client but also avoids even the appearance of impropriety, and therefore commingling of such funds should be avoided.

Paragraph (b) of § 11.115 would address situations wherein a practitioner has an arrangement with an invention promoter to be paid for legal services, and the promoter collects advanced legal fees from a client. In these situations, the practitioner would be responsible for safeguarding the funds advanced by inventor-clients to the promoter. The practitioner's involvement might provide the arrangement between the promoter and inventor-client with a genre of legitimacy and security for the funds. Thus, the arrangement enables the promoter to receive and have the funds for the practitioner's legal services. It would be appropriate for the practitioner to be expected to safeguard the client's funds advanced for the practitioner's legal services. Thus, if the promoter kept the funds advanced by the client and ceases doing business, the practitioner would be responsible for continuing to provide the legal services, even if he or she did not safeguard the advanced funds.

Some invention promoters eventually cease doing business. The Federal Trade Commission acted to freeze the assets of two invention promoters, and a District Court froze the assets. *See Federal Trade Commission* v. *American Inventors Corporation,* 37 USPQ2d 1154, 1995 U.S. Dist. LEXIS 18854 (D.Mass. 1995). The companies ceased doing business, and unsuccessfully sought protection in bankruptcy. *See Federal Trade Commission* v. *American Institute for Research and Development,* 219 B.R. 639, 1998 U.S. Dist. LEXIS 4391 (D.Mass. 1998) (dismissing involuntary bankruptcy proceedings by company to avoid risk of abuse of bankruptcy system and in support of the court's interest in vindicating its remedial orders). The matter remains pending, and what the clients will recover, if anything, is uncertain. Under § 11.115(b), a practitioner would be responsible for safeguarding the funds advanced by the client. For example, a practitioner could arrange to have the promoter return the funds to the client, who might then advance the funds to the practitioner.

Paragraph (c) of § 11.115 would be substantially the same as current § 10.112(b)(2). In a variety of circumstances, practitioners receive funds from third parties from which the practitioner's fee will be paid. If there is risk that the client may divert the funds without paying the fee, the lawyer is not required to remit the portion from which the fee is to be paid. A practitioner is not required to remit the portion from which the fee is to be paid. However, a practitioner may not hold funds to coerce a client into accepting the practitioner's contention. The disputed portion of the funds should be kept in trust and the practitioner should suggest means for prompt resolution of the dispute, such as arbitration. The undisputed portion of the funds shall be promptly distributed.

Third parties, such as a client's creditors, may have just claims against funds or other property in a practitioner's custody. A practitioner may have a duty under applicable law to protect such third-party claims against wrongful interference by the client, and accordingly may refuse to surrender the property to the client. However, a practitioner should not unilaterally assume to arbitrate a dispute between the client and the third party.

The obligations of a practitioner under this section are independent of those arising from activity other than rendering legal services. For example, the applicable law relating to fiduciaries governs a practitioner who serves as an escrow agent even though the practitioner does not render legal services in the transaction.

Paragraph (d) of § 11.115 would be substantially identical to current § 10.112(c).

Paragraph (e) of § 11.115 would require funds, securities or other properties held by a practitioner as a fiduciary to be maintained in separate fiduciary accounts, and the practitioner would not be permitted to commingle the assets of such fiduciary accounts except as provided by state bar ethics rules.

Paragraph (f) of § 11.115 would require a practitioner to maintain books and records that establish compliance with paragraphs (a) and (d) of § 11.115 for a period of five years after termination of the representation. A member of the bar in the District of Columbia is required to maintain records for a five-year period. Further, the five-year period is consistent with the statute of limitation period within which formal action must be taken to discipline a practitioner. *See Johnson* v. *SEC*, 87 F.3d, 484 (D.C.Cir. 1996); *3M Company* v. *Browner*, 17 F.3d 1453 (D.C.Cir. 1994).

Paragraph (g) of § 11.115 would require a minimum accounting procedure that would be applicable to all escrow accounts subject to §§ 11.115(a) and (d).

The records §§ 11.115(f) and (g) would require a practitioner to keep are the same records the practitioner must currently maintain to comply with 37 CFR 10.112(c)(3). Section 10.112(c)(3) requires a practitioner to ''maintain complete records of all funds, securities and other properties of a client coming into the possession of the practitioner.'' Section 10.112(c)(3) is substantially the same as DR 9–102(b)(3) of the Code of Professional Responsibility of the American Bar Association, which was adopted by numerous states. It has been long recognized that compliance with the Code's rule requires maintenance of, *inter alia*, a cash receipts journal, a cash disbursements journal, and a subsidiary ledger, as well as period trial balances, and insufficient fund check reporting. *See Wright* v. *Virginia State Bar*, 357 S.E.2d 518, 519 (Va. 1987); *In re Librizzi*, 569 A.2d 257, 258–259 (N.J. 1990); *In re Heffernan*, 351 N.W.2d 13, 14 (Minn. 1984); *In re A*ustin, 333 N.W.2d 633, 634 (Minn. 1983); and *In re Kennedy*, 442 A.2d 79, 84–85 (Del. 1982). Thus, §§ 11.115(f) and (g) articulate recordkeeping requirements that currently obtain for all practitioners.

With respect to property that constitutes evidence, such as the instruments or proceeds of crime, *see* § 11.304(a).

Paragraph (h) of § 11.115 would provide for accepting, as complying with §§ 11.115(f) and (g), financial records maintained by an attorney that comply with his or her state bar's financial recordkeeping requirements if the attorney is a member in good standing of the bar of the highest court of that state, and the attorney's principal place of business is in that state. For patent agents employed by a law firm, substantial compliance with the USPTO recordkeeping requirements will be met if the law firm in a state employing the agent complies with the financial recordkeeping requirements of that state. Attorneys and patent agents outside United States, all attorneys not maintaining a financial account records in compliance with his or her state bar's recordkeeping requirements, and all other patent agents must comply with USPTO recordkeeping requirements detailed in § 11.115. The USPTO presumes that patent agents employed by law firms do not have control over how records are to be maintained and may not have a choice of what guidelines with which they must comply. Patent agents who are hired as contractors, on the other hand, and self-employed patent agents are presumed to have control and, thus, must comply with the provisions of §§ 11.115(f) and (g).

Section 11.116 would continue the current practice regarding withdrawal. A practitioner should not accept representation in a matter unless it can be performed competently, promptly, without improper conflict of interest, and to completion.

Paragraph (a) of § 11.116 would address mandatory withdrawal. A practitioner ordinarily must decline or withdraw from representation if the client demands that the practitioner engage in conduct that is illegal or violates the Rules of Professional Conduct or other law. The practitioner is not obliged to decline or withdraw simply because the client suggests such a course of conduct; a client may make such a suggestion in the hope that a practitioner will not be constrained by a professional obligation.

Difficulty may be encountered if withdrawal is based on the client's demand that the practitioner engage in unprofessional conduct, or failure to pay agreed-upon fees. The Office or court may wish an explanation for the withdrawal, while the practitioner may be bound to keep confidential the facts that would constitute such an explanation. The practitioner's statement that irreconcilable differences between the practitioner and client require termination of the representation ordinarily should be accepted as sufficient.

Paragraph (a) of § 11.116 would also address discharge of a practitioner. A client has a right to discharge a practitioner at any time, with or without cause, subject to liability for payment for the practitioner's services. Where future dispute about the withdrawal may be anticipated, it may be advisable to prepare a written statement reciting the circumstances. Whether an inventor, who is employed by a company and has signed a power of attorney to a practitioner retained by the company, can discharge the practitioner may depend on the facts and applicable law. In the absence of evidence that the company is the assignee of record of the entire interest, and that as assignee, the company has given a power of attorney to the practitioner, the inventor at least technically may revoke the power of attorney. Upon recording an assignment of the entire interest, the company may elect to revoke all previous powers of attorney and appoint the practitioner. 37 CFR 1.36. If an employee-inventor refuses to execute an assignment, and there is an agreement between the employee and employer for assignment of patent rights, the employer may be entitled under state law to specific performance of the agreement. *See In re RCA Corporation*, 209 USPQ 1114 (Comm'r Pat. 1981).

If a client is mentally incompetent, the client may lack the legal capacity to discharge the practitioner. The practitioner should make a special effort to help the client consider the consequences and, in an extreme case, may initiate proceedings for a conservatorship or similar protection of the client. *See* § 11.114.

Paragraph (b) of § 11.116 would address optional withdrawal. A practitioner may withdraw from representation in some circumstances. The practitioner has the option to withdraw if the withdrawal can be accomplished without material adverse effect on the client's interests. Withdrawal is also justified if the client persists in a course of action that the practitioner reasonably believes is criminal or fraudulent, for a practitioner is not required to be associated with such conduct even if the practitioner does not further it. *See* § 11.102(d) and (e). Withdrawal is also permitted if the practitioner's services were misused in the past even if that would materially prejudice the client.

A practitioner may withdraw if the client refuses to abide by the terms of an agreement relating to the representation, such as an agreement concerning the timely payment of the practitioner's fees, court costs or other out-of-pocket expenses of the representation, or an agreement limiting the objectives of the representation.

If the matter is not pending in court or before the Office, a practitioner will not have ''other good cause for withdrawal'' unless the practitioner is acting in good faith and the circumstances are exceptional enough to outweigh the material adverse effect on the interests of the client that withdrawal will cause.

Paragraph (b) of § 11.116 would address assisting the client upon withdrawal. Even if the client has unfairly discharged the practitioner, a practitioner would be required to take all reasonable steps to mitigate the consequences to the client. The practitioner may retain papers as security for a fee only to the extent permitted by § 11.108(i).

Paragraph (c) of § 11.116 would address compliance with requirements of a tribunal, *e.g.*, the Office. This paragraph would reflect that a practitioner may, by appearing before a tribunal, become subject to the

tribunal's power in some circumstances to prevent a withdrawal that would otherwise be proper. Section 11.116(c) would require the practitioner who is ordered to continue a representation before a tribunal to do so. However, § 11.116(c) is not intended to prevent the practitioner from challenging the tribunal's order as beyond its jurisdiction, arbitrary, or otherwise improper while, in the interim, continuing the representation.

Paragraph (d) of § 11.116 would address return of a client's property or money. This paragraph would require a practitioner to make timely return to the client of any property or money ''to which the client is entitled.'' Where a practitioner holds property or money of a client at the termination of a representation and there is a dispute concerning the distribution of such property or money—whether such dispute is between the practitioner and a client, the practitioner and another practitioner who is owed a fee in the matter, or between either the practitioner or the client and a third party—the practitioner would have to segregate the disputed portion of such property or money, hold that property or money in trust as required by § 11.115, and promptly distribute any undisputed property and amounts. *See* § 11.115(c).

Notwithstanding the foregoing, where a practitioner has a valid lien covering undisputed amounts of property or money, the practitioner might continue to hold such property or money to the extent permitted by the substantive law governing the lien asserted. *See* generally §§ 11.108, and 11.115(c).

The ethical mandate ''to protect a client's interests'' is recognized as displacing the common law retaining lien. *See* Formal Opinion 1690, Legal Ethics Committee of the Virginia State Bar (1997). Therefore, the proposed rule would provide an exception regarding retention of any part of a client's patent and trademark application files that had been filed with the Office. For example, this would include application itself, as well as any amendment, or reply filed in the Office. Documents filed in the Office are not within the attorney work product exception. Once the documents are filed with the Office, they no longer constitute work product. *See* Formal Opinion 250, Legal Ethics Committee of the District of Columbia (1994) (Files containing copies of applications filed with the FCC and amendments and correspondence relating to those applications, also filed with the FCC, are not within the work product exception). Also excepted from retention is any patent or trademark application prosecution work product for which a practitioner has been paid. Further excepted is any prosecution-related paper whenever assertion of a retaining lien on the paper would prejudice or imperil the protection of the client's interests. *See* Formal Opinion 1690, Legal Ethics Committee of the Virginia State Bar (1997).

It is recognized that more is required to establish material prejudice with regard to attorney work product than to client-provided papers. In situations wherein a client is represented by a new practitioner, material prejudice does not occur simply because a new practitioner must create work product, such as research, drafting, and memoranda, that are contained in the original practitioner's file. Creating work product may be inconvenient and an expense to the client, but it does not rise to the level of material prejudice to a client's interest in subsequent representation. *Accord*, Formal Opinion 1690, Legal Ethics Committee of the Virginia State Bar (1997).

Section 11.117 would introduce rules regarding the sale of a practice before the Office involving patent matters. The practice of law is a profession, not merely a business. Clients are not commodities that can be purchased and sold at will. Pursuant to § 11.117, when a registered practitioner ceases to practice and another registered practitioner or firm of registered practitioners takes over the representation, the selling practitioner could obtain compensation for the reasonable value of the practice, as could withdrawing partners of law firms. *See* §§ 11.504 and 11.506.

Termination of practice by the seller. The requirement of § 11.117(b) that all of the private practice be sold would be satisfied if the seller in good faith makes the entire practice available for sale to the purchaser. The fact that a number of the seller's clients decide not to be represented by the purchaser but take their matters elsewhere, therefore, does not result in a violation. Neither does a return to private practice as a result of an unanticipated change in circumstances result in a violation. For example, a registered practitioner who has sold the practice to accept an appointment to judicial office would not violate the requirement that the sale be attendant to cessation of practice if the practitioner later resumes private practice upon being defeated in a contested or a retention election for the office.

The requirement that the seller cease to engage in the private practice of law, including practice before the Office in patent matters, does not prohibit employment of a registered patent attorney as a lawyer on the staff of a public agency or a legal services entity which provides legal services to the poor, or as in-house counsel to a business.

Section 11.117 would permit a sale attendant upon retirement from the private practice of law within the jurisdiction. Its provisions, therefore, would accommodate the registered practitioner who sells the practice upon the occasion of moving to another state. Some states are so large that a move from one locale therein to another is tantamount to leaving the jurisdiction in which the practitioner has engaged in the practice of law. To also accommodate registered practitioners so situated, the sale of the practice would be permitted when the registered practitioner leaves the geographic area rather than the entire state.

Single purchaser. Section 11.117 would require a single purchaser. A prohibition against piecemeal sale of a practice protects those clients whose matters are less lucrative and who might find it difficult to secure other counsel if a sale could be limited to substantial fee-generating matters. Inasmuch as the practice being sold involves patent applications pending before the Office, the purchaser would be required to be practitioner(s) which include registered practitioners willing to undertake all client pending patent matters in the practice, subject to client consent. If, however, the purchaser is unable to undertake all client matters because of a conflict of interest in a specific matter respecting which the purchaser is not permitted by § 11.107 or another rule to represent the client, the requirement that there be a single purchaser would be nevertheless satisfied.

Client confidences, consent, and notice. Negotiations between seller and prospective purchaser prior to disclosure of information relating to a specific representation of an identifiable client would no more violate the confidentiality provisions of proposed § 11.106 than do preliminary discussions concerning the possible association of another practitioner or mergers between firms, with respect to which client consent is not required. Providing the purchaser access to client-specific information relating to the representation and to the file, however, requires client consent. Section 11.117 would provide that before such information can be disclosed by the seller to the purchaser, the client must be given actual written notice of the contemplated sale, including the identity of the purchaser and any proposed change in the terms of future

representation, and must be told that the decision to consent or make other arrangements must be made within 90 days. If nothing is heard from the client within that time, consent to the sale is presumed.

A registered practitioner ceasing to practice cannot be required to remain in practice because some clients cannot be given actual notice of the proposed purchase. Since these clients cannot themselves consent to the purchase or direct any other disposition of their files, § 11.117 would permit an order from a court having jurisdiction authorizing their transfer or other disposition. The court can be expected to determine whether reasonable efforts to locate the client have been exhausted, and whether the absent client's legitimate interests will be served by authorizing the transfer of the file so that the purchaser may continue the representation. Preservation of client confidences requires that the petition for a court order be considered *in camera.*

All the elements of client autonomy, including the client's absolute right to discharge a practitioner and transfer the representation to another, survive the sale of the practice.

Fee arrangements between client and purchaser. A sale of a practice could not be financed by increases in fees charged the clients of the practice. The purchaser must honor existing agreements between the seller and the client as to fees and the scope of the work, unless the client consents after full disclosure. The purchaser would, however, advise the client that the purchaser will not undertake the representation unless the client consents to pay the higher fees the purchaser usually charges. To prevent client financing of the sale, the higher fee the purchaser may charge would not exceed the fees charged by the purchaser for substantially similar service rendered prior to the initiation of the purchase negotiations.

The purchaser could not intentionally fragment a practice that is the subject of the sale by charging significantly different fees in substantially similar matters. Doing so would make it possible for the purchaser to avoid the obligation to take over the entire practice by charging arbitrarily higher fees for less lucrative matters, thereby increasing the likelihood that those clients would not consent to the new representation.

Registered practitioners participating in the sale of a law practice are subject to the ethical standards applicable to involving another practitioner in the representation of a client. These include, for example, the seller's obligation to exercise competence in identifying a purchaser qualified to assume the practice and the purchaser's obligation to undertake the representation competently (*see* § 11.101); the obligation to avoid disqualifying conflicts, and to secure client consent after consultation for those conflicts which can be agreed to (*see* § 11.107); and the obligation to protect information relating to the representation (*see* §§ 11.106 and 11.109).

Applicability of § 11.117. Section 11.117 applies to the sale of a law practice by representatives of a deceased, disabled or disappeared registered practitioner. Thus, the seller may be represented by a non-lawyer representative not subject to these Rules. Since, however, no registered practitioner may participate in a sale of a law practice, which does not conform to the requirements of this Rule, the representatives of the seller as well as the purchasing practitioner can be expected to see to it that they are met.

Admission to or retirement from a law partnership or professional association, retirement plans and similar arrangements, and a sale of tangible assets of a law practice, would not constitute a sale or purchase governed by proposed § 11.117. Section 11.117 also would not apply to the transfers of legal representation between registered practitioners when such transfers are unrelated to the sale of a practice.

Section 11.201 would introduce a rule addressing the practitioner's role in providing advice to a client.

Section 11.201—Scope of Advice. A client is entitled to straightforward advice expressing the practitioner's honest assessment. Legal advice often involves unpleasant facts and alternatives that a client may be disinclined to confront. In presenting advice, a practitioner endeavors to sustain the client's morale and may put advice in as acceptable a form as honesty permits. However, a registered practitioner should not be deterred from giving candid advice, including advice as to patentability or unpatentability, by the prospect that the advice will be unpalatable to the client.

Advice couched in narrow legal terms may be of little value to a client, especially where practical considerations, such as cost or effects on other people, are predominant. Purely technical legal advice, therefore, can sometimes be inadequate. It is proper for a practitioner to refer to relevant moral and ethical considerations in giving advice. Although a practitioner is not a moral advisor *per se*, moral and ethical considerations impinge upon most legal questions and may decisively influence how the law will be applied.

A client may expressly or impliedly ask the practitioner for purely technical advice. When such a request is made by a client experienced in legal matters, the practitioner may accept it at face value. When such a request is made by a client inexperienced in legal matters, however, the practitioner's responsibility as advisor may include indicating that more may be involved than strictly legal considerations.

Matters that go beyond strictly legal questions may also be in the domain of another profession. Family matters can involve problems within the professional competence of psychiatry, clinical psychology, or social work; business matters can involve problems within the competence of the accounting profession or of financial specialists. Where consultation with a professional in another field is itself something a competent practitioner would recommend, the practitioner should make such a recommendation. At the same time, a practitioner's advice at its best often consists of recommending a course of action in the face of conflicting recommendations of experts.

Paragraph (a) of § 11.201—Offering Advice. Under paragraph (a) of § 11.201, in general, a practitioner would not be expected to give advice until asked by the client. However, when a practitioner knows that a client proposes a course of action that is likely to result in substantial adverse legal consequences to the client, duty to the client under § 11.104 could require that the practitioner act as if the client's course of action is related to the representation. A practitioner ordinarily has no duty to initiate investigation of a client's affairs or to give advice that the client has indicated is unwanted, but a practitioner might initiate advice to a client when doing so appears to be in the client's interest.

Paragraph (b) of § 11.201 would address a practitioner providing patentability opinions to clients referred by an invention promoter.

Section 11.202 would provide rules for a practitioner acting as intermediary between clients. A practitioner acts as intermediary when the practitioner represents two or more parties with potentially conflicting interests. For instance, representation of a client referred by an invention promoter may result in the practitioner having two clients, the inventor and invention promoter. A key factor in defining the relationship is whether the parties share responsibility for the practitioner's fee,

but the common representation may be inferred from other circumstances. Because confusion can arise as to the practitioner's role where each party is not separately represented, it is important that the practitioner make clear the relationship. In addition, the existence of a document purporting to establish an agency relationship between the inventor and invention promoter would not vitiate the possibility that the practitioner might have two clients.

Because the potential for confusion is so great, § 11.202(c) would impose the requirement that an explanation of the risks of the common representation be furnished, in writing. The process of preparing the writing would cause the practitioner involved to focus specifically on those risks, a process that might suggest to the practitioner that the particular situation is not suited to the use of the practitioner as an intermediary. In any event, a written explanation would perform a valuable role in educating the client to such risks as may exist—risks that many clients may not otherwise comprehend. A client might not agree to waive the requirement for a written analysis of the risks. The ''unusual circumstances'' requirement might be met in rare situations where an assessment of risks is not feasible at the beginning of the intermediary role. In such circumstances, the writing would have to be provided as soon as it becomes feasible to assess the risks with reasonable clarity. The consent required by § 11.202(c) would have to be in writing, and would refer to the disclosure upon which it is based.

Section 11.202 would not apply to a practitioner acting as arbitrator or mediator between or among parties who are not clients of that practitioner, even where the practitioner has been appointed with the concurrence of the parties. In performing such a role, the practitioner may be subject to applicable codes of ethics, such as the Code of Ethics for Arbitration in Commercial Disputes prepared by the Joint Committee of the American Bar Association and the American Arbitration Association.

A practitioner acts as intermediary in seeking to establish or adjust a relationship between clients on an amicable and mutually advantageous basis; for example, in helping to organize a business in which two or more clients are entrepreneurs, working out the financial reorganization of an enterprise in which two or more clients have an interest, arranging a property distribution in settlement of an estate, or mediating a dispute between clients. The practitioner seeks to resolve potentially conflicting interests by developing the parties' mutual interests. The alternative can be that each party may have to obtain separate representation, with the possibility in some situations of incurring additional cost, complication, or even litigation. Given these and other relevant factors, all the clients may prefer that the practitioner act as intermediary.

In considering whether to act as intermediary between clients, a practitioner should be mindful that if the intermediation fails, the result can be additional cost, embarrassment, and recrimination. In some situations the risk of failure is so great that intermediation is plainly impossible. For example, a practitioner cannot undertake common representation of clients between whom contentious litigation is imminent or who contemplate contentious negotiations. More generally, if the relationship between the parties has already assumed definite antagonism, the possibility that the clients' interests can be adjusted by intermediation ordinarily is not very good.

The appropriateness of intermediation can depend on its form. Forms of intermediation range from informal arbitration where each client's case is presented by the respective client and the practitioner decides the outcome, to mediation, to common representation where the clients' interests are substantially though not entirely compatible. One form may be appropriate in circumstances where another would not. Other relevant factors include whether the practitioner subsequently will represent both parties on a continuing basis and whether the situation involves creating a relationship between the parties or terminating one.

Because the practitioner is required to be impartial between commonly represented clients, intermediation would be improper when that impartiality cannot be maintained. For example, a practitioner who has represented one of the clients for a long period of time and in a variety of matters could have difficulty being impartial between that client and one to whom the practitioner has only recently been introduced. Another example would be a practitioner who represents a client, such as an invention promoter, that refers a number of its clients to the practitioner to prepare and prosecute patent applications for the clients, and the practitioner could have difficulty being impartial between the referring invention promoter and the referred clients.

Section 11.202 and Confidentiality and Privilege. A particularly important factor in determining the appropriateness of intermediation would be the effect on client-practitioner confidentiality and the attorney-client or patent agent-client privilege. In a common representation, the practitioner would still be required both to keep each client adequately informed and to maintain confidentiality of information relating to each of the representations. *See* §§ 11.104 and 11.106. Complying with both requirements while acting as intermediary requires a delicate balance. If the balance cannot be maintained, the common representation would be improper. With regard to the attorney-client or patent agent-client privilege, the prevailing rule is that as between commonly represented clients the privilege does not attach. Hence, it must be assumed that if litigation eventuates between the clients, the privilege will not protect any such communications, and the clients should be so advised.

For example, a practitioner, hired by A and B to prepare a patent application for A's invention, acts as an intermediary under § 11.202 when, upon instructions from A and B, the practitioner prepares an assignment transferring a one-half undivided interest in A's invention and any resulting patent to A and B, even if only B is to pay the legal fees. If A and B later dispute the validity of the assignment and each retains counsel of their own choice, the practitioner may communicate the information regarding the terms of the assignment to both counsel. The attorney-client or patent agent-client privilege does not attach. The practitioner may submit his legal bills to B for past services in accordance with the retainer agreement. *See* Opinion 93–76 (1993) of the Ethics Advisory Panel of the Rhode Island Supreme Court.

Section 11.202 and Full Disclosure. In acting as intermediary between clients, the practitioner would be required to make full disclosure to the clients on the implications of doing so, and proceed only upon consent based on such full disclosure. The practitioner would have to make clear that the practitioner's role is not that of partisanship normally expected in other circumstances.

Paragraph (d) of § 11.202 would apply the principle expressed in § 11.104. Where the practitioner is intermediary, the clients ordinarily would have to assume greater responsibility for decisions than when each client is independently represented.

Section 11.202 and Withdrawal. Common representation does not diminish the rights of each client in the client-practitioner relationship. Each has the right to loyal and diligent representation, the right to discharge the practitioner as stated in § 11.116, and the protection of § 11.109 concerning obligations to a former client.

Section 11.203 would articulate ethical standards for circumstances where a practitioner provides an evaluation of a matter affecting a client for the use of someone other than the client. An evaluation may be performed at the client's direction but for the primary purpose of establishing information for the benefit of third parties; for example, an opinion concerning the title of property rendered at the behest of a vendor for the information of a prospective purchaser, or at the behest of a borrower for the information of a prospective lender. Section 11.203 would not authorize conduct that otherwise would constitute aiding the unauthorized practice of law. Thus, providing a nonlawyer, who offers legal services to potential customers, with legal advice to pass on to the nonlawyer's customer(s) would continue to be viewed as aiding the unauthorized practice of law. *See* Formal Opinion 87, Ethics Committee of the Colorado Bar Association (1991).

A legal evaluation should be distinguished from an investigation of a person with whom the practitioner does not have a client-practitioner relationship. For example, a practitioner retained by a purchaser to analyze a vendor's title to property does not have a client-practitioner relationship with the vendor. Likewise, an investigation into a person's affairs by a Government practitioner, or by special counsel employed by the Government, is not an evaluation as that term is used in this section. The question is whether the practitioner is retained by the person whose affairs are being examined. When the practitioner is retained by that person, the general Rule of Professional Conduct concerning loyalty to client and preservation of confidences would apply, which is not the case if the practitioner is retained by someone else. For this reason, it is essential to identify the person by whom the practitioner is retained. This should be made clear not only to the person under examination, but also to others to whom the results are to be made available.

Section 11.203 and Duty to Third Person. When the evaluation is intended for the information or use of a third person, a legal duty to that person may or may not arise. That legal question is beyond the scope of § 11.203. However, because such an evaluation involves a departure from the normal client-practitioner relationship, careful analysis of the situation is required. The practitioner must be satisfied as a matter of professional judgment that making the evaluation is compatible with other functions undertaken in behalf of the client. For example, if the practitioner is acting as advocate in defending the client against charges of fraud, it would normally be incompatible with that responsibility for the practitioner to perform an evaluation for others concerning the same or a related transaction. Assuming no such impediment is apparent, however, the practitioner should advise the client of the implications of the evaluation, particularly the practitioner's responsibilities to third persons and the duty to disseminate the findings.

Section 11.203 and Access to and Disclosure of Information. The quality of an evaluation depends on the freedom and extent of the investigation upon which it is based. Ordinarily a practitioner should have whatever latitude of investigation seems necessary as a matter of professional judgment. Under some circumstances, however, the terms of the evaluation may be limited. For example, certain issues or sources may be categorically excluded, or the scope of search may be limited by time constraints or the non-cooperation of persons having relevant information. Any such limitations that are material to the evaluation should be described in a report giving the results of the investigation. If, after a practitioner has commenced an evaluation, the client refuses to comply with the terms upon which it was understood the evaluation was to have been made, the practitioner's obligations are determined by law, having reference to the terms of the client's agreement and the surrounding circumstances.

Section 11.203 and Financial Auditors' Requests for Information. When a question concerning the legal situation of a client arises at the instance of the client's financial auditor and the question is referred to the practitioner, the practitioner's response prudently might be made in accordance with procedures recognized in the legal profession. Such a procedure is set forth in the American Bar Association Statement of Policy Regarding Practitioners' Responses to Auditors' Requests for Information, adopted in 1975.

Section 11.301 would continue the requirement that a practitioner present well-grounded claims. The advocate has a duty to use legal procedure for the fullest benefit of the client's cause, but also a duty not to abuse legal procedure. The law, both procedurally and substantively, establishes the limits within which an advocate may proceed. However, the law is not always clear and never is static. Accordingly, in determining the proper scope of advocacy, account must be taken of the law's ambiguities and potential for change.

The filing of an action or defense or similar action taken for a client is not frivolous merely because the facts have not first been fully substantiated or because the practitioner expects to develop vital evidence only by discovery. Such action is not frivolous even though the practitioner believes that the client's position ultimately will not prevail. The action is frivolous if the practitioner is unable either to make a good-faith argument on the merits of the action taken or to support the action taken by a good-faith argument for an extension, modification, or reversal of existing law.

Section 11.302 would continue the requirement that practitioners diligently pursue litigation and Office proceedings. Dilatory practices bring the administration of justice into disrepute and may be contrary to the client's interest in patent prosecution. Delay should not be indulged merely for the convenience of the advocates, or for the purpose of frustrating an opposing party's attempt to obtain rightful redress or repose. It is not a justification that similar conduct is often tolerated by the bench and bar. The question is whether a competent practitioner acting in good faith would regard the course of action as having some substantial purpose other than delay. Realizing financial or other benefit from otherwise improper delay in litigation is not a legitimate interest of the client.

Section 11.303 would continue the duty of candor to a tribunal while specifying its application under different situations. Section 11.303 would define the duty of candor to the tribunal. In dealing with a tribunal, including the Office, the practitioner is also required to comply with the general requirements of § 11.102 (e) and (f). The advocate's responsibility is to endeavor to present the client's case with persuasive force. Performance of that duty, while maintaining confidences of the client, is qualified by the advocate's duty of candor to the tribunal. *See Lipman* v. *Dickinson,* 174 F.3d 1363, 50 USPQ2d 1490 (Fed. Cir. 1999).

While an advocate normally does not vouch for the evidence submitted in a cause—the tribunal is responsible for assessing its probative value—the same may not apply in practice before the

Office. *See Kingsland* v. *Dorsey,* 338 U.S. 318 (1949) (sustaining attorney's exclusion where attorney authored the article that attorney introduced into evidence as an article written by another).

Paragraph (a) of § 11.303, like current § 10.89(b)(1), would require that a practitioner reveal to the Office known authority directly adverse to the position of the client unless the authority is cited by an opponent or employee of the Office. All decisions made by the Office in patent and trademark matters affect the public interest. *See Lear* v. *Adkins,* 395 U.S. 653 (1969). Many of the decisions made by the Office are made ex parte. Accordingly, practitioners must cite to the Office known authority that is contrary, *i.e.*, directly adverse, to the position being taken by the practitioner in good faith. The practitioner could argue that the cited authority should not be followed, or should be overruled or modified.

Section 11.303 and Representations by a Practitioner. An advocate is responsible for pleadings and other documents prepared for litigation or prosecution of patent and trademark applications. However, an advocate is usually not required to have personal knowledge of factual matters that are based on information furnished by a client asserted therein, because litigation or prosecution documents ordinarily present assertions by the client, or by someone on the client's behalf, and not assertions by the practitioner. Compare § 11.301. However, an assertion purporting to be based on the practitioner's own knowledge, such as an assertion made by the practitioner in an affidavit, petition, or reply to an Office action, like a statement in open court, may properly be made only when the practitioner knows the assertion is true or believes it to be true on the basis of a reasonably diligent inquiry. The Office has disciplined practitioners for making false statements of fact in an affidavit or declaration. *See In re Dubno,* 1959 Off. Gaz. 25 (June 21, 1977). There may be circumstances where failure to make a disclosure is the equivalent of an affirmative misrepresentation. *See Lipman* v. *Dickinson,* 174 F.3d 1363, 50 USPQ2d 1490 (Fed. Cir. 1999). The obligation prescribed in § 11.102(e) not to counsel a client to commit or assist the client in committing a fraud applies in litigation and proceedings before the Office, but would be subject to §§ 11.303(a)(4), (b) and (d). Regarding compliance with § 11.102(e), see the comment to that proposed section. *See also* the comment to proposed § 11.804(b).

Section 11.303 and Misleading Legal Argument. Legal argument based on a knowingly false representation of law constitutes dishonesty toward the tribunal. A practitioner is not required to make a disinterested exposition of the law, but must recognize the existence of pertinent legal authorities. Furthermore, as stated in § 11.303(a)(3), an advocate has a duty to disclose directly adverse authority in the controlling jurisdiction that has not been disclosed by the opposing party and that is dispositive of a question at issue. The underlying concept is that a legal argument is a discussion seeking to determine the legal premises properly applicable to the case.

Section 11.303 and False Evidence. When evidence that a practitioner knows to be false is provided by a person who is not the client, the practitioner must refuse to offer it regardless of the client's wishes.

When false evidence is offered by the client, however, a conflict may arise between the practitioner's duty to keep the client's disclosure confidential and the duty of candor to the tribunal. Upon ascertaining that material evidence is false, the practitioner should seek to persuade the client that the evidence should not be offered. If the material evidence has already been offered before the practitioner learns that it is false, its false character should immediately be disclosed to the tribunal. If the persuasion is ineffective, the practitioner must take reasonable remedial measures. In patent matters pending before the Office, if a practitioner comes to realize that evidence material to patentability offered before the Office in a patent case is false, the practitioner has a duty to disclose information regarding the falsity with respect to each pending claim until the claim is cancelled or withdrawn from consideration, or the application becomes abandoned. This is consistent with current § 1.56.

Except in the defense of a criminally accused, the rule generally recognized is that, if necessary to rectify the situation, an advocate must disclose the existence of the client's deception to the tribunal, Office, and/or to the other party. Such a disclosure can result in grave consequences to the client, including not only a sense of betrayal but also loss of the case and perhaps a prosecution for perjury. But the alternative is that the practitioner, contrary to current § 1.56 or proposed §§ 11.303 and 11.804(c), cooperate in deceiving the tribunal or Office, thereby subverting the truth-finding process, which the adversary system is designed to implement. *See* § 11.102(d). Furthermore, unless it is clearly understood that the practitioner will act upon the duty to disclose the existence of false evidence, the client can simply reject the practitioner's advice to reveal the false evidence and insist that the practitioner keep silent. Thus the client could in effect coerce the practitioner into being a party to fraud on the tribunal or Office.

Paragraph (d) of § 11.303 would provide that if a practitioner learns that a fraud or inequitable conduct has been perpetrated on the Office, the practitioner must reveal the same to the Office. Where notification would require disclosure to the Office of information not protected under §§ 1.56, or 11.106(a), the practitioner has a duty of disclosure to prevent the occurrence or furtherance of the fraud or inequitable conduct by commission or omission.

Paragraph (b) of § 11.303—Duration of obligation. A practical time limit on the obligation to rectify the presentation of false evidence has to be established. In the Model Code of Professional Responsibility, the American Bar Association has suggested that the conclusion of the proceeding, through all appeals, is a reasonably definite point for the termination of the obligation.

Patent matters are not necessarily concluded in a single proceeding before the Office with the issuance of a patent. The patent may be subject to examination again in a reissue application, as well as reexamination and interference proceedings. The procedures are available throughout the period for which the patent is granted. Accordingly, in patent matters before the Office, the duty of disclosure continues for the duration of the pendency of the patent application and the period for which the patent is granted.

Paragraph (c) of § 11.303—Refusing to offer proof believed to be false. Generally speaking, a practitioner has all authority to refuse to offer testimony or other proof that the practitioner believes is untrustworthy. Offering such proof may reflect adversely on the practitioner's ability to discriminate in the quality of evidence and thus impair the practitioner's effectiveness as an advocate.

Paragraph (d) of § 11.303—Ex parte proceedings. Ordinarily, an advocate has the limited responsibility of presenting one side of the matters that a tribunal should consider in reaching a decision; the conflicting position is

expected to be presented by the opposing party.

However, in any *ex parte* proceeding, such as prosecution of a patent application, or an application for a temporary restraining order, there is no balance of presentation by opposing advocates. The object of an *ex parte* proceeding is nevertheless to yield a substantially just result. The patent examiner or judge has an affirmative responsibility to accord the absent party just consideration. The practitioner for the represented party has the correlative duty to make disclosures of material facts known to the practitioner and that the practitioner reasonably believes are necessary to an informed decision. In an *ex parte* proceeding before the Office in a patent case, a practitioner's duty of disclosure would remain the same as in § 1.56. The practitioner would be required to inform the Office of all information material to patentability known to the practitioner in accordance with § 1.56, whether or not the facts are adverse.

Paragraph (e) of § 11.303 would define some, but not all, acts that would constitute violations of paragraphs (a) through (d) of this section. The USPTO believes that it would be helpful to practitioners if some specific prohibitions were set out in the rules. The prohibitions set out in paragraphs (1) through (5) of § 11.303(e) represent violations that have occurred in the past or that the Office specifically seeks to prevent. The specific acts set out in paragraph (e) would not constitute a complete description of all acts in violation of paragraphs (a) through (d).

Paragraph (1) of § 11.303(e) would put practitioners on notice that misconduct includes knowingly misusing a ''Certificate of Mailing or Transmission'' under § 1.8 of this subchapter. *See In re Dula,* 1030 Off. Gaz. 20 (May 17 1983); *In re Klein,* 6 USPQ2d 1547 (Comm'r Pat. 1987), *aff'd sub nom., Klein* v. *Peterson,* 696 F. Supp. 695, 8 USPQ2d 1434 (D.D.C. 1988), aff'd, 866 F.2d 412, 9 USPQ 2d 1558 (Fed. Cir. 1989); *Small* v. *Weiffenbach,* 10 USPQ 2d 1898 (Comm'r Pat. 1989).

Paragraph (2) of § 11.303(e) would include as misconduct knowingly violating or causing to be violated the duty of candor requirements of §§ 1.56 or 1.555. *See In re Milmore,* 196 USPQ 628 (Comm'r Pat. 1977); *Kingsland* v. *Dorsey,* 338 U.S. 318 (1949); *Hatch* v. *Ooms,* 72 USPQ 406 (D.D.C. 1947).

Paragraph (4) of § 11.303(e) would include as misconduct knowingly signing a paper filed in the Office in violation of the provisions of § 11.18 or making a scandalous or indecent statement in a paper filed in the Office. The provision is based on Rule 11 of the Federal Rules of Civil Procedure. *See Weiffenbach* v. *Gilden,* 1160 Off. Gaz. 39 (Mar. 8, 1994).

Section 11.304 would contemplate that the evidence in a case be marshaled fairly in *ex parte* and *inter partes* proceedings. Prohibitions against destruction or concealment of evidence, improperly influencing witnesses, obstructive tactics in discovery procedure, and the like secure fair competition in adversary and *ex parte* systems.

Paragraph (a) of § 11.304, like current § 10.85(a)(7), would prohibit a practitioner from obstructing another party's access to evidence, and from altering, destroying, or concealing evidence. Documents and other items of evidence are often essential to establish a claim or defense. Subject to evidentiary privileges, the right of an opposing party, including the Government, to obtain evidence through discovery or subpoena is an important procedural right. The exercise of that right can be frustrated if relevant material is altered, concealed, or destroyed. To the extent clients are involved in the effort to comply with discovery requests, the practitioner's obligations are to pursue reasonable efforts to assure that documents and other information subject to proper discovery requests are produced. Applicable law in many jurisdictions makes it an offense to destroy material for the purpose of impairing its availability in a pending proceeding or a proceeding whose commencement can be foreseen. Falsifying evidence is also generally a criminal offense. Section 11.304(a) applies to evidentiary material generally, including computerized information.

A practitioner should ascertain that the practitioner's handling of documents or other physical objects does not violate any other law. Federal criminal law may forbid the destruction of documents or other physical objects in circumstances not covered by the ethical rule set forth in § 11.304(a). *See, e.g.,* 18 U.S.C. 1503 (obstruction of justice); 18 U.S.C. 1505 (obstruction of proceedings before departments, agencies, and committees); 18 U.S.C. 1510 (obstruction of criminal investigations). Finally, some discovery rules having the force of law may prohibit the destruction of documents and other material even if litigation is not pending or imminent. Section 11.304 would not set forth the scope of a practitioner's responsibilities under all applicable laws. It would merely impose on the practitioner an ethical duty to make reasonable efforts to comply fully with those laws. The prohibitions of § 11.304(a) may overlap with criminal obstruction provisions and civil discovery rules, but they apply whether or not the prohibited conduct violates criminal provisions or court rules. Thus, the alteration of evidence by a practitioner, whether or not such conduct violates criminal law or court rules, constitutes a violation of § 11.304(a). *See Weiffenbach* v. *Logan,* 27 USPQ 2d 1870 (Comm'r Pat. 1993), *aff'd. sub nom., Logan* v. *Comer,* No. 93–0335 (D.D.C. 1994), *aff'd. sub nom., Logan* v. *Lehman,* No. 95–1216 (Fed. Cir. 1995).

Because of the duty of confidentiality under § 11.106, the practitioner would be generally forbidden to volunteer information about physical evidence received from a client without the client's consent after consultation. An exception would arise in the case of volunteering information required under § 1.56 to be disclosed.

If the evidence, not required to be disclosed under § 1.56, is received from the client and is subpoenaed or otherwise requested through the discovery process while held by the practitioner, the practitioner will be obligated to deliver the evidence directly to the appropriate persons, unless there is a basis for objecting to the discovery request or moving to quash the subpoena. A practitioner should, therefore, advise the client of the risk that evidence may be subject to subpoena or discovery, and of the practitioner's duty to turn the evidence over in that event, before accepting it from the client.

If the practitioner has received physical evidence belonging to the client and the evidence is not required to be disclosed under § 1.56, for purposes of examination or testing, the practitioner may later return the property to the client pursuant to § 11.115, provided that the evidence has not been requested by discovery or subpoenaed. The practitioner may not be justified in returning to a client physical evidence, the possession of which by the client would be *per se* illegal, such as certain drugs and weapons. And, if it is reasonably apparent that the evidence is not the client's property, the practitioner may not retain the evidence or return it to the client. Instead, the practitioner would, under § 11.304(a), have to make a good-faith effort to return the evidence to its owner.

Paragraph (b) of § 11.304 would provide that it is not improper to pay a witness's expenses or to compensate a witness for time taken in preparing to

testify, in attending a proceeding, or in testifying in that proceeding.

Section 11.305 would proscribe forms of improper influence upon a tribunal. Such forms of improper influence are proscribed by criminal law. Others are specified in the ABA Model Code of Judicial Conduct, with which an advocate should be familiar. A practitioner is required to avoid contributing to a violation of such provisions. The advocate's function is to present evidence and argument so that the cause may be decided according to law. Refraining from abusive or obstreperous conduct is a corollary of the advocate's right to speak on behalf of litigants. A practitioner may stand firm against abuse by a judge but should avoid reciprocation; the judge's default is no justification for similar dereliction by an advocate. An advocate can present the cause, protect the record for subsequent review, and preserve professional integrity by patient firmness no less effectively than by belligerence or theatrics.

Section 11.306 is reserved. Rule 3.6 of the Model Rules of Professional Conduct contain ''[g]uidance on trial publicity.'' It would be a conflict of interest for the Office to attempt to control communications to the public by attorneys representing a party in a suit against the Office. Accordingly, the provisions of Rule 3.6 are not being proposed. Nevertheless, an attorney in a civil action brought against the Office would be subject to the professional conduct rules of the state where the attorney is licensed to practice law. If, in the course of the trial, the attorney violates the state's professional conduct rules and is disciplined by the state authorities, the attorney could be subject to discipline under the proposed rules. *See* §§ 11.24 and 11.803(f)(5).

Section 11.307 would generally proscribe a practitioner from acting as advocate in a proceeding before the Office in which the practitioner is likely to be a necessary witness. Combining the roles of advocate and witness can prejudice the opposing party and can involve a conflict of interest between the practitioner and client. The opposing party has a right to object where the combination of roles may prejudice that party's rights in the litigation. A witness is required to testify on the basis of personal knowledge, while an advocate is expected to explain and comment on evidence given by others. It may not be clear whether a statement by an advocate-witness should be taken as proof or as an analysis of the proof.

A registered practitioner could normally testify in an interference proceeding when his or her diligence is an issue in the interference. The Office would continue to assess on a case-by-case basis the weight to be given testimony by a registered practitioner who also represents a party in the proceeding in which the registered practitioner gives testimony. *See Wilder* v. *Snyder,* 201 USPQ 927, 934 (Bd. Pat. Int. 1979).

Paragraph (a)(1) of § 11.307 would recognize that if the testimony will be uncontested, the ambiguities in the dual role are purely theoretical.

Paragraph (a)(2) of § 11.307 would recognize that permitting the practitioners to testify concerning the extent and value of legal services rendered in the action in which the testimony is offered on the subject, avoids the need for a second trial with new counsel to resolve that issue. Moreover, in such a situation, the judge has first-hand knowledge of the matter in issue; hence, there is less dependence on the adversary process to test the credibility of the testimony.

Paragraph (a)(3) of § 11.307 would recognize that a balancing is required between the interests of the client and those of the opposing party. Whether the opposing party is likely to suffer prejudice depends on the nature of the case, the importance and probable tenor of the practitioner's testimony, and the probability that the practitioner's testimony will conflict with that of other witnesses. Even if there is risk of such prejudice, in determining whether the practitioner should be disqualified, due regard must be given to the effect of disqualification on the practitioner's client. It is relevant that one or both parties could reasonably foresee that the practitioner would probably be a witness.

If the only reason for not permitting a practitioner to combine the roles of advocate and witness is possible prejudice to the opposing party, there is no reason to disqualify other practitioners in the testifying practitioner's firm from acting as advocates in that trial. In short, there is no general rule of imputed disqualification applicable to § 11.307. However, the combination of roles of advocate and witness might involve an improper conflict of interest between the practitioner and the client in addition to or apart from possible prejudice to the opposing party. Whether there is such a client conflict is determined by §§ 11.107 or 11.109. For example, if there is likely to be a significant conflict between the testimony of the client and that of the practitioner, the representation would be improper under the standard set forth in § 11.107(b) without regard to § 11.307(a). The problem could arise whether the practitioner is called as a witness on behalf of the client, or is called by the opposing party. Determining whether such a conflict exists is, in the first instance, the responsibility of the practitioner involved. *See* Comment to § 11.107. Section 11.307(b) would state that other practitioners in the testifying practitioner's firm are disqualified only when there is such a client conflict and the testifying practitioner therefore could not represent the client under §§ 11.107 or 11.109. The principles of client consent, embodied in §§ 11.107 and 11.109, also would apply to § 11.307(b). Thus, the reference to §§ 11.107 and 11.109 incorporates the client consent aspects of those Rules. Section 11.307(b) as proposed would provide the protection for the client, not rights of disqualification to the adversary. Subject to the disclosure and consultation requirements of §§ 11.107 and 11.109, the client may consent to the firm's continuing representation, despite the potential problems created by the nature of the testimony to be provided by a practitioner in the firm.

Even where a practitioner's testimony would not involve a conflict with the client's interests under §§ 11.107 or 11.109 and would not be precluded under § 11.307, the client's interests might nevertheless be harmed by the appearance as a witness of a practitioner in the firm that represents the client. For example, the practitioner's testimony would be vulnerable to impeachment on the grounds that the practitioner-witness is testifying to support the position of the practitioner's own firm. Similarly, a practitioner whose firm's colleague is testifying in the case should recognize the possibility that the practitioner might not scrutinize the testimony of the colleague carefully enough and that this could prejudice the client's interests, whether the colleague is testifying for or against the client. In such instances, the practitioner should inform the client of any possible adverse effects on the client's interests that might result from the practitioner's relationship with the colleague-witness, so that the client may make a meaningful choice whether to retain the practitioner for the representation in question.

Section 11.308 is reserved. Rule 3.8 of the Model Rules of Professional Conduct addresses the ''Special Responsibilities of a Prosecutor'' in the context of criminal proceedings. Inasmuch as practice before the Office does not involve criminal proceedings, the content of Model Rule 3.8 is not

being proposed. Nevertheless, an attorney who is both a practitioner before the Office and a criminal prosecutor would be subject to both the Office and State professional conduct rules. If, in the course of a criminal proceeding, the attorney violates the state's professional conduct rules and is disciplined by the state authorities, the attorney could be subject to discipline under the proposed rules. *See* §§ 11.24 and 11.803(f)(5).

Section 11.309 would introduce a practitioner's responsibility in a non-adjudicative role before an administrative agency, such as the Office. The proposed rule would provide conformity with Rule 3.9 of the Rules of Professional Conduct adopted by state bars. In representation before bodies such as legislatures, municipal councils, and executive and administrative agencies acting in a rule-making or policy-making capacity (including the USPTO), practitioners present facts, formulate issues, and advance argument in the matters under consideration. The decision-making body, like a court, should be able to rely on the integrity of the submissions made to it. A practitioner appearing before such a body should deal with it honestly and in conformity with applicable rules of procedure.

Practitioners have no exclusive right to appear before non-adjudicative bodies, as they do before a court. The requirements of § 11.309, therefore, may subject practitioners to regulations inapplicable to advocates, such as non-practitioner lobbyists. However, legislatures and administrative agencies have a right to expect practitioners to deal with them as they deal with courts.

Section 11.309 does not apply to representation of a client in a negotiation or other bilateral transaction with a Government agency, such as the Office; representation in such a transaction is governed by §§ 11.401 through 11.404.

Section 11.309 is closely related to §§ 11.303 through 11.305, which deal with conduct regarding tribunals. The term ''tribunal,'' as defined in the terminology section of the proposed Rules, refers to adjudicative or quasi-adjudicative bodies, including the Office.

Section 11.401 would require a practitioner to be truthful when dealing with others on a client's behalf where the client has immediate or prospective business before the Office. However, the practitioner generally has no affirmative duty to inform an opposing party of relevant facts. A misrepresentation can occur if the practitioner incorporates or affirms a statement of another person that the practitioner knows is false. Misrepresentations can also occur by failure to act. The term ''third person'' as used in §§ 11.401(a) and (b) refers to any person or entity other than the practitioner's client.

Section 11.401(a)—Statements of Material Fact or Law. This Rule would refer to material statements of fact. Whether a particular statement should be regarded as material, and as one of fact, can depend on the circumstances. Under generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact. Estimates of price or value placed on the subject of a transaction and a party's intentions as to an acceptable settlement of a claim are in this category, and so is the existence of an undisclosed principal except where nondisclosure of the principal would constitute fraud. There may be other analogous situations. In other circumstances, a particular factual statement may be material; for example, a statement to a client's potential licensor of an invention that an application for a patent on the invention is pending, when the practitioner knows the application has been abandoned for some time, and the client is unaware of its status.

Section 11.401(b) would recognize that substantive law may require a practitioner to disclose certain information to avoid being deemed to have assisted the client's crime or fraud. The requirement of disclosure created by this section is, however, subject to the obligations created by § 11.106.

Section 11.402 would provide a standard for communicating with a party represented by counsel in connection with representing a client having immediate or prospective business before the Office. This rule would not prohibit communication with a party, or an employee or agent of a party, concerning matters outside the representation. For example, the existence of a controversy between two organizations does not prohibit a practitioner for either organization from communicating with nonpractitioner representatives of the other organization regarding a separate matter. Also, parties to a matter may communicate directly with each other and a practitioner having independent justification for communicating with the other party is permitted to do so.

Section 11.402(b) would address the case of communicating with agents or employees of an organization that is a represented party concerning the subject of representation. Section 11.402(b) would prohibit communication by a practitioner for one party concerning the subject of the representation with persons having the power to bind the organization as to the particular representation to which the communication relates. If an agent or employee of the organization with authority to make binding decisions regarding the representation is represented in the matter by separate counsel, the consent by that agent's or employee's counsel to a communication will be sufficient for purposes of this section.

Section 11.402(a) would cover any person, whether or not a party to a formal proceeding, who is represented by counsel concerning the matter in question.

Section 11.402(a) would not apply to the situation in which a practitioner contacts employees of an organization for the purpose of obtaining information generally available to the public, or obtainable under the Freedom of Information Act, even if the information in question is related to the representation. For example, a practitioner for a plaintiff who has filed suit against an organization represented by a practitioner may telephone the organization to request a copy of a press release regarding the representation, without disclosing the practitioner's identity, obtaining the consent of the organization's practitioner, or otherwise acting as paragraphs (a) and (b) of this Rule would require.

Section 11.402(c) would recognize that special considerations come into play when a practitioner is seeking to redress grievances involving the Government, including the Office. It would permit communications with those in Government having the authority to redress such grievances (but not with any other Government personnel) without the prior consent of the practitioner representing the Government in such cases. However, a practitioner making such a communication without the prior consent of the practitioner representing the Government must make the kinds of disclosures that are required by § 11.402(b) in the case of communications with non-party employees.

Section 11.402(d) would not prohibit a practitioner from bypassing counsel representing the Government on every issue that may arise in the course of disputes with the Government. It is intended to provide practitioners access to decision makers in Government with respect to genuine grievances, such as to present the view that the Government's basic policy position with respect to a dispute is faulty, or that Government personnel are conducting themselves

improperly with respect to aspects of the dispute. It is not intended to provide direct access on routine disputes such as ordinary discovery disputes, extensions of time or other scheduling matters, or similar routine aspects of the resolution of disputes.

Section 11.402 is not intended to enlarge or restrict the law enforcement activities of the United States or the Office of Enrollment and Discipline, which are authorized and permissible under the Constitution and the law of the United States. The ''authorized by law'' proviso to § 11.402(a) is intended to permit Government conduct that is valid under this law. The proviso is not intended to freeze any particular substantive law, but is meant to accommodate substantive law as it may develop over time.

Section 11.403 would provide a standard for communicating with an unrepresented person, particularly one not experienced in dealing with legal matters. Such a person might assume that a practitioner will provide disinterested advice concerning the law even when the practitioner represents a client. In dealing personally with any unrepresented third party on behalf of the practitioner's client, a practitioner should not give advice to the unrepresented party other than the advice to obtain counsel.

Section 11.404 would require a practitioner to respect the rights of third parties. Responsibility to a client requires a practitioner to subordinate the interests of others to those of the client, but that responsibility does not imply that a practitioner may disregard the rights of third persons. It is impractical to catalogue all such rights, but they include legal restrictions on methods of obtaining evidence from third persons.

Section 11.501 would set forth the responsibilities of a partner or supervisory practitioner. Paragraphs (a) and (b) of § 11.501 would refer to practitioners having supervisory authority over the professional work of a firm, or unit of a Government agency. This includes members of a partnership and the shareholders in a law firm organized as a professional corporation; practitioners having supervisory authority in the law department of an enterprise or Government agency; and practitioners who have intermediate managerial responsibilities in a firm.

Under § 11.501(a), a partner or supervisory practitioner in a firm would be responsible for ensuring that the firm has in effect measures giving reasonable assurance that all practitioners in the firm conform to the Rules of Professional Conduct. Under § 11.501(b), a supervisory practitioner in a Government unit would be responsible for making reasonable efforts to ensure that any practitioner subject to supervision conforms to the Rules of Professional Conduct.

The measures required to fulfill the responsibility prescribed in §§ 11.501(a) and (b) would depend on the firm's or unit's structure and the nature of its practice. In a small firm, informal supervision and occasional admonition ordinarily might be sufficient. In a large firm, or in practice situations in which intensely difficult ethical problems frequently arise, more elaborate procedures may be necessary. Some firms, for example, have a procedure whereby junior practitioners can make confidential referral of ethical problems directly to a designated senior partner or special committee. *See* § 11.502. Firms, whether large or small, may also encourage their members to participate in continuing legal education in professional ethics if such education is not required. In any event, the ethical atmosphere of a firm can influence the conduct of all its members and a practitioner having authority over the work of another may not assume that the subordinate practitioner will inevitably conform to the Rules.

Paragraph (c) of § 11.501 would set forth general principles of imputed responsibility for the misconduct of others. Section 11.501(c)(1) would make any practitioner who orders or, with knowledge, ratifies misconduct responsible for that misconduct. *See also* § 11.804(a). Section 11.501(c)(2) would extend that responsibility to any practitioner who is a partner in the firm in which the misconduct takes place, or who has direct supervisory authority over the practitioner who engages in misconduct, when the practitioner knows or should reasonably know of the conduct and could intervene to ameliorate its consequences. Whether a practitioner has such supervisory authority in particular circumstances would be a question of fact. A practitioner with direct supervisory authority is a practitioner who has an actual supervisory role with respect to directing the conduct of other practitioners in a particular representation. A practitioner who is technically a ''supervisor'' in organizational terms, but is not involved in directing the effort of other practitioners in a particular representation, is not a supervising practitioner with respect to that representation.

The existence of actual knowledge is also a question of fact. Whether a practitioner should reasonably have known of misconduct by another practitioner in the same firm would be an objective standard based on evaluation of all the facts, including the size and organizational structure of the firm, the practitioner's position and responsibilities within the firm, the type and frequency of contacts between the various practitioners involved, the nature of the misconduct at issue, and the nature of the supervision or other direct responsibility (if any) actually exercised. The mere fact of partnership or a position as a principal in a firm would not be sufficient, without more, to satisfy this standard. Similarly, the fact that a practitioner holds a position on the management committee of a firm, or heads a department of the firm, would not be sufficient, standing alone, to satisfy this standard.

Appropriate remedial action would depend on the immediacy of the involvement and the seriousness of the misconduct. The supervisor would be required to intervene to prevent avoidable consequences of misconduct if the supervisor knows that the misconduct occurred. Thus, if a supervising practitioner knows that a subordinate misrepresented a matter to an opposing party in a negotiation, the supervisor as well as the subordinate would have a duty to correct the resulting misapprehension.

Professional misconduct by a practitioner under supervision could reveal a violation of § 11.501(b) on the part of the supervisory practitioner even though it would not entail a violation of § 11.501(c) because there was no direction, ratification, or knowledge of the violation.

Apart from §§ 11.501 and 11.804(a), a practitioner would not have disciplinary liability for the conduct of a partner, associate, or subordinate. Whether a practitioner may be liable civilly or criminally for another practitioner's conduct is a question of law beyond the scope of these Rules.

Section 11.502 would set forth the ethical responsibilities of a subordinate practitioner. Although a practitioner would not be relieved of responsibility for a violation by the fact that the practitioner acted at the direction of a supervisor, that fact may be relevant in determining whether a practitioner had the knowledge required to render conduct a violation of the Rules. For example, if a subordinate filed a frivolous pleading at the direction of a supervisor, the subordinate would not be guilty of a professional violation unless the subordinate knew of the document's frivolous character.

When practitioners in a supervisor-subordinate relationship encounter a

matter involving professional judgment as to ethical duty, the supervisor may assume responsibility for making the judgment. Otherwise a consistent course of action or position could not be taken. If the question can reasonably be answered only one way, the duty of both practitioners is clear and they would be equally responsible for fulfilling it. However, if the question is reasonably arguable, someone has to decide upon the course of action. That authority ordinarily reposes in the supervisor, and a subordinate may be guided accordingly. For example, if a question arises whether the interests of two clients conflict under § 11.107, the supervisor's reasonable resolution of the question should protect the subordinate professionally if the resolution is subsequently challenged.

Section 11.503 would set forth a practitioner's responsibilities regarding nonpractitioner assistants. Practitioners generally employ assistants in their practice, including secretaries, investigators, law student interns, and paraprofessionals. Such assistants, whether employees or independent contractors, act for the practitioner in rendition of the practitioner's professional services. A practitioner should give such assistants appropriate instruction and supervision concerning the ethical aspects of their employment, particularly regarding the obligation not to disclose information relating to representation of the client, and should be responsible for their work product. The measures employed in supervising nonpractitioners should take account of the fact that they do not have legal training and are not subject to professional discipline.

Just as practitioners in private practice may direct the conduct of investigators who may be independent contractors, prosecutors and other Government practitioners may effectively direct the conduct of police or other governmental investigative personnel, even though they may not have, strictly speaking, formal authority to order actions by such personnel, who report to the chief of police or the head of another enforcement agency. Such prosecutors or other Government practitioners have a responsibility for police or investigative personnel, whose conduct they effectively direct, equivalent to that of private practitioners with respect to investigators hired by private practitioners. *See also* the comments to § 11.501, in particular, the concept of what constitutes direct supervisory authority, and the significance of holding certain positions in a firm. Comments to § 11.501 apply as well to § 11.503.

Section 11.504 would provide for the professional independence of a practitioner. The provisions of § 11.504 would express traditional limitations on sharing fees with nonpractitioners. (On sharing fees among practitioners not in the same firm, *see* § 11.105(e).) These limitations would be to protect the practitioner's professional independence of judgment. Where someone other than the client pays the practitioner's fee or salary, or recommends employment of the practitioner, that arrangement does not modify the practitioner's obligation to the client. As stated in § 11.504(d), such arrangements should not interfere with the practitioner's professional judgment.

Giving anything of value in exchange for recommending or securing employment for the practitioner would be specifically barred. Thus, for example, under proposed § 11.504(a), a practitioner would not be able to receive payment from an inventor for legal services and then pay an invention promoter a share for finding the inventor-client and referring the inventor-client to the practitioner. Likewise, the prohibition against a practitioner splitting fees with a non-practitioner is directed at the risk posed by the possibility of control of legal matters by a non-practitioner interested more in personal profit than the client's welfare. *See In the Matter of Jones,* 2 Cal. State Bar Ct.Rptr. 411 (Review Dept. 1993). To the extent this policy is implicated, a practitioner should not be able to ''sanitize'' such impermissible fee-splitting by the simple expedient of having an invention promoter receive the funds, make the division, and distribute them to the practitioner. *Accord* Formal Opinion 1997–148, Standing Committee on Professional Responsibility and Conduct (California); Formal Opinion 87, Ethics Committee of the Colorado State Bar (1991). Under proposed § 11.504(b), such practices would be specifically proscribed in cases involving an invention promoter. Ethics opinions and court decisions in those jurisdictions finding violations of rules barring fee-splitting between lawyers and non-lawyers in the estate planning and living trust contexts do not turn upon whether the lawyer receives payment for the trust and divides it with the marketer, or vice versa.

Section 11.505 would proscribe engaging in or aiding the unauthorized practice of law. The definition of the practice of law is established by law and might vary from one jurisdiction to another. Whatever the definition, limiting the practice of patent law before the Office to those recognized to practice protects the public against rendition of legal services by unqualified persons or organizations. A patent application is recognized as being a legal document. *See Sperry* v. *Florida,* 373 U.S. 379, 137 USPQ 578 (1963). Thus, a corporation that is not authorized to practice law renders legal services, as opposed to clerical services where, upon request from a general practice attorney and for a fee, it causes a patent application to be prepared by a registered practitioner. *See Lefkowitz* v. *Napatco,* 415 N.E.2d 916, 212 USPQ 617 (NY 1980). There are numerous cases and ethics opinions wherein attorneys have been found to have aided lay organizations in the unauthorized practice of law by agreeing to accept referrals from a non-lawyer engaged in unauthorized practice of law. Some involve non-lawyers marketing estate planning packages. A registered practitioner accepting referrals from a non-lawyer engaged in unauthorized practice of law paralleling such marketing packages might be aiding the unauthorized practice of law. An attorney was found to have aided the unauthorized practice of law by permitting a non-attorney operating as a business to gather data from estate planning clients for preparation of legal documents, and forward the data to the attorney who thereafter prepared the documents (including a will, living trust, living will, and powers of attorney). The attorney, without having personally met or corresponded with the client, forwarded the documents to the non-attorney for the client to execute. *See Wayne County Bar Ass'n.* v. *Naumoff,* 660 N.E.2d 1177 (Ohio 1996). In another case, an attorney agreed to accept referrals from non-attorneys who marketed, through free seminars, living trusts as estate planning devices to avoid probate. At the conclusion of the seminars, the marketers gathered personal and asset information on a form from clients desiring consultations with the marketers. The marketers then discussed the living trust with the clients, and what could and could not be done. The marketers recommended the attorney, who accepted 100 referrals in a two year period. The information gathered by the marketers would then be forwarded to the attorney, either by the marketers or the clients, and the attorney then spoke with the clients by telephone to answer their questions. The attorney then prepared trust documents for the clients' review, and later met with the clients in person,

went over the information and documents, and the clients signed the documents at the meeting. The attorney was found to have aided the unauthorized practice of law. *See Comm. on Professional Ethics & Conduct* v. *Baker,* 492 N.W.2d 695,597 (Iowa 1992). *See also People* v. *Laden,* 893 P.2d 771 (Colo. 1995), *People* v. *Macy,* 789 P.2d 188 (Colo. 1990), *People* v. *Boyles,* 591 P.2d 1315 (Colo. 1979); *In re Discipio,* 645 N.E.2d 906 (Ill. 1994); *In re Komar,* 532 N.E.2d 801 (Ill. 1988); Formal Opinion 705, Committee on Professional Ethics of the Illinois State Bar Association (1982); Formal Opinion 1977–148, Standing Committee on Professional Responsibility and Conduct; Formal Opinion 87, Ethics Committee of the Colorado State Bar (1991).

Paragraphs (b), (c), and (d) of § 11.505 would permit a practitioner to employ the services of paraprofessionals and delegate functions to them, so long as the practitioner supervises the delegated work and retains responsibility for their work. *See* § 11.503. Likewise, it would permit practitioners to provide professional advice and instruction to nonpractitioners whose employment requires knowledge of law; for example, claims adjusters, employees of financial or commercial institutions, social workers, accountants and persons employed in Government agencies. In addition, a practitioner may counsel nonpractitioners who wish to proceed *pro se.* Paragraph (d) of § 11.505, like § 10.47(b), makes it clear that a practitioner is prohibited from aiding a suspended or excluded practitioner in the practice of law before the Office.

Section 11.506, like current § 10.38, would prohibit agreements restricting rights to practice. An agreement restricting the right of partners or associates to practice after leaving a firm not only limits their professional autonomy, but also limits the freedom of clients to choose a practitioner. Section 11.506(a) would prohibit such agreements except for restrictions incident to provisions concerning retirement benefits for service with the firm.

Paragraph (b) of § 11.506 would prohibit a practitioner from agreeing not to represent other persons in connection with settling a claim on behalf of a client.

Section 11.507 would provide for a practitioner being subject to the Rules of Professional Conduct if the practitioner provides law-related services.

Section 11.601 would encourage a practitioner to provide *pro bono publico service.* This Rule would reflect the long-standing ethical principle underlying Canon 2 of the Code of Professional Responsibility that ''A practitioner should assist the legal profession in fulfilling its duty to make legal counsel available.'' The Rule would incorporate the legal profession's historical commitment to the principle that all persons in our society should be able to obtain necessary legal services. The Rule would also recognize that the rights and responsibilities of individuals and groups in the United States are increasingly defined in legal terms and that, as a consequence, legal assistance in coping with the web of statutes, rules, and regulations is imperative for persons of modest and limited means, as well as for the relatively well-to-do. The Rule would also recognize that a practitioner's *pro bono* services are sometimes needed to assert or defend public rights belonging to the public generally where no individual or group can afford to pay for the services.

This Rule would carry forward the ethical precepts set forth in the Code. Specifically, the Rule would recognize that the basic responsibility for providing legal services for those unable to pay ultimately rests upon the individual practitioner, and that every practitioner, regardless of professional prominence or professional workload, should find time to participate in or otherwise support the provision of legal services to the disadvantaged.

The Rule also would acknowledge that while the provision of free legal services to those unable to pay reasonable fees continues to be an obligation of each practitioner as well as the profession generally, the efforts of individual practitioners are often not enough to meet the need. Thus, it has been necessary for the profession and Government to institute additional programs to provide legal services. Accordingly, legal aid offices, practitioner referral services, and other related programs have been developed, and others will be developed by the profession and Government. Every practitioner should support all proper efforts to meet this need for legal services. A practitioner also should not refuse a request from a court or bar association to undertake representation of a person unable to obtain counsel except for compelling reasons such as those listed in § 11.602.

Section 11.601 also would express the profession's traditional commitment to make legal counsel available, but it is not intended that the Rule be enforced through disciplinary process. Neither is it intended to place any obligation on a Government practitioner that is inconsistent with laws, such as 18 U.S.C. 203 and 205, limiting the scope of permissible employment or representational activities.

Section 11.602 would provide for a practitioner's accepting a tribunal's appointment to represent a client. The practitioner would not be obligated to accept appointment if the practitioner regards the client's character or cause as repugnant. All practitioners have a responsibility to assist in providing *pro bono publico* service. *See* section 11.601. An individual practitioner fulfills this responsibility by accepting a fair share of unpopular matters or indigent or unpopular clients. A practitioner may also be subject to appointment by a court to serve unpopular clients or persons unable to afford legal services. This rule should not be construed as empowering the Office, and the Office does not intend to use this rule, as a means to appoint a practitioner to represent any person or party before the Office in any matter.

Section 11.602 and Appointed Counsel. For good cause a practitioner may seek to decline an appointment to represent a person who cannot afford to retain counsel or whose cause is unpopular. Good cause exists if the practitioner could not handle the matter competently, see § 11.101, or if undertaking the representation would result in an improper conflict of interest; for example, when the client or the cause is so repugnant to the practitioner as to be likely to impair the client-practitioner relationship or the practitioner's ability to represent the client. A practitioner may also seek to decline an appointment if acceptance would be substantially and unreasonably burdensome, such as when it would impose a financial sacrifice so great as to be unjust.

An appointed practitioner would have the same obligations to the client as retained counsel, including the obligations of loyalty and confidentiality, and is subject to the same limitations on the client-practitioner relationship, such as the obligation to refrain from assisting the client in violation of the Rules.

Section 11.603 would provide for practitioners supporting and participating in legal service organizations. A practitioner who is an officer or a member of such an organization does not thereby have a client-practitioner relationship with persons served by the organization. However, there is potential conflict between the interests of such persons and the interests of the practitioner's clients. If the possibility of such conflict disqualified a practitioner from serving on the board of a legal services organization, the profession's

involvement in such organizations would be severely curtailed. It may be necessary in appropriate cases to reassure a client of the organization that the representation will not be affected by conflicting loyalties of a member of the board. Established, written policies in this respect can enhance the credibility of such assurances.

Section 11.604 would encourage the efforts of practitioners to maintain and improve our legal system. This system should function in a manner that commands public respect and fosters the use of legal remedies to achieve redress of grievances. By reason of education and experience, practitioners are especially qualified to recognize deficiencies in the legal system and to initiate corrective measures therein. Thus, they should participate in proposing and supporting legislation and programs to improve the system, without regard to the general interests or desires of clients or former clients. Rules of law are deficient if they are not just, understandable, and responsive to the needs of society. If a practitioner believes that the existence or absence of a rule of law, substantive or procedural, causes or contributes to an unjust result, the practitioner should endeavor by lawful means to obtain appropriate changes in the law. This Rule expresses the policy underlying Canon 8 of the Code of Professional Responsibility of the American Bar Association that ''A practitioner should assist in improving the legal system'' through legislation. Practitioners employed by the Government may be subject to limits on their personal ability to propose legislation regarding the department or agency where they are employed. Accordingly, it is not intended that this Rule be enforced through disciplinary process.

Practitioners involved in organizations seeking law reform generally do not have a client-practitioner relationship with the organization. Otherwise, it might follow that a practitioner could not be involved in a bar association law reform program that might indirectly affect a client. *See also* § 11.102(b). For example, a practitioner specializing in patent law prosecution or litigation might be regarded as disqualified from participating in drafting revisions of rules governing that subject. In determining the nature and scope of participation in such activities, a practitioner should be mindful of obligations to clients under other Rules, particularly § 11.107. A practitioner is professionally obligated to protect the integrity of the program by making an appropriate disclosure within the organization when the practitioner knows a private client might be materially benefited.

Section 11.701 would govern all communications about a practitioner's services, including advertising. It is especially important that statements about a practitioner or the practitioner's services be accurate, since many members of the public lack detailed knowledge of legal matters. Certain advertisements such as those that describe the amount of a damage award, the practitioner's record in obtaining favorable verdicts, or those containing client endorsements, unless suitably qualified, have a capacity to mislead by creating an unjustified expectation that similar results can be obtained for others. Advertisements comparing the practitioner's services with those of other practitioners are false or misleading if the claims made cannot be substantiated.

Section 11.701 and Advertising. To assist the public in obtaining legal services, practitioners should be allowed to make known their services not only through reputation but also through organized information campaigns in the form of advertising. Advertising involves an active quest for clients, contrary to the tradition that a practitioner should not seek clientele. However, the public's need to know about legal services can be fulfilled in part through advertising. This need is particularly acute in the case of persons of moderate means who have not made extensive use of legal services. The interest in expanding public information about legal services ought to prevail over considerations of tradition.

Section 11.701 would permit public dissemination of information concerning a practitioner's name or firm name, address, and telephone number; the kinds of services the practitioner will undertake; the basis on which the practitioner's fees are determined, including prices for specific services and payment and credit arrangements; a practitioner's foreign language ability; names of references and, with their consent, names of clients regularly represented; and other information that might invite the attention of those seeking legal assistance.

Questions of effectiveness and taste in advertising are matters of speculation and subjective judgment. Some state jurisdictions have had extensive prohibitions against television advertising, against advertising going beyond specific facts about a practitioner, or against ''undignified'' advertising. Television is now one of the most powerful media for getting information to the public, particularly persons of low and moderate income; prohibiting television advertising, therefore, would impede the flow of information about legal services to many sectors of the public. Limiting the information that may be advertised has a similar effect.

This proposal is based on the premise that there might be no significant distinction between disseminating information and soliciting clients through mass media or through individual personal contact. In-person solicitation can, however, create additional problems because of the particular circumstances in which the solicitation takes place. Section 11.701 prohibits in-person solicitation in circumstances or through means that are not conducive to intelligent, rational decisions.

Sections 11.701 and 11.702, and paying others to recommend a practitioner. A practitioner would be allowed to pay for advertising permitted by this section. *See* § 11.702(c). Section 11.702 also would permit a practitioner to pay a not-for-profit lawyer referral service or legal service organization for channeling professional work to the practitioner. Thus, such a service or organization, other than the practitioner may advertise or recommend the practitioner's services. Likewise, a practitioner may participate in practitioner referral programs and pay the usual fees charged by such programs. However, special concerns arise when a practitioner is making payments to intermediaries, such as invention promoters, to recommend the practitioner's services to others. These concerns are particularly significant when the payments are not being made to a recognized or established agency or organization, such as a bar-organized practitioner referral program. In employing intermediaries, such as invention promoters, the practitioner is bound by all of the provisions of § 11.701. However, paragraphs (b)(4), and (b)(5) of § 11.701 contain provisions specifically relating to the use of intermediaries.

Paragraph (b)(4) of § 11.701 imposes specific obligations on the practitioner who uses an intermediary to ensure that the potential client, who is the target of the solicitation, is informed of the consideration paid or to be paid by the practitioner to the intermediary, and any effect of the payment of such consideration on the total fee to be charged. The concept of payment, as incorporated in § 11.701(b)(4), includes giving anything of value to the recipient and is not limited to payments of money alone. For example, if an intermediary

were provided the free use of an automobile or free clerical services in return for soliciting clients on behalf of the practitioner, the obligations imposed by § 11.701(b)(4) would apply and impose the specified disclosure requirements.

Statements by an invention promoter in connection with the marketing of the patent applications and inventions, whether on the telephone, at a seminar, or oral or in writing, regarding a practitioner preparing the patent applications and the availability of that practitioner to respond to questions relating to the application, would be communications under § 11.701 since they concern the availability of a practitioner for professional employment, and are therefore subject to the requirements of § 11.701. Like the communications found violative in *Leoni* v. *State Bar, supra,* 39 Cal.3d 609 (Cal. 1985) and *People* v. *Morse,* 21 Cal.App.4th 259, fn. 13 (1993), affd. *In re Morse,* 11 Cal. A4th 184 (Cal. 1995) they have potential to mislead members of the public. In *Leoni* v. *State Bar,* the letters and brochures inaccurately suggested or intimated that all recipients needed a lawyer, that their property was subject to immediate attachment, that bankruptcy was appropriate for them, and the like. In *People* v. *Morse,* the advertisements made inaccurate suggestions and statements regarding the protections afforded recipients by the homestead laws. Statements which, by their generic, ''one-size-fits-all'' recommendation of patents for everyone, may similarly contain untrue statements, and omit facts—such as that patents may not be worth the cost or in the client's best interest in every case—necessary to make the communications not misleading.

Further, an invention promoter's statements on the telephone or at a meeting regarding the professional employment of the practitioner in connection with obtaining patent protection would constitute a prohibited in-person solicitation under §§ 11.703(a) and 11.703(b). Section 11.703(a) and (b) would proscribe a practitioner from seeking employment through an intermediary under circumstances involving false or misleading statements, undue influence, a potential client who is physically or mentally unable to exercise reasonable judgment, and the practitioner has not taken reasonable steps to ensure that the potential client is informed of the consideration paid to the intermediary as well as any possible effect the payment has on the total fee charged. These rules would apply because a significant motivation for the promotion of the practitioner's services for the inventor is pecuniary gain (rather than communication of general information regarding patents). *See FTC* v. *AIRD,* 219 B.R. 639 (D Mass. 1998). For purposes of § 11.703, it makes no difference whether the invention promoter or the practitioner seeks or receives payment from the participant, since the rule regulates employment motivated by pecuniary gain, without regard to whether a practitioner or one acting on his behalf seeks or obtains that gain. Since the solicitation is directed at obtaining prospective clients with whom the practitioner has no prior professional relationship, it would be prohibited by § 11.703(a). The use of the invention promoter to communicate with the inventor would not insulate the practitioner from § 11.703, which prohibits improper solicitations made by ''an intermediary for the practitioner.'' In both the advertising and the solicitations, the invention promoter cannot do on the practitioner's behalf what the practitioner cannot do. The invention promoter simply becomes the agent of the practitioner. A practitioner cannot avoid the prohibition against in-person solicitation by associating with a non-practitioner who engages in such prohibited conduct on the lawyer's behalf. *Accord* Formal Opinion 1997–148, Standing Committee on Professional Responsibility and Conduct (California).

Paragraph (b)(5) of § 11.701 would impose specific obligations on the practitioner who uses an invention promoter as an intermediary to ensure that the potential client who is the target of the solicitation is accurately informed in every contract between the client and intermediary of all legal fees and expenses included in the funds the client delivers to the intermediary. The practitioner would also have to ensure that every communication to the client by the intermediary requesting funds accurately reflect all legal fees and expenses included in the funds sought, and that the potential client is informed of the discount in legal fees the practitioner gives or will give in consideration for the promoter referring a client.

Paragraph (d) of § 11.701 is based on 35 U.S.C. 32, and prohibits advertising that is specifically precluded by statute.

Paragraph (e) of § 11.701 is based on 5 U.S.C. 501, which prohibits the use of the name of a Member of Congress or of an individual in the service of the United States in advertising the practitioner's practice before the Office.

Section 11.702 would provide for advertising by practitioners. Paragraph (a) of § 11.702 would continue the requirements of current § 10.32(a) that provide for practitioners advertising their services through public media. Paragraph (b) of § 11.702 would introduce a requirement of keeping a copy of advertisements or communications (whether in printed or electronic media) for a period for two years. Paragraph (e) of § 11.702, like current § 10.32(c), would require any communication made pursuant to this rule to include the name of at least one practitioner responsible for its content.

Section 11.703 would address the potential for abuse inherent in direct in-person or live telephone contact by a practitioner with a prospective client known to need legal services. These forms of contact between a practitioner and a prospective client subject the layperson to the private importuning of the trained advocate in a direct interpersonal encounter. The prospective client, who may already feel overwhelmed by the circumstances giving rise to the need for legal services, may find it difficult fully to evaluate all available alternatives with reasoned judgment and appropriate self-interest in the face of the practitioner's presence and insistence upon being retained immediately. The situation is filled with the possibility of undue influence, intimidation, and overreaching, as was recognized in *Ohralik* v. *Ohio State Bar Ass'n.,* 436 U.S. 447 (1978) (disciplining attorney for soliciting clients for pecuniary gain under circumstances evidencing undue influence, intimidation, or overreaching).

Paragraph (a) of § 11.703, like current § 10.33, would provide a general prohibition against in-person or live telephone contact to solicit professional employment from a prospective client with whom the practitioner has no family or prior professional relationship when a significant motive for the practitioner's doing so is the practitioner's pecuniary gain and the solicitation occurs under circumstances evidencing undue influence, intimidation, or overreaching. This potential for abuse inherent in direct in-person or live telephone solicitation of prospective clients justifies its prohibition, particularly since practitioner advertising and written and recorded communication permitted under § 11.702 offer alternative means of conveying necessary information to those who may be in need of legal services. Advertising and written and recorded communications which may be mailed or autodialed make it possible for a prospective client to be informed

about the need for legal services, and about the qualifications of available practitioners, without subjecting the prospective client to direct in-person or telephone persuasion that may overwhelm the client's judgment.

A practitioner may not circumvent the Rules of Professional Conduct through the acts of another. *See* § 11.804(a). Accordingly, the provisions of § 11.804(a) may be violated by any solicitation by an intermediary invention promoter involving in-person or live telephone contact to solicit professional employment for a practitioner from a prospective client with whom the practitioner has no family or prior professional relationship when a significant motive is the pecuniary.

Paragraph (c) of § 11.703 would require the words ''Advertising Material'' on the outside of the envelope, and at the beginning and end of any electronic or recorded communication. The use of general advertising and written and recorded communications to transmit information from practitioner to prospective client, including patent and trademark clients, rather than direct in-person or live telephone contact, will help to assure that the information flows clearly as well as freely. The contents of advertisements and communications permitted under § 11.702 are permanently recorded so that they cannot be disputed and may be shared with others who know the practitioner. This potential for informal review is itself likely to help guard against statements and claims that might constitute false and misleading communications, in violation of § 11.701. The contents of direct in-person or live telephone conversations between a practitioner to a prospective client can be disputed and are not subject to third-party scrutiny. Consequently, they are much more likely to approach (and occasionally cross) the dividing line between accurate representations and those that are false and misleading.

There is far less likelihood that a practitioner would engage in abusive practices against an individual with whom the practitioner has a prior personal or professional relationship or where the practitioner is motivated by considerations other than the practitioner's pecuniary gain. Consequently, the general prohibition in § 11.703(a) and the requirements of § 11.703(c) would not be applicable in those situations.

But even permitted forms of solicitation can be abused. Thus, any solicitation which contains information which is false or misleading within the meaning of § 11.701, which involves coercion, duress or harassment within the meaning of § 11.703(b)(2), or which involves contact with a prospective client who has made known to the practitioner a desire not to be solicited by the practitioner within the meaning of § 11.703(b)(1) would be prohibited. Further, if after sending a letter or other communication to a client as permitted by § 11.702 the practitioner receives no response, any further effort to communicate with the prospective client may violate the provisions of § 11.703(b). Likewise, if a solicitation on a practitioner's behalf by an intermediary contains false or misleading information within the meaning of § 11.701, the solicitation may violate the provisions of § 11.804(a). Similarly, any solicitation by an intermediary invention promoter involving follow-up telephone calls to prospective clients who have not responded to an initial solicitation may violate the provisions of § 11.804(a).

Section 11.703 is not intended to prohibit a practitioner from contacting representatives of inventor-run organizations or groups that may be interested in establishing a group or prepaid legal plan for their members, or insureds for the purpose of informing such entities of the availability of and details concerning the plan or arrangement which the practitioner or the practitioner's firm is willing to offer. This form of communication is not directed to a prospective client. Rather, it is usually addressed to an individual acting in a fiduciary capacity seeking a supplier of legal services for others who may, if they choose, become prospective clients of the practitioner. Under these circumstances, the activity which the practitioner undertakes in communicating with such representatives and the type of information transmitted to the individual are functionally similar to and serve the same purpose as advertising permitted under § 11.702.

The requirement in § 11.703(c) that certain communications be marked ''Advertising Material'' does not apply to communications sent in response to requests of potential clients or their spokespersons or sponsors. General announcements by practitioners, including changes in personnel or office location, do not constitute communications soliciting professional employment from a client known to be in need of legal services within the meaning of this section.

Paragraph (d) of § 11.703 would permit, in conformity with Rules of Professional Conduct adopted by state bars, a lawyer to participate with an organization which uses personal contact to solicit members for its group or prepaid legal service plan, provided that the personal contact is not undertaken by any practitioner who would be a provider of legal services through the plan. The organization referred to in paragraph (d) must not be owned by or directed (whether as manager or otherwise) by any practitioner or law firm that participates in the plan. For example, paragraph (d) would not permit a lawyer to create an organization controlled directly or indirectly by the practitioner and use the organization for the in-person or telephone solicitation of legal employment of the practitioner through memberships in the plan or otherwise. The communication permitted by these organizations also must not be directed to a person known to need legal services in a particular matter, but is to be designed to inform potential plan members generally of another means of affordable legal services. Practitioners who participate in a legal service plan must reasonably assure that the plan sponsors are in compliance with §§ 11.701, 11.702, and 11.703(b). *See* § 11.804(a).

Section 11.704 would permit a practitioner to indicate areas of practice in communications about the practitioner's services. If a practitioner practices only in certain fields, or will not accept matters except in a specified field or fields, the practitioner is permitted to so indicate. A practitioner is generally permitted to state that the practitioner is a ''specialist,'' practices a ''specialty,'' or ''specializes in'' particular fields, but such communications are subject to the ''false and misleading'' standard applied in § 11.701 to communications concerning a practitioner's services.

However, a practitioner may not communicate that the practitioner has been recognized or certified as a specialist in a particular field of law, except as provided by this section.

Paragraph (a) of § 11.704 would continue the provisions of current § 10.31(c) proscribing a non-lawyer, *e.g.,* a patent agent, from holding himself/herself out as an attorney, lawyer, or member of a bar; or as authorized to practice before the Office in trademark matters unless authorized by § 11.14(b).

Paragraph (b) of § 11.704 would continue the provisions of current § 10.34(b) permitting a registered practitioner who is an attorney to use the designation ''Patents,'' ''Patent Attorney,'' ''Patent Lawyer,'' ''Registered Patent Attorney,'' or a substantially similar designation.

Paragraph (c) of § 11.704 would continue the procedure of current § 10.34(c) permitting a registered patent agent who is not an attorney to use the designation ''Patents,'' ''Patent Agent,'' ''Registered Patent Agent,'' or a substantially similar designation.

Section 11.705 would provide for firm names and letterheads. A firm may be designated by the names of all or some of its members, by the names of deceased members where there has been a continuing succession in the firm's identity, or by a trade name such as the ABC Legal Clinic. Although the United States Supreme Court has held that legislation may prohibit the use of trade names in professional practice, use of such names in law practice is acceptable so long as it is not misleading. For example, if a private firm uses a trade name that includes a geographical name such as Springfield Legal Clinic, an express disclaimer that it is a public legal aid agency may be required to avoid a misleading implication. It may be observed that any firm name including the name of a deceased partner is, strictly speaking, a trade name. The use of such names to designate law firms has proven a useful means of identification. However, it is misleading to use the name of a practitioner not associated with the firm or a predecessor of the firm.

Paragraph (d) of § 11.705 would provide that practitioners sharing office facilities, but who are not in fact partners, may not denominate themselves as, for example, Smith and Jones, for that title suggests partnership in the practice of law.

Section 11.801 would impose the same duty to persons seeking admission to a bar as well as to practitioners. Hence, if a person makes a material false statement in connection with an application for registration, it may be the basis for subsequent disciplinary action if the person is admitted, and in any event may be relevant in a subsequent admission application. The duty imposed by § 11.801 applies to a practitioner's own admission or discipline as well as that of others. Thus, it is a separate professional offense for a practitioner knowingly to make a misrepresentation or omission in connection with a disciplinary investigation of the practitioner's own conduct. Section 11.801 also requires affirmative clarification of any misunderstanding on the part of the admissions or disciplinary authority of which the person involved becomes aware.

Section 11.801 is subject to the provisions of the Fifth Amendment of the United States Constitution and corresponding provisions of state constitutions. A person relying on such a provision in response to a question, however, should do so openly and not use the right of nondisclosure as a justification for failure to comply with this rule.

A practitioner representing an applicant for registration, or representing another practitioner who is the subject of a disciplinary inquiry or proceeding, is governed by the Rules applicable to the client-practitioner relationship. For example, § 11.106 may prohibit disclosures, which would otherwise be required by a practitioner serving in such representative capacity. Practitioners representing an applicant or another practitioner must take steps to reasonably assure compliance with §§ 11.303(a)(1) and (2), and 11.804(c). *See Lipman* v. *Dickinson,* 174 F.3d 1363, 50 USPQ 2d 1490 (Fed. Cir. 1999).

Section 11.803 would require reporting a violation of the Rules of Professional Conduct. Self-regulation of the legal profession requires that members of the profession seek a disciplinary investigation when they know of a violation of the Rules of Professional Conduct. Practitioners have a similar obligation with respect to judicial misconduct. An apparently isolated violation may indicate a pattern of misconduct that only a disciplinary investigation can uncover. Reporting a violation is especially important where the victim is unlikely to discover the offense.

Consistent with the current rule, § 10.24(a), a report about misconduct is not required where it would involve violation of § 11.106. However, a practitioner should encourage a client to consent to disclosure where prosecution would not substantially prejudice the client's interests.

If a practitioner were obliged to report every violation of the Rules, the failure to report any violation would itself be a professional offense. Such a requirement existed in many jurisdictions but proved to be unenforceable. Section 11.803 would limit the reporting obligation to those offenses that a self-regulating profession must vigorously endeavor to prevent. A measure of judgment is, therefore, required in complying with the provisions of this section. The term ''substantial'' refers to the seriousness of the possible offense and not the quantum of evidence of which the practitioner is aware. A written communication describing the substantial misconduct should be made to the OED Director where the conduct is in connection with practice before the Office. Criminal convictions in state or Federal courts, and disciplinary actions other jurisdictions also should be communicated to the OED Director. A practitioner who believes that another practitioner has a significant problem of alcohol or other substance abuse affecting the latter practitioner's practice before the Office, in addition to reporting the matter to the OED Director, should also report the perceived situation to a counseling committee, operated by the state bar, which assists practitioners having such problems.

The duty to report professional misconduct does not apply to a practitioner retained to represent a practitioner whose professional conduct is in question. Such a situation is governed by the Rules applicable to the client-practitioner relationship.

Paragraph (b) of § 11.803 would provide for reporting knowledge that an employee of the Office has committed a violation of applicable Federal statute and rules adopted by the Office of Government Ethics (OGE). However, not all such violations are reportable to the Office of Enrollment and Discipline. For example, an Office employee who is not a practitioner could not be subject to the imperative USPTO Rules of Professional Conduct. Accordingly, violations of a Federal statute or OGE-adopted rules should be reported to the appropriate authorities, which do not include OED.

Paragraph (e) of § 11.803 would provide for disciplining a practitioner suspended or disbarred from practice as an attorney or agent on ethical grounds by any duly constituted authority of the United States (*e.g.*, a Federal court or another agency), a State (*e.g.*, a state supreme court), or a foreign authority in the case of a practitioner residing in a foreign country (*e.g.*, a foreign patent office). Practitioners have been suspended or excluded from practice before the Office following disbarment or suspension in a state. *See In re Davis,* 982 Off. Gaz. 2 (May 1, 1979), *aff'd sub nom., Davis* v. *Commissioner,* No. 80–1036 (D.C. Cir. Mar. 31, 1981), *cert. denied,* 454 U.S. 1090 (1981) (attorney excluded by USPTO following disbarment in Minnesota for misconduct involving both patent and non-patent matters); *In re Hodgson,* 1023 Off. Gaz. 13 (Oct. 12, 1982) (attorney excluded by USPTO after disbarment in Virginia following criminal conviction); *In re Pattison,* 1023 Off. Gaz. 13 (Oct. 12, 1982) (attorney excluded by USPTO after disbarment in Maryland for misconduct involving patent and non-patent matters); *Attorney Grievance Commission (Maryland)* v. *Pattison,* 441 A.2d 328 (Md. 1982); *Nakamura* v.

Harper, 1062 Off. Gaz. 433 (Jan. 28, 1986) (attorney excluded by USPTO after disbarment in Maryland for misconduct in patent and non-patent matters addressed in *Attorney Grievance Commission (Maryland)* v. *Harper,* 477 A.2d 756 (Md. 1984)); and *In re Kraft,* 954 Off. Gaz. 550 (Jan. 11, 1977), *aff'd. sub nom., Kraft* v. *Commissioner,* No. 77–0087 (D.D.C. Nov. 3, 1977) (attorney excluded by USPTO following suspension in Idaho).

Paragraph (f) of § 11.803 would define some, but not all, acts that would constitute violations of paragraphs (a) through (e) of this section. The USPTO believes that it would be helpful to practitioners if some specific prohibitions were set out in the rules. The prohibitions set out in paragraphs (1) through (4) of § 11.803 represent violations that have occurred in the past or that the USPTO specifically seeks to prevent. The specific acts set out in paragraph (f) would not constitute a complete description of all acts in violation of paragraphs (a) through (e).

Section 11.804 would continue the practice of providing for discipline involving a variety of acts constituting misconduct.

Paragraph (b) of § 11.804 would address many kinds of illegal conduct reflecting adversely on fitness to practice law, such as offenses involving fraud and the offense of willful failure to file an income tax return. *See In re Milmore,* 196 USPQ 628 (Comm'r Pat. 1977) (fraud on the Office); *In re Donal E. McCarthy,* 922 Off. Gaz. 2 (May 17, 1974) (income tax evasion); *In re Edwin Crabtree,* 1023 Trademark Off. Gaz. 44 (Oct. 27 1987) (income tax evasion). However, some kinds of offenses carry no such implication. Traditionally, the distinction was drawn in terms of offenses involving ''moral turpitude.'' A current regulation, 37 CFR 10.23(b)(3), proscribes ''illegal conduct involving moral turpitude.'' That concept can be construed to include offenses concerning some matters of personal morality, such as adultery and comparable offenses, that have no specific connection to fitness for the practice of law. Although a practitioner is personally answerable to the entire criminal law, a practitioner should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice. Offenses involving violence, dishonesty, breach of trust, or serious interference with the administration of justice are in that category. *See, e.g., In re Bernard Miller,* 688 Off. Gaz. 1 (Nov. 2, 1954) (excluding attorney from USPTO following conviction and incarceration, *Miller* v. *State (Oklahoma),* 281 P.2d 441 (Crim. App. Okla. 1955)). A pattern of repeated offenses, even ones of minor significance when considered separately, can indicate indifference to legal obligation.

Paragraph (d) of § 11.804, like § 10.23(b)(5), would prohibit conduct that ''is prejudicial to the administration of justice.'' There is extensive case law on this standard, as set forth below. Examples of these cases involve a practitioner's failure to cooperate with the OED Director or Bar Counsel during an investigation. A practitioner's failure to respond to investigative inquiries or Bar Counsel's subpoenas may constitute misconduct. *See Bovard* v. *Gould,* D96–02 *http://www.uspto.gov/web/offices/com/sol/foia/oed/disc/D02.pdf* (Comm'r Pat 1997); *In re Cope,* 455 A.2d 1357 (D.C. 1983); *In re Haupt,* 444 A.2d 317 (D.C. 1982); *In re Lieber,* 442 A.2d 153 (D.C. 1982); *In re Whitlock,* 441 A.2d 989 (D.C. 1982); *In re Russell,* 424 A.2d 1087 (D.C. 1980); *In re Willcher,* 404 A.2d 185 (D.C. 1979). Misconduct also may arise from the failure to abide by agreements made with Bar Counsel. *See In re Harmon,* M–79–81 (D.C. Dec. 14, 1981) (breaking promise to Bar Counsel to offer complainant refund of fee or vigorous representation constitutes conduct prejudicial to the administration of justice).

In the Office, a variety of conduct by practitioners has been found to constitute conduct prejudicial to the administration of justice. For example, such conduct includes a practitioner's destruction of a maintenance fee reminder, payment of Office fees with checks drawn on an overdrawn account, and settling a dispute with a former client by precluding disclosure of a grievance to the Office. *See Bovard* v. *Cole,* D95–01 (Comm'r Pat. 1995); *Weiffenbach* v. *Maxon,* D89–11 (Comm'r Pat. 1990); and *In re Johnson,* D2001–09, *http://www.uspto.gov/web/offices/com/sol/foia/oed/discD25.pdf* (Comm'r Pat. 2001). In other jurisdictions, a practitioner's failure to appear in court for a scheduled hearing is another common form of conduct deemed prejudicial to the administration of justice. *See In re Evans,* No. M–126–82 (D.C. Dec. 18, 1982); *In re Doud,* Bar Docket No. 442–80 (Sept. 23, 1982); *In re Bush* (Bush III), No. S–58–79/D/39/80 (D.C. Apr. 30, 1980); *In re Molovinsky,* No. M–31–79 (D.C. Aug. 23, 1979). Similarly, failure to obey court orders has been found to constitute misconduct under § 11.804(d). *See In re Whitlock,* 441 A.2d 989–91 (D.C. 1982); *In re Brown,* Bar Docket No. 222–78 (Aug. 4, 1978); and *In re Bush* (Bush I), No. DP–22–75 (D.C. July 26, 1977).

While the above categories—failure to cooperate with Bar Counsel and failure to obey court orders—encompass the major forms of misconduct proscribed by § 11.804(d), that provision would be interpreted flexibly and includes any improper behavior of an analogous nature. For example, the failure to turn over the assets of a conservatorship to the court or to the successor conservator has been held to be conduct ''prejudicial to the administration of justice.'' *In re Burka,* 423 A.2d 181 (D.C. 1980). In *Russell,* 424 A.2d 1087 (D.C. 1980), the court found that failure to keep the Bar advised of respondent's changes of address, after being warned to do so, was also misconduct under that standard. And in *In re Schattman,* No. M–63–81 (D.C. June 2, 1981), it was held that a practitioner's giving a worthless check in settlement of a claim against the practitioner by a client was improper.

Paragraph (g) of § 11.804 is based on 35 U.S.C. 32, and would prohibit disreputable or gross misconduct. An example of a practitioner being excluded for gross misconduct is found in *In re Wedderburn,* 1897 Dec. Comm'r. Pat. 77 (Comm'r Pat. 1897), mandamus denied sub nom., *United States ex rel. Wedderburn* v. *Bliss,* 1897 Dec. Comm'r. Pat. 750 (Sup.Ct. D.C. 1897), aff'd. 12 App. D.C. 485, 1898 Dec. Comm'r Pat. 413 (D.C. Cir. 1898).

Paragraph (h) of § 11.804 would define some, but not all, acts that would constitute violations of paragraphs (a) through (g) of this section. The USPTO believes that it would be helpful to practitioners if some specific prohibitions were set out in the rules. The prohibitions set out in paragraphs (1) through (10) of § 11.804 represent conduct that has occurred in the past or which the USPTO specifically seeks to prevent. The specific acts set out in paragraph (h) would not constitute a complete description of all acts in violation of paragraphs (a) through (g).

Paragraph (h)(1) of § 11.804, for example, would proscribe knowingly giving false or misleading information or knowingly participating in a material way in giving false or misleading information, to a client in connection with any immediate, prospective, or pending business before the Office.

Paragraph (h)(2) of § 11.804 would include as misconduct representing before the Office in a patent case either a joint venture comprising an inventor and an invention promoter or an inventor referred to the registered practitioner by an invention promoter. One requirement for the misconduct to obtain is that the registered practitioner know, or be advised by the Office, that

a formal complaint has been filed by a Federal or state agency, that the complaint is based on any violation of any law relating to securities, unfair methods of competition, unfair or deceptive acts or practices, mail fraud, or other civil or criminal conduct, and the complaint is pending before a Federal or state court or Federal or state agency, or has been resolved unfavorably by such court or agency, against the invention promoter in connection with invention development services. Another requirement is that the informed or advised registered practitioner fails to fully advise the inventor of the existence of the pending complaint or unfavorable resolution thereof prior to undertaking or continuing representation of the joint venture or inventor. The Federal Trade Commission, Securities and Exchange Commission, and the U.S. Department of Justice are Federal agencies empowered to investigate and file charges included within the scope of the proposed rule. *See Securities and Exchange Commission* v. *Lawrence Peska Associates, Inc.,* Civil Action 77–2436 (S.D. Fla., Filed: Aug. 8, 1977); *United States* v. *Beecroft,* 608 F.2d 753 (9th Cir. 1979) (upholding mail fraud convictions of defendant officers of a company which helped inventors promote and market their ideas).

Attorneys General in state agencies also can file charges arising from actions that may also constitute violations of consumer protection laws within the scope of the proposed rules. *See, e.g.*, Thomas, *Invention Development Service and Inventors: Recent Inroads on Caveat Inventors,* 60 J. Pat. Off. Soc'y. 355, 376 n. 75 (1978); Shemin, *Idea Promoter Control: The Time Has Come,* 60 J. Pat. Off. Soc'y. 261, 262 n.7 (1978); and *Illinois* v. *Lawrence Peska Associates, Inc.,* Civil Action No. 77CH 3771 (Cir.Ct. Cook Cty June 8, 1977). Similarly, a practitioner who represented an inventor referred by an invention promoter, and knew or should have known that the invention promoter was charged by the FTC with engaging in unfair or deceptive acts or practices, could be subject to disciplinary action under the proposed rule if the practitioner does not advise the inventor of the existence of the charges.

In using ''invention promoter'' and ''invention marketing and promotion services,'' the proposed rule applies the definitions used in § 11.1.

Paragraph (h)(7) of § 11.804 would provide that a practitioner may not accept or use the assistance from an Office employee in the presentation or prosecution of an application except to the extent that the employee may lawfully participate in an official capacity. The proposed rule would cover not only situations where an Office employee, such as a patent examiner or other person, is paid for their assistance, but also where the employee is not paid for their assistance. Thus, where claims in an application are rejected over a reference that is in a foreign language, a practitioner may not engage a person, employed by the Office, to translate the reference and use the translation to traverse the rejection. Moreover, the proposed rule would not be limited to situations involving bribery, and would not require a conviction for bribery.

Paragraph (i) of § 11.804 would provide that a practitioner who acts with reckless indifference to whether a representation is true or false would be chargeable with knowledge of its falsity. Likewise, deceitful statements of half-truths or concealment of material facts shall be deemed actual fraud within the meaning of this part. *See, e.g., United States* v. *Beecroft,* 608 F.2d 753 (9th Cir. 1979).

Section 11.805 would provide a practitioner and other persons practicing before the Office with guidance that he or she would be subject to the disciplinary authority and rules of the USPTO. Paragraph (a) of § 11.805 restate long-standing law. The USPTO Director has statutory, 35 U.S.C. 2(b)(2)(D), and inherent authority to adopt rules regulating the practice of attorneys and other persons before the USPTO in patent, trademark, and non-patent law. The USPTO, like other Government agencies, has inherent authority to regulate who may practice before it as attorneys, including the authority to discipline attorneys. *See Goldsmith* v. *U.S. Board of Tax Appeals,* 270 U.S. 117 (1926); *Herman* v. *Dulles,* 205 F.2d 715 (D.C. Cir. 1953), and *Koden* v. *U.S. Department of Justice,* 564 F.2d 228 (7th Cir. 1977). Courts have affirmed that Congress, through the Administrative Procedure Act, 5 U.S.C. 500, did not limit the inherent power of agencies to discipline professionals who appear or practice before them. *See Polydoroff* v. *ICC,* 773 F.2d 372 (D.C. Cir. 1985); *Touche Ross & Co.* v. *SEC,* 609 F.2d 570 (2d Cir. 1979).

A practitioner may be potentially subject to more than one set of rules of professional conduct which impose different obligations. The registered patent attorney would be licensed to practice in more than one jurisdiction, *i.e.*, the Office and at least one state. The rules of professional conduct may differ between these jurisdictions. A practitioner may be admitted to practice before a particular court with rules that differ from those of the Office or other jurisdictions in which the practitioner is licensed to practice. In the past, decisions have not developed clear or consistent guidance as to which rules apply in such circumstances.

Paragraph (b) of § 11.805 seeks to resolve such potential conflicts. Its premise would be that minimizing conflicts between rules, as well as uncertainty about which rules are applicable, is in the best interest of both clients and the profession (as well as the bodies having authority to regulate the profession). Accordingly, it takes the approach of (i) providing that any particular conduct of a practitioner shall be subject to only one set of rules of professional conduct, and (ii) making the determination of which set of rules applies to particular conduct as straightforward as possible, consistent with recognition of appropriate regulatory interests of relevant jurisdictions.

Paragraph (b)(1) of § 11.805 would provide that as to a practitioner's conduct relating to practice before the Office, where the practitioner is registered or recognized to practice (either generally or granted limited recognition), the practitioner would be subject to the rules of the Office Rules of Professional Conduct.

Paragraph (b)(2) of § 11.805 would provide that as to a practitioner's conduct relating to a proceeding in or before a court before which the practitioner is admitted to practice (either generally or pro hac vice), the practitioner would be subject only to the rules of professional conduct of that court. As to all other conduct, § 11.805(b) would provide that a practitioner recognized to practice before the Office would be subject to the rules of the Office in regard to conduct occurring in connection with practice before the Office. The rule also would provide that a practitioner recognized to practice before the Office practicing in multiple jurisdictions would be subject only to the rules of the jurisdiction where he or she (as an individual, not his or her firm) principally practices, but with one exception: if particular conduct clearly has its predominant effect in another admitting jurisdiction, then only the rules of that jurisdiction shall apply. The intention is for the latter exception to be a narrow one. It would be appropriately applied, for example, to a situation in which a practitioner admitted in, and principally practicing in, State A, but also admitted in State B, handled an acquisition by a company whose headquarters and operations were in State B of another,

similar to such company. The exception would not appropriately be applied, on the other hand, if the practitioner handled an acquisition by a company whose headquarters and operations were in State A of a company whose headquarters and main operations were in State A, but which also had some operations in State B.

If two admitting jurisdictions were to proceed against a practitioner for the same conduct, they should, applying this rule, identify the same governing ethics rules. They should take all appropriate steps to see that they do apply the same rule to the same conduct, and in all events should avoid proceeding against a practitioner on the basis of two inconsistent rules.

If an attorney admitted in State A also is a registered practitioner, the practitioner may view that he or she is subject to possibly different ethical obligations under State and Office rules regarding disclosure of prior art references. Typically, this obtains in patent matters where the practitioner is informed by the client of the existence of a prior reference that appears to the practitioner to be material to the patentability of the client's patent application, but the client believes the reference is not directly relevant to the invention, and does not want to disclose the reference to the Office. The practitioner is engaged in practicing before the Office. It would be appropriate to apply § 11.805(b) and follow the Office rules, §§ 1.56 and 11.106(c), requiring disclosure of information material to the patentability of a claimed invention. *See* Formal Opinion 96–12, Professional Guidance Committee of the Philadelphia Bar Association (1996).

The choice of law provision is not intended to apply to practice abroad.

Section 11.806 would address sexual relations with clients, employees, and third persons.

Paragraph (a) of § 11.806 would define ''sexual relations'' as intercourse or touching another person for the purpose of sexual arousal, sexual gratification, or sexual abuse. Paragraph (b)(1) of § 11.806 would proscribe a practitioner from requiring sexual relations with a client or third party incident to or as a condition of any professional representation. Paragraph (b)(2) of § 11.806 would proscribe sexual relations with an employee incident to or as a condition of employment. Under paragraph (b)(3) of § 11.806, use of coercion, intimidation, or undue influence in entering into sexual relations with a client, or employee is proscribed.

Paragraph (c) of § 11.806. Under paragraph (c) of § 11.806, the regulation would not apply to sexual relations between practitioners and their spouses or to ongoing consensual sexual relationships predating the practitioner-client relationship or practitioner-employee relationship.

Paragraph (d) of § 11.806. Under paragraph (d) of § 11.806, practitioners in the firm would not be subject to discipline solely because a practitioner in the firm has sexual relations with a client but the practitioner does not participate in the representation of that client.

TABLE 1.—PRINCIPAL SOURCE OF SECTIONS 11.1 THROUGH 11.18

Section	Source	Part 10 concordance
§ 11.1	37 CFR 10.1	§ 10.1
	MRPR	
§ 11.2	37 CFR 10.2	§ 10.2
	DC RULE XI, § 6	
§ 11.3	37 CFR 10.170	§ 10.170
§ 11.4	37 CFR 10.3	§ 10.3
§ 11.5	37 CFR 10.5	§ 10.5
§ 11.6	37 CFR 10.6	§ 10.6
§ 11.7(a)(b)	37 CFR 10.7(a)	§ 10.7(a)
§ 11.7(b)(1)	37 CFR 10.7(b)	§ 10.7(b)
§ 11.7(b)(2)	New	None
	37 CFR 1.8 and 1.10	None
§ 11.7(c)	Case law	None
	RDCCA 46(12)(ii), third sentence	
§ 11.7(d)	New	§ 10.7(b)
§ 11.7(e)	New	None
§ 11.7(f)	37 CFR 10.6(c)	§ 10.6(c)
	37 CFR 10.7(b)	§ 10.7(b)
§ 11.7(g)	37 CFR 10.7(a)	§ 10.7(a)
§ 11.7(h)	Case law	None
	California State Bar Policy	None
	FlaRSC 2–13	None
	GaSCR Part A, § 11	None
	MoSCR 8.05	None
§ 11.7(i)	California State Bar Policy	None
§ 11.7(j)	RDCCA 46(f)–(g)	None
	Willner v. *Comm. on Character & Fitness*, 373 U.S. 96 (1963)	
§ 11.7(k)	Colo. Rule 201.12	None
§ 11.8(a)	RDCCA 46(b)(10)	None
§ 11.8(b)–(c)	RDCCA 46(h)(2), (3)	None
§ 11.8(d)	OGVSB Rule 11	None
§ 11.9(a)–(c)	37 CFR 10.9(a)–(c)	§ 10.9
§ 11.10(a)	37 CFR 10.10(a)	§ 10.10
§ 11.10(b)	5 CFR 2637.201	§ 10.10(b)
	5 CFR 2637.202	§ 10.10(b)
§ 11.10(c)	5 CFR 2637.201	None
	5 CFR 2637.202	None
§ 11.10(d)–(e)	37 CFR 10.10(c)–(d)	§ 10.10(c)–(d)
§ 11.11(a)	37 CFR 10.11(a)	§ 10.11(a)

TABLE 1.—PRINCIPAL SOURCE OF SECTIONS 11.1 THROUGH 11.18—Continued

Section	Source	Part 10 concordance
§ 11.11(b)	OGVSB Rule 19	None
§ 11.11(c)	New	None
§ 11.11(d)	New	None
§ 11.11(e)–(f)	1064 Off.Gaz.12	None
§ 11.12(a)–(d)	OGVSB Rule 17	None
§ 11.12(e)	OGVSB Rule 19	None
§ 11.13	OGVSB Rule 17	None
§ 11.14	37 CFR 10.14	§ 10.14
§ 11.15	37 CFR 10.15	§ 10.15
§ 11.16	New	None
§ 11.17 [Reserved]		
§ 11.18	37 CFR 10.18	§ 10.18
	FRCP 11	

Abbreviations:
Colo. Rule means Rules Governing Admission to the Bar of the State of Colorado (March 23, 2000).
DC RULE XI means Rule XI of the Rules Governing the District of Columbia Bar.
FlaLRSC 2–13 means Rule 2–13 of the Florida Rules of the Supreme Court Relating to Admissions to the Bar.
GaSCR Part A, § 11 means Part A, Rule 11 of the Georgia Supreme Court Rules Governing Admission to the Practice of Law.
MoSCR 8.05 means Rule 8.05 of the Missouri Supreme Court Rules Governing Admission to the Bar in Missouri.
RDCCA means Rules of the District of Columbia Court of Appeals.
OGVSB means Organization & Government of the Virginia State Bar.

TABLE 2.—PRINCIPAL SOURCE OF SECTIONS 11.19 THROUGH 11.62

Section	Source	Part 10 concordance
§ 11.19	DC RULE XI	§ 10.1, 10.2
	37 CFR 10.130	§ 10.130
§ 11.20	DC RULE XI, § 3	None
§ 11.21	DC BPR Chap. 6	None
§ 11.22	DC BPR Chap. 2	None
§ 11.23	37 CFR 10.4	§ 10.4
§ 11.24	DC BPR Chap. 10	None
§ 11.25	DC BPR Chap. 8	None
	Calif. § 6102(d)	None
§ 11.26	DC BPR Chap.	None
§ 11.27	37 CFR 10.133	§ 10.133
	DC BPR Chap.15	
§ 11.28	DC BPR Chap. 14	None
	DC RULE XI, § 13	
§§ 11.29–11.31 [Reserved]		
§ 11.32	37 CFR 10.132	§ 10.132
§ 11.33 [Reserved]		
§ 11.34	37 CFR 10.134	§ 10.134
§ 11.35	37 CFR 10.135	§ 10.135
§ 11.36	37 CFR 10.136	§ 10.136
§ 11.37	37 CFR 10.137	§ 10.137
§ 11.38	37 CFR 10.138	§ 10.138
§ 11.39	37 CFR 10.139	§ 10.139
§ 11.40	37 CFR 10.140	§ 10.140
§ 11.41	37 CFR 10.141	§ 10.141
§ 11.42	37 CFR 10.142	§ 10.142
§ 11.43	37 CFR 10.143	§ 10.143
§ 11.44	37 CFR 10.144	§ 10.144
§ 11.45	37 CFR 10.145	§ 10.145
§§ 11.46–11.48 [Reserved]		
§ 11.49	37 CFR 10.149	§ 10.149
§ 11.50	37 CFR 10.150	§ 10.150
§ 11.51	37 CFR 10.151	§ 10.151
§ 11.52	37 CFR 10.152	§ 10.152
§ 11.53	37 CFR 10.153	§ 10.153
§ 11.54	37 CFR 10.154	§ 10.154
§ 11.55(a)	37 CFR 10.155(a)	§ 10.155(a)
	FRAP Rule 28	
§ 11.55(b)	FRAP Rule 28	None
	FRAP Rule 32(a)(4), and (7)	
	FRAP Rule 32(a)(4), (5) and (6)	
§ 11.55(c)–(e)	37 CFR 10.155(b)–(d)	§ 10.155(b)–(d)
§ 11.56	37 CFR 10.157	§ 10.157
§ 11.58	37 CFR 10.158	§ 10.158
	DC Rule XI, § 14	
	Calif. Rule 955	

TABLE 2.—PRINCIPAL SOURCE OF SECTIONS 11.19 THROUGH 11.62—Continued

Section	Source	Part 10 concordance
§ 11.59	37 CFR 10.159	§ 10.159
§ 11.60	37 CFR 10.160	§ 10.160
	DC RULE XI, § 16	
	DC BPR Chap. 9	
§ 11.61	37 CFR 10.161	§ 10.161
§ 11.62	New	

Abbreviations:
DC RULE XI means Rule XI of the Rules Governing the District of Columbia Bar (1999).
DC BPR means Rules of the District of Columbia Court of Appeals Board of Professional Conduct (1999).
Calif. Rule means California Bar Rule.
Calif § 6102(d) means Article 6, § 6102(d) of the California State Bar Act.
FRAP means Federal Rules of Appellate Procedure.

TABLE 3.—PRINCIPAL SOURCE OF SECTIONS 11.100 THROUGH 11.806

Section	Source	Part 10 concordance
Competence:		
§ 11.101(a)	MRPR 1.1	§ 10.77(a)
§ 11.101(b)	DCRPR 1.1b	None
§ 11.101(c)(1)	§ 10.23(c)(7)	§ 10.23(c)(7)
§ 11.101(c)(2)	§ 10.23(c)(13)	§ 10.23(c)(13)
§ 11.101(c)(3)	§ 10.23(c)(19)	§ 10.23(c)(19)
§ 11.101(c)(4)	§ 10.23(c)(20)	§ 10.23(c)(20)
Scope of Representation:		
§ 11.102(a)	MRPR 1.2(a)	§ 10.84(a)(1)
§ 11.102(b)	MRPR 1.2(b)	None
§ 11.102(c)	MRPR 1.2(c)	§ 10.84(b)
§ 11.102(d)	MRPR 1.2(d)	§ 10.85(a)(6)(7)(8)
		§ 10.89
§ 11.102(e)	MRPR 1.2(e)	§ 10.40(c)(1)(iii)
		§ 10.111(c)
§ 11.102(f)	DCRPR 1.2(d)	None
Diligence:		
§ 11.103(a)	MRPR 1.3	§ 10.77(c)
		§ 10.84(a)(1), (3)
§ 11.103(b)–(c)	New	§ 10.77(c)
		§ 10.84(a)(1), (3)
Communication:		
§ 11.104(a)	MRPR 1.4(a)	§ 10.77(c)
		§ 10.84(a)(1)(3)
§ 11.104(b)	MRPR 1.4(b)	None
§ 11.104(c)	DCRPR 1.4(c)	None
§ 11.104(d)(1)	10.23(c)(8)	§ 10.23(c)(8)
Fees:		
§ 11.105(a)	MRPR 1.5(a)	§ 10.36(a)(b)
§ 11.105(b)–(c)	MRPR 1.5(b)–(c)	None
§ 11.105(e)(1)	MRPR 1.5(e)(1)	§ 10.37(a)
§ 11.105(e)(2)–(4)	DCRPR 1.5(e)(2)–(4)	§ 10.37(a)
§ 11.105(f)	MRPR 1.5(f)	None
Confidentiality:		
§ 11.106(a)(1)	MRPR 1.6(a)	§ 10.57(a)(b)(c)
§ 11.106(a)(2)–(3)	DCRPR 1.6	§ 10.57(a)(b)(c)
§ 11.106(b)(1)	MRPR 1.6(b)(2)	§ 10.57(c)(4)
§ 11.106(b)(2)	MRPR 1.6(b)(2)	None
§ 11.106(c)	37 CFR 1.56	None
§ 11.106(d)–(h)	DCRPR 1.6	None
Conflicts of Interest:		
§ 11.107(a)	MRPR 1.7	§ 10.62(a)
		§ 10.66(a)(b)
		§ 10.68(b)
§ 11.107(b)&(b)(1)	MRPR 1.7	§ 10.62(a)(b)
		§ 10.63
		§ 10.65(a)
		§ 10.66(a)(b)(c)
		§ 10.68(a)
§ 11.107(b)(2)	MRPR 1.7	None
Prohibited Transactions:		
§ 11.108(a)	MRPR 1.8(a)	§ 10.65(a)
§ 11.108(b)	MRPR 1.8(b)	§ 10.57(b)
§ 11.108(c)	MRPR 1.8(c)	None
§ 11.108(d)	MRPR 1.8(d)	None

TABLE 3.—PRINCIPAL SOURCE OF SECTIONS 11.100 THROUGH 11.806—Continued

Section	Source	Part 10 concordance
§ 11.108(e)	MRPR 1.8(e)	§ 10.64(b)
§ 11.108(f)	MRPR 1.8(f)	§ 10.68(a)(b)
§ 11.108(f)(1)(ii)	New	None
§ 11.108(g)	MRPR 1.8(g)	§ 10.67(a)
§ 11.108(h)	MRPR 1.8(h)	§ 10.63(a)
§ 11.108(i)	MRPR 1.8(i)	None
§ 11.108(j)	MRPR 1.8(j)	§ 10.62(a) § 10.64(a) 35 U.S.C. 4
§ 11.108(k)	New	None
Former Client:		
§ 11.109(a)	MRPR 1.9(a)	§ 10.66(c)
§ 11.109 (b)	MRPR 1.9(b)	None
§ 11.109 (c)	MRPR 1.9(c)	None
Imputed Disqualification:		
§ 11.110(a)	MRPR 1.10(a)	§ 10.66(d)
§ 11.110(b)	MRPR 1.10(b)	§ 10.66(d)
§ 11.110(c)	MRPR 1.10(c)	§ 10.66(a)
Government/Private:		
§ 11.111(a)	MRPR 1.11(a)	§ 10.111(b)
§ 11.111(b)	MRPR 1.11(b)	None
§ 11.111(c)	MRPR 1.11(c)	None
§ 11.111(d)	MRPR 1.11(d)	None
§ 11.111(e)	MRPR 1.11(e)	None
Former Judge:		
§ 11.112(a)(b)	MRPR 1.12(a)(b)	§ 10.111(a)(b)
§ 11.112(c)	MRPR 1.12(c)	§ 10.66(d)
§ 11.112(d)	MRPR 1.12(d)	None
Organization as Client:		
§ 11.113(a)	MRPR 1.13(a)	None
§ 11.113(b)	MRPR 13(b)	§ 10.68(b)
§ 11.113(c)	MRPR 1.13(c)	§ 10.66(d) § 10.68(b)
§ 11.113(d)	MRPR 1.13(d)	None
§ 11.113(e)	MRPR 13(e)	§ 10.66(b)(c)
Disabled Client:		
§ 11.114	MRPR 1.14	None
Safekeeping of Property:		
§ 11.115(a)	VRPC 1.15(a)	§ 10.112(a)
§ 11.115(b)	New	None
§ 11.115(c)	VRPC 1.15(b)	§ 10.112(b)(2)
§ 11.115(d)	VRPC 1.15(c)	§ 10.112(c)
§ 11.115(e)–(f)	VRPC 1.15(d)–(e)	§ 10.112(c)(3)
§ 11.115(g)	VRCP 1.15(f)	None
§ 11.115(h)–(i)	§ 10.23(c)(3)	§ 10.23(c)(3)
Declining/Terminating Representation:		
§ 11.116(a)(1)	MRPR 1.16(a)(1)	§ 10.39 § 10.40(b)(1)(2)
§ 11.116(a)(2)	MRPR 1.16(a)(2)	§ 10.40(b)(3) § 10.40(c)(4)
§ 11.116(a)(3)	MRPR 1.16(a)(3)	§ 10.40(b)(4)
§ 11.116(b)(1)	MRPR 1.16(b)(1)	§ 10.40(c)(1)(ii)(iii) § 10.40(c)(2)
§ 11.116(b)(2)	MRPR 1.16(b)(2)	§ 10.40(c)(1)(iv)
§ 11.116(b)(3)	MRPR 1.16(b)(3)	§ 10.40(c)(1)(vi)(ix)(x)
§ 11.116(b)(5)	MRPR 1.16(b)(5)	§ 10.40(c)(1)(iv)(v)
§ 11.116(b)(6)	MRPR 1.16(b)(6)	§ 10.40(c)(6)
§ 11.116(c)	MRPR 1.16(c)	§ 10.40(a)
§ 11.116(d)	MRPR 1.16(d)	§ 10.40(a)
Sale of Practice:		
§ 11.117	MRPR 1.17	None
§§ 11.118–11.200 [Reserved]		
Advisor:		
§ 11.201(a)	MRPR 2.1(a)	§ 10.68(b)
§ 11.201(b)	New	None
Intermediary:		
§ 11.202(a)(1)	MRPR 2.2(a)(1)	§ 10.66(a)(c)
§ 11.202(a)(2)	MRPR 2.2(a)(2)	§ 10.66(a)(c)
§ 11.202(a)(3)	MRPR 2.2(a)(3)	§ 10.66(a)(c)
§ 11.202(b)	New	None
§ 11.202(c)	MRPR 2.2(b)	None
§ 11.202(c)	MRPR 2.2(c)	§ 10.66(b)(c)

TABLE 3.—PRINCIPAL SOURCE OF SECTIONS 11.100 THROUGH 11.806—Continued

Section	Source	Part 10 concordance
Evaluation for Third Party:		
§ 11.203	MRPR 2.3	None
§§ 11.204–11.300 [Reserved]		
Meritorious Claim:		
§ 11.301	MRPR 3.1	§ 10.63(a)(b) § 10.39(a)(b) § 10.85(a)(1)(2)
Expediting Litigation:		
§ 11.302(a)	MRPR 3.2	§ 10.23(b)(5) § 10.84(a)(1)(2)
§ 11.302(b)	DCRPR 3.2(a)	None
Candor:		
§ 11.303(a)(1)	MRPR 3.3(a)(1)	§ 10.23(b)(4)(5) § 10.85(a)(4)(5)
§ 11.303(a)(2)	MRPR 3.3(a)(2)	§ 10.23(b)(4)(5) § 10.85(a)(3) § 10.85(b)(1) § 10.92(a)
§ 11.303(a)(3)	MRPR 3.3(a)(3)	§ 10.85(a)(5) § 10.89(b)(1)
§ 11.303(a)(4)	MRPR 3.3(a)(4)	§ 10.23(b)(4)(5) § 10.85(a)(7) § 10.85(b)(1)
§ 11.303(b)	MRPR 3.3(b)	§ 10.85(b)
§ 11.303(c)(d)	MRPR 3.3(c)(d)	None
§ 11.303(e)(1)	§ 10.23(c)(9)	§ 10.23(c)(9)
§ 11.303(e)(2)	§ 10.23(c)(10)	§ 10.23(c)(10)
§ 11.303(e)(3)	§ 10.23(c)(11)	§ 10.23(c)(11)
§ 11.303(e)(4)	§ 10.23(c)(15)	§ 10.23(c)(15)
§ 11.303(c)(5)	§ 10.23(c)(2)(ii)	§ 10.23(c)(2)(ii)
Fairness:		
§ 11.304(a)	MRPR 3.4(a)	§ 10.23(b)(4)(5) § 10.89(c)(6)
	MRPR 3.4(b)	§ 10.23(b)(4)(5)(6) § 10.85(a)(6) § 10.92(c)
§ 11.304(c)	MRPR 3.4(c)	§ 10.23(b)(5) § 10.89(a) § 10.89(c)(5)(7)
§ 11.304(d)	MRPR 3.4(d)	§ 10.23(b)(5) § 10.89(a) § 10.89(c)(6)
§ 11.304(e)	MRPR 3.4(e)	§ 10.23(b)(5) § 10.89(c)(1)(2)(3)(4)
Impartiality:		
§ 11.305(a)	MRPR 3.5(a)	§ 10.89 § 10.92 § 10.101(a)
§ 11.305(b)	MRPR 3.5(b)	None
§ 11.305(c)	MRPR 3.5(c)	§ 10.84(a) § 10.89(c)(5)
§ 11.305(d)(1)	§ 10.23(c)(4)	§ 10.23(c)(4)
Trial Publicity:		
§ 11.306 [Reserved]		
Practitioner as Witness:		
§ 11.307(a)	MRPR 3.7(a)	§ 10.62(b)(1)(2) § 10.63
§ 11.307(b)	MRPR 3.7(b)	§ 10.62(b) § 10.63
§ 11.308 [Reserved]		
Advocate on Nonjudicial Proceeding:		
§ 11.309	MRPR 3.9	§ 10.89(b)(2) § 10.111(c)
§§ 11.310–11.400 [Reserved]		
Truthfulness to Others:		
§ 11.401	MRPR 4.1	§ 10.85(a)(3)(4)(5)(7) § 10.85(b)
Communication between practitioner and opposing parties:		
§ 11.402(a)	MRPR 4.2(a)	§ 10.87(a)
§ 11.402(b)–(d)	DCRPR 4.2(b)–(d)	None
Dealing with unrepresented person:		

TABLE 3.—PRINCIPAL SOURCE OF SECTIONS 11.100 THROUGH 11.806—Continued

Section	Source	Part 10 concordance
§ 11.403	MRPR 4.3	§ 10.87(a)
Respect for rights of third persons:		
§ 11.404	MRPR 4.4	§ 10.84(a)(1) § 10.85(a)(1) § 10.89(c)(2)
§§ 11.405–11.500 [Reserved]		
Responsibilities of a partner or supervisory practitioner:		
§ 11.501(a)–(b)	MRPR 5.1(a)–(b)	§ 10.57(d)
§ 11.501(c)	MRPR 5.1(c)	§ 10.23(b)(2)
Responsibilities of a subordinate practitioner:		
§ 11.502	MRPR 5.2	None
Responsibilities regarding nonpractitioner assistants:		
§ 11.503(a)	MRPR 5.3(a)	§ 10.57(d)
§ 11.503(b)	MRPR 5.3(b)	§ 10.23(b)
§ 11.503(c)	MRPR 5.3(c)	None
Professional independence of a practitioner:		
§ 11.504(a)	MRPR 5.4(a)	§ 10.48(a)
§ 11.504(b)	MRPR 5.4(c)	§ 10.68(b)
§ 11.504(d)	MRPR 5.4(d)	§ 10.68(c)
Unauthorized practice of law:		
§ 11.505(a)	MRPR 5.5(a)	§ 10.47(a) § 10.14(d)
§ 11.505(b)	MRPR 5.5(b)	§ 10.47(a)
§ 11.505(c)	§ 10.47(a)	§ 10.47(a)
§ 11.505(d)	§ 10.47(b)	§ 10.47(b) § 10.23(c)(6)
§ 11.505(e)	New	§ 10.14(b)
§ 11.505(f)	§ 10.47(b)	§ 10.47(b)
Restrictions on right to practice:		
§ 11.506(a)–(b)	MRPR 5.6	§ 10.38
Responsibilities regarding law-related services:		
§ 11.507(a)(1)(2)	MRPR 5.7(a)(1)(2)	None
§ 11.507(a)(3)	New	None
§ 11.507(b)	MRPR 5.7(b)	None
§§ 11.508–11.600 [Reserved]		
Pro Bono Publico service:		
§ 11.601	DCRPR 6.1	None
Accepting appointments:		
§ 11.602	MRPR 6.2	None
Membership in legal services organization:		
§ 11.603	MRPR 6.3	None
§ 11.604		§ 10.32(a)
§§ 11.605–11.700 [Reserved]		
Law reform activities:		
§ 11.701(b)(1)–(4)	DCRPR 7.1(b)	§ 10.111(c)
§ 11.701(b)(5)	New	None
§ 11.701(c)	DCRPR 7.1(c)	§ 10.33
§ 11.701(d)–(e)	New	§ 10.31(a)–(b)
Advertising:		
§ 11.702(a)	MRPR 7.2(a)	§ 10.32(a)
§ 11.702(b)	MRPR 7.2(b)	None
§ 11.702(c)	MRPR 7.2(c)	§ 10.32(b)
§ 11.702(d)	MRPR 7.2(d)	None
§ 11.702(e)	New	§ 10.32(c)
Direct contact with prospective clients:		
§ 11.703(a)	MRPR 7.3(a)	§ 10.33
§ 11.703(b)–(d)	MRPR 7.3(b)–(d)	None
Communication of fields of practice and certification:		
§ 11.704	MRPR 7.4	None
§ 11.704(a)–(c)	§ 10.32(c)–(d)	§ 10.31(c)–(d)
	§ 10.34(a)–(b)	§ 10.34(a)–(b)
§ 11.704(d)	New	None
§ 11.704(e)	MRPR 7.4(b)	None
Firm names and letterheads:		
§ 11.705(a)	MRPR 7.5(a)	§ 10.35(a)
§ 11.705(b)	MRPR 7.5(b)	None
§ 11.705(c)	MRPR 7.5(c)	§ 10.31(b)
§ 11.705(d)	MRPR 7.5(d)	§ 10.35(b)
§§ 11.706–11.800 [Reserved]		
Bar admission and disciplinary matters:		
§ 11.801(a)	MRPR 8.1(a)	§ 10.22(a)(b)

TABLE 3.—PRINCIPAL SOURCE OF SECTIONS 11.100 THROUGH 11.806—Continued

Section	Source	Part 10 concordance
§ 11.801(b)	MRPR 8.1(b)	§ 10.23(b)(5) § 10.24(b)
§ 11.801(c)	§ 10.23(c)(16)	§ 10.23(c)(16)
Judicial and legal officials:		
§ 11.802(a)	MRPR 8.2(a)	§ 10.102
§ 11.802(b)	MRPR 8.2(b)	§ 10.103
Reporting professional misconduct:		
§ 11.803(a)	MRPR 8.3(a)	§ 10.24(a)
§ 11.803(b)	MRPR 8.3(b)	§ 10.24(a)
§ 11.803(c)	MRPR 8.3(c)	None
§ 11.803(d)	New	None
§ 11.803(f)(1)	§ 10.23(c)(5)	§ 10.23(c)(5)
§ 11.803(f)(2)	§ 10.23(c)(14)	§ 10.23(c)(14)
§ 11.803(f)(3)	§ 10.23(c)(12)	§ 10.23(c)(12)
§ 11.803(f)(4)	§ 10.23(c)(18)	§ 10.23(c)(18)
Misconduct:		
§ 11.804(a)	MRPR 8.4(a)	§ 10.23(b)(1)(2)
§ 11.804(b)	MRPR 8.4(b)	§ 10.23(c)(1)
§ 11.804(d)	MRPR 8.4(d)	§ 10.23(b)(5)
§ 11.804(e)	MRPR 8.4(e)	§ 10.23(c)(5)
§ 11.804(f)	MRPR 8.4(f)	None
§ 11.804(g)	MRPR 8.4(g)	35 U.S.C. 32 § 10.23(a)
§ 11.804(h)(1)	§ 10.23(c)(2)	§ 10.23(c)(2)
§ 11.804(h)(2)	§ 10.23(c)(17)	§ 10.23(c)(17)
§ 11.804(h)(3)	§ 10.23(c)(17)	§ 10.23(c)(17)
§ 11.804(h)(4)	31 CFR 8.35(c)	None
§ 11.804(h)(5)	New	None
§ 11.804(h)(6)	31 CFR 8.36	None
§ 11.804(h)(7)	18 U.S.C. 205(a) and (b) 18 U.S.C. 209(a)	None
§ 11.804(h)(8)	18 U.S.C. 205	None
§ 11.804(h)(9)	New	None
§ 11.804(h)(10)	§ 10.23(c)(16)	§ 10.23(c)(16)
§ 11.804(i)	§ 10.23(d)	§ 10.23(d)
Disciplinary authority: Choice of law:		
§ 11.805	MRPR 8.5	None
Sexual relations with clients and third persons:		
§ 11.806	NYADSD 200.29–a	None
§§ 11.807–900 [Reserved]		

Abbreviations:
DCRPR means the District of Columbia Court of Appeals Rules of Professional Conduct (1999).
MRPR means the Model Rules of Professional Conduct of the American Bar Association (1999).
NYADSD means the Official Court Rules of the New York Appellate Division, Second Department (2000).
VRPC means Virginia Rules of Professional Conduct (1999).

Classification

Regulatory Flexibility Act

The Deputy General Counsel, United States Patent and Trademark Office certified to the Chief Counsel for Advocacy, Small Business Administration, that the changes in this notice of proposed rule making will not have a significant impact on a substantial number of small entities (Regulatory Flexibility Act, 5 U.S.C. 605(b)). The provisions of the Regulatory Flexibility Act relating to the preparation of an initial flexibility analysis are not applicable to this rulemaking because the rules will not have a significant economic impact on a substantial number of small entities. The primary purpose of the rule is to codify enrollment procedures and bring the USPTO's disciplinary rules for practitioners into line with the American Bar Association Model Rules, which have been adopted by most states. This will ease both the procedures for processing registration applications and practitioners' burden in learning and complying with USPTO regulations.

The rule establishes a new annual registration fee of $100 per year for practitioners. The average salary of a practitioner is over $100,000, and an annual fee of less than one tenth of one percent of that amount will not have a significant economic impact on a substantial number of practitioners. The rule also establishes a fee of $130 for petitions to the Director of the Office of Enrollment and Discipline. As with the annual fee, this fee is insignificant.

Further, the rule requires registered practitioners to complete a computer-based continuing legal education (CLE) program once every one to three years. The program, which will consist primarily of a review of recent changes to patent statutes, regulations and policies, will take one to two hours to complete. This dedication of a small amount of time for CLE every one to three years will not have a significant impact on practitioners. Further, the CLE will substitute for or reinforce practitioners' independent efforts to keep their knowledge of relevant provisions current and avoid time-consuming and costly errors.

The rule imposes a $1600 fee for a petition for reinstatement for a suspended or excluded practitioner and removes the $1500 cap on disciplinary proceeding costs that can be assessed against such a practitioner as a condition of reinstatement.

Approximately 5 of the 28,000 practitioners petition for reinstatement each year, and approximately 2 of these petitions occur under circumstances where disciplinary proceeding costs may be assessed. These changes therefore will not affect a substantial number of practitioners.

Executive Order 13132

This notice of proposed rule making does not contain policies with federalism implications sufficient to warrant preparation of a Federalism Assessment under Executive Order 13132 (August 4, 1999).

Executive Order 12866

This notice of proposed rule making has been determined to be not significant for purposes of Executive Order 12866 (September 30, 1993).

Paperwork Reduction Act

This notice of proposed rule making involves information collection requirements which are subject to review by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). This proposed rule introduces new information requirements and fees into collection 0651–0012. The United States Patent and Trademark Office is currently seeking renewal for information collection 0651–0012. Additional collection of information activities involved in this notice of proposed rule making have been reviewed and previously approved by OMB under OMB control number 0651–0017.

The title, description, and respondent description of the currently approved information collection 0651–0017 and the renewal of 0651–0012 are shown below with an estimate of the annual reporting burdens. Included in this estimate is the time for reviewing instructions, gathering and maintaining the data needed, and completing and reviewing the collection of information. The principal impact of the changes in this notice of proposed rule making is to registered practitioners.

OMB Number: 0651–0012.

Title: Admittance to Practice and Roster of Registered Patent Attorneys and Agents Admitted to Practice Before the Patent and Trademark Office.

Form Numbers: PTO–158, PTO158A, PTO–275, PTO–107A, PTO 1209, PTO 2126.

Affected Public: Individuals or households, business or other for-profit, Federal Government, and state, local or tribal government.

Estimated Number of Respondents: 64,142.

Estimated Time Per Response: The USPTO estimates that it takes the public 30 minutes to complete either an application for registration to practice before the USPTO, or an application for a foreign resident to practice before the USPTO and, depending upon the complexity of the situation, to gather, prepare and submit the application. It is estimated to take 20 minutes to complete undertakings under 37 CFR 10.10(b); 10 minutes to complete data sheets; 5 minutes to complete the oath or affirmation, and the request for a paper copy of the continuing training program and to furnish narrative; 45 minutes to complete the petition for waiver of regulations; and 90 minutes to complete the written request for reconsideration of disapproval notice of application and the petition for reinstatement to practice. It is estimated to take 2 hours and 10 minutes for the annual practitioner registration/continuing training program—ten minutes to fill out the form and an average of 2 hours to complete the continuing training program on-line. It is estimated to take 2 hours and 5 minutes for the paper-based version of the annual practitioner registration/continuing training program—five minutes to request the materials and 2 hours to complete the continuing training program on paper. These times include time to gather the necessary information, prepare and submit the forms and requirements in this collection.

Estimated Total Annual Burden Hours: 58,745.

Needs and Uses: The public uses the forms in this collection to apply for the examination for registration, to ensure that all of the necessary information is provided to the USPTO and to request inclusion on the Register of Patent Attorneys and Agents.

OMB Number: 0651–0017.

Title: Practitioner Records Maintenance and Disclosure Before the Patent and Trademark Office.

Form Numbers: None.

Affected Public: Individuals or households, businesses or other for-profit, not-for-profit institutions, Federal Government, and state, local, or tribal governments.

Estimated Number of Respondents: 330.

Estimated Time Per Response: 9 hours annually for practitioners to maintain client files; two hours to gather, prepare and submit a response to one violation report.

Estimated Total Annual Burden Hours: 2,270.

Needs and Uses: The information in this collection is necessary for the United States Patent and Trademark Office to comply with Federal regulations, 35 U.S.C. 6(a) and 35 U.S.C. 31. The Office of Enrollment and Discipline collects this information to insure compliance with the USPTO Code of Professional Responsibility, 37 CFR 10.20–10.112. This Code requires that registered practitioners maintain complete records of clients, including all funds, securities and other properties of clients coming into his/her possession, and render appropriate accounts to the client regarding such records, as well as report violations of the Code to the USPTO. The registered practitioners are mandated by the Code to maintain proper documentation so that they can fully cooperate with an investigation in the event of a report of an alleged violation and that violations are prosecuted as appropriate.

Comments are invited on: (1) Whether the collection of information is necessary for proper performance of the functions of the agency; (2) the accuracy of the agency's estimate of the burden; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information to respondents.

Interested persons are requested to send comments regarding these information collections, including suggestions for reducing this burden, to Harry I. Moatz, Director of Enrollment and Discipline, United States Patent and Trademark Office, PO Box 1450, Alexandria, Virginia 22313–1450, or to the Office of Information and Regulatory Affairs of OMB, New Executive Office Building, 725 17th Street, NW., Room 10235, Washington, DC 20503, Attention: Desk Officer for the United States Patent and Trademark Office.

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

List of Subjects

37 CFR Part 1

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

37 CFR Part 2

Administrative practice and procedure, Trademarks.

37 CFR Part 10

Administrative practice and procedure, Inventions and patents, Lawyers, Reporting and recordkeeping requirements.

37 CFR Part 11

Administrative practice and procedure, Inventions and patents, Lawyers, Reporting and recordkeeping requirements.

For the reasons set forth in the preamble, the United States Patent and Trademark Office proposes to amend 37 CFR Parts 1, 2, 10, and 11 as follows:

PART 1—RULES OF PRACTICE IN PATENT CASES

1. The authority citation for 37 CFR Part 1 continues to read as follows:

Authority: 35 U.S.C. 2(b)(2), unless otherwise noted.

2. Section 1.1 is amended by revising paragraph (a) introductory text and by adding paragraph (a)(4) to read as follows:

§ 1.1 Addresses for correspondence with the United States Patent and Trademark Office.

(a) *In general.* Except for paragraphs (a)(3)(i), (a)(3)(ii), and (d)(1) of this section, all correspondence intended for the United States Patent and Trademark Office must be addressed to either ''Director of the United States Patent and Trademark Office, P.O. Box 1450, Alexandria, Virginia 22313–1450'' or to specific areas within the Office as set out in paragraphs (a)(1), (a)(2), and (a)(3)(iii) of this section. When appropriate, correspondence should also be marked for the attention of a particular office or individual.

* * * * *

(4) *Office of Enrollment and Discipline correspondence.* All correspondence concerning enrollment, registration, and investigations should be addressed to the Mail Stop OED, Director of the United States Patent and Trademark Office, P.O. Box 1450, Alexandria, Virginia 22313–1450.

* * * * *

3. Section 1.4 is amended by revising paragraph (d)(2) to read as follows:

§ 1.4 Nature of correspondence and signature requirements.

* * * * *

(d) * * *

(2) The presentation to the Office (whether by signing, filing, submitting, or later advocating) of any paper by a party, whether a practitioner or non-practitioner, constitutes a certification under § 11.18(b) of this subchapter. Violations of § 11.18(b)(2) of this subchapter by a party, whether a practitioner or non-practitioner, may result in the imposition of sanctions under § 11.18(c) of this subchapter. Any practitioner violating § 11.18(b) of this subchapter may also be subject to disciplinary action. *See* §§ 11.18(d) and 11.804(i)(15) of this subchapter.

* * * * *

4. Section 1.8 is amended by revising paragraph (a)(2)(iii)(A) to read as follows:

§ 1.8 Certificate of mailing or transmission.

(a) * * *

(2) * * *

(iii) * * *

(A) Correspondence filed in connection with a disciplinary proceeding under part 11 of this chapter.

* * * * *

5. Section 1.21 is amended by revising paragraph (a) to read as follows:

§ 1.21 Miscellaneous fees and charges.

* * * * *

(a) Registration of attorneys and agents:

(1) For admission to examination for registration to practice:	
(i) Application Fee (non-refundable)	$40.00
(ii) Registration examination fee	
(A) For test administration by private sector entity	200.00
(B) For test administration by the USPTO	450.00
(2) On registration to practice or grant of limited recognition under §§ 11.9(b) or (c)	100.00
(3) [Reserved]	
(4) For certificate of good standing as an attorney or agent	10.00
Suitable for framing	20.00
(5) For review of decision:	
(i) by the Director of Enrollment and Discipline under § 11.2(c)	130.00
(ii) of the Director of Enrollment and Discipline under § 11.2(d)	130.00
(6) For requesting regrading of an examination under § 10.7(c):	
(i) Regrading of seven or fewer questions	230.00
(ii) Regrading of eight or more questions	460.00
(7) Annual fee for registered attorney or agent:	
(i) Active Status	100.00
(ii) Voluntary Inactive Status	25.00
(iii) Fee for requesting restoration to active status from voluntary inactive status	50.00
(iv) Balance due upon restoration to active status from voluntary inactive status	75.00
(8) Annual fee for individual granted limited recognition	100.00
(9)(i) Delinquency fee	50.00
(ii) Reinstatement fee	100.00
(10) On application by a person for recognition or registration after disbarment, suspension, or resignation pending disciplinary proceedings in any other jurisdiction; on petition for reinstatement by a person excluded, suspended, or excluded on consent from practice before the Office; on application by a person for recognition or registration who is asserting rehabilitation from prior conduct that resulted in an adverse decision in the Office regarding the person's moral character; and on application by a person for recognition or registration after being convicted of a felony or crime involving moral turpitude or breach of fiduciary duty	1,600.00
(11) Paper version of continuing training program and furnished narrative	75.00
(12) Application by Sponsor for Pre-approval of a Continuing Education Program	60.00

* * * * *

6. Section 1.31 is revised to read as follows:

§ 1.31 Applicants may be represented by a registered attorney or agent.

An applicant for patent may file and prosecute his or her own case, or he or she may be represented by a registered attorney, registered agent, or other individual authorized to practice before the United States Patent and Trademark

Office in patent matters. *See* §§ 11.6 and 11.9 of this subchapter. The United States Patent and Trademark Office cannot aid in the selection of a registered attorney or agent.

7. In § 1.33, paragraph (c) is revised to read as follows:

§ 1.33 Correspondence respecting patent applications, reexamination proceedings, and other proceedings.

* * * * *

(c) All notices, official letters, and other communications for the patent owner or owners in a reexamination proceeding will be directed to the attorney or agent of record (*See* § 1.34(b)) in the patent file at the address listed on the register of patent attorneys and agents maintained pursuant to §§ 11.5 and 11.11 of this subchapter or, if no attorney or agent is of record, to the patent owner or owners at the address or addresses of record.

* * * * *

8. Section 1.455 is amended by revising the first sentence of paragraph (a) to read as follows:

§ 1.455 Representation in international applications.

(a) Applicants of international applications may be represented by attorneys or agents registered to practice before the Patent and Trademark Office or by an applicant appointed as a common representative (PCT Art. 49, Rules 4.8 and 90 and § 11.10). * * *

* * * * *

PART 2—RULES OF PRACTICE IN TRADEMARK CASES

9. The authority citation for 37 CFR Part 2 continues to read as follows:

Authority: 15 U.S.C. 1123, 35 U.S.C. 2(b)(2), unless otherwise noted.

10. Section 2.11 is revised to read as follows:

§ 2.11 Applicants may be represented by an attorney.

The owner of a trademark may file and prosecute his or her own application for registration of such trademark, or he or she may be represented by an attorney or other individual authorized to practice in trademark matters under § 11.14 of this subchapter. The United States Patent and Trademark Office cannot aid in the selection of an attorney or other representative.

11. Section 2.17 is amended by revising paragraphs (a) and (c) to read as follows:

§ 2.17 Recognition for representation.

(a) When an attorney as defined in § 11.1(c) of this subchapter acting in a representative capacity appears in person or signs a paper in practice before the United States Patent and Trademark Office in a trademark case, his or her personal appearance or signature shall constitute a representation to the United States Patent and Trademark Office that, under the provisions of § 11.14 of this subchapter and the law, he or she is authorized to represent the particular party in whose behalf he or she acts. Further proof of authority to act in a representative capacity may be required.

* * * * *

(c) To be recognized as a representative, an attorney as defined in § 11.1(c) of this subchapter may file a power of attorney, appear in person, or sign a paper on behalf of an applicant or registrant that is filed with the Office in a trademark case.

* * * * *

12. Section 2.24 is revised to read as follows:

§ 2.24 Designation of representative by foreign applicant.

If an applicant is not domiciled in the United States, the applicant must designate by a written document filed in the United States Patent and Trademark Office the name and address of some person resident in the United States on whom may be served notices or process in proceedings affecting the mark. If this document does not accompany or form part of the application, it will be required and registration refused unless it is supplied. Official communications of the United States Patent and Trademark Office will be addressed to the domestic representative unless the application is being prosecuted by an attorney at law or other qualified person duly authorized, in which event Official communications will be sent to the attorney at law or other qualified person duly authorized. The mere designation of a domestic representative does not authorize the person designated to prosecute the application unless qualified under paragraph (a), (b) or (c) of § 11.14 of this subchapter and authorized under § 2.17(b).

13. Section 2.33 is amended by revising paragraph (a)(3) to read as follows:

§ 2.33 Verified statement.

(a) * * *

(3) An attorney as defined in § 11.1(c) of this subchapter who has an actual or implied written or verbal power of attorney from the applicant.

* * * * *

14. Section 2.161 is amended by revising paragraph (b)(3) to read as follows:

§ 2.161 Requirements for a complete affidavit or declaration of continued use or excusable nonuse.

(b) * * *

(3) An attorney as defined in § 11.1(c) of this subchapter who has an actual or implied written or verbal power of attorney from the owner.

* * * * *

PART 10—[REMOVED]

15. Part 10 is removed.

16. Part 11 is added as follows:

PART 11—REPRESENTATION OF OTHERS BEFORE THE UNITED STATES PATENT AND TRADEMARK OFFICE

Subpart A—General Provisions

General Information

Sec.

11.1 Definitions.

11.2 Director of the Office of Enrollment and Discipline.

11.3 Suspension of rules, immunity.

Subpart B—Recognition To Practice Before the USPTO

Patents, Trademarks, and Other Non-Patent Law

11.4 Committee on Enrollment.

11.5 Register of attorneys and agents in patent matters; practice before the Office.

11.6 Registration of attorneys and agents.

11.7 Requirements for registration.

11.8 Oath and registration fee.

11.9 Limited recognition in patent matters.

11.10 Restrictions on practice in patent matters.

11.11 Removing names from the register.

11.12 Mandatory continuing training for licensed practitioners.

11.13 Eligible mandatory continuing education programs.

11.14 Individuals who may practice before the Office in trademark and other non-patent matters.

11.15 Refusal to recognize a practitioner.

11.16 Financial books and records.

11.17 [Reserved]

11.18 Signature and certificate for correspondence filed in the United States Trademark Office.

Subpart C—Investigations and Disciplinary Proceedings

Jurisdiction, Sanctions, Investigations, and Proceedings

11.19 Disciplinary jurisdiction.

11.20 Disciplinary sanctions.

11.21 Warnings.

11.22 Investigations.

11.23 Committee on Discipline.

11.24 Interim suspension and discipline based upon reciprocal discipline.

11.25 Interim suspension and discipline based upon conviction of committing a serious crime or other crime coupled with confinement or commitment to imprisonment.

11.26 Diversion.

11.27 Exclusion by consent.
11.28 Incompetent and incapacitated practitioners.
11.29–11.31 [Reserved]
11.32 Initiating a disciplinary proceeding; reference to a hearing officer.
11.34 Complaint.
11.35 Service of complaint.
11.36 Answer to complaint.
11.37 Supplemental complaint.
11.38 Contested case.
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11.40 Representative for OED Director or respondent.
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Authority: 5 U.S.C. 500, 15 U.S.C. 1123, 35 U.S.C. 2(b)(2)(D), 32.

Subpart A—General Provisions

General Information

§ 11.1 Definitions.

This part governs solely the practice of patent, trademark, and other law before the United States Patent and Trademark Office. Nothing in this part shall be construed to preempt the authority of each State to regulate the practice of law, except to the extent necessary for the United States Patent and Trademark Office to accomplish its Federal objectives. Unless otherwise clear from the context, the following definitions apply to this part:

Addiction means any chemical or psychological dependency upon intoxicants or drugs.

Affidavit means affidavit, declaration under 35 U.S.C. 25 (*see* §§ 1.68 and 2.20 of this subchapter), or statutory declaration under 28 U.S.C. 1746.

Appearing means an individual's attendance to a matter before the Office, and includes physical presence before the Office in a formal or informal setting, or conveyance of a communication, either electronically or in any other manner, with intent to influence an Office employee in any patent, trademark or other non-patent law matter.

Application means an application for a design, plant, or utility patent; a provisional application; a request for reexamination; an application to reissue any patent; a protest; an application to register a trademark; an appeal to the Board of Patent Appeals and Interferences or to the Trademark Trial and Appeal Board; an opposition, cancellation, or concurrent use in a trademark matter; and all written communications submitted to the Office in connection with the foregoing.

Attorney or lawyer means an individual who is a member in good standing of the highest court of any State, including an individual who is in good standing of the highest court of one State and under an order of any court or Federal agency suspending, enjoining, restraining, disbarring or otherwise restricting the attorney from practice before the bar of another State or Federal agency. A *non-lawyer* means a person who is not an attorney or lawyer.

Belief or *believes* means that the person involved actually supposed the fact in question to be true. A person's belief may be inferred from circumstances.

Consent means a client's uncoerced assent to a proposed course of action after consulting with the practitioner about the matter in question.

Consult or *consultation* means communication of information *reasonably* sufficient to permit the client to appreciate the significance of the matter in question.

Conviction or *convicted* means any confession to a crime; a verdict or judgment finding a person guilty of a crime; any entered plea, including *nolo contendre* or Alford plea, to a crime; or receipt of deferred adjudication (whether judgment or sentence has been entered or not) for an accused or pled crime.

Crime means any offense declared to be a felony by Federal or State law, or an attempt, solicitation or conspiracy to commit the same.

Data Sheet means a form used to collect name, address, and telephone information from individuals recognized to practice before the Office in patent matters.

Differing interests means every interest that may adversely affect either the judgment or the loyalty of a practitioner to a client, whether it be a conflicting, inconsistent, diverse, or other interest.

Disability means any mental or physical infirmity or illness.

Disability matter means any issue, question, proceeding or determination within the scope of this section.

Disciplinary Court means any court of record and any other agency or tribunal with authority to disbar, exclude, or suspend an attorney from the practice of law in said agency or tribunal.

Diversion means turning aside or altering a practitioner's practices or procedures through rehabilitation to achieve conformity with the USPTO Rules of Professional Conduct.

Employee of a tribunal means an employee of a court, the Office, or another adjudicatory body.

Exclusion means barred and not admitted to practice before the Office in patent, trademark and other non-patent law.

Firm or *law firm* means each and every practitioner in a private firm, each and every practitioner employed in the legal department of a corporation or other organization, and each and every practitioner employed in a legal services organization.

Fiscal year means the period of time from October 1st through the ensuing September 30th.

Fraud or *fraudulent* means conduct having a purpose to deceive and not merely negligent misrepresentation or failure to apprise another of relevant information.

Full disclosure means a clear explanation of the differing interests involved in a transaction, the advantages of seeking independent legal advice, and a detailed explanation of the risks and disadvantages to the client entailed in any agreement or arrangement, including not only any financial losses that will or may foreseeably occur to the client, but also any liabilities that will or may foreseeably accure to the client.

Giving information within the meaning of § 11.804(h)(1) means making a written statement or representation or an oral statement or representation.

Hearing officer means an attorney who is an officer or employee of the Office designated by the USPTO Director to conduct a hearing required by 35 U.S.C. 32 or a person appointed under 5 U.S.C. 3105.

Incapacitated means the state of suffering from a disability or addiction of such nature as to cause a practitioner to be unfit to be entrusted with professional matters, or to aid in the administration of justice as a practitioner.

Invention promoter means any person, or corporation and any of its agents, employees, officers, partners, or independent contractors thereof, who is neither a registered practitioner nor law firm, who (1) advertises in media of general circulation offering assistance to market and patent an invention, or (2) enters into a contract or other agreement with a customer to assist the customer in marketing and patenting an invention.

Knowingly, known, or *knows* means actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances.

Law clerk means a person, typically a recent law school graduate, who acts, typically for a limited period, as a confidential assistant to a judge or judges of a court; to a hearing officer or a similar administrative hearing officer; or to the head of a governmental agency or to a member of a governmental commission, either of which has authority to adjudicate or to promulgate rules or regulations of general application.

Legal profession means those individuals who are lawfully engaged in practice of patent, trademark, and other law before the Office.

Legal service means any service that may lawfully be performed by a practitioner for any person having immediate, prospective, or pending business before the Office.

Matter means any litigation, administrative proceeding, lobbying activity, application, claim, investigation, controversy, arrest, charge, accusation, contract, a negotiation, estate or family relations practice issue, request for a ruling or other determination, or any other matter covered by the conflict of interest rules of the appropriate Government entity, except as expressly limited in a particular rule.

Mentally incompetent or *involuntarily committed to a mental hospital* means a judicial determination in a final order that declares a practitioner to be mentally incompetent or that commits a practitioner involuntarily to a mental hospital or similar institution as an inpatient.

OED Director means the Director of the Office of Enrollment and Discipline.

Office means the United States Patent and Trademark Office.

Partner means a member of a law partnership or a shareholder in a *law firm* organized as a professional corporation.

Person means an individual, a corporation, an association, a trust, a partnership, and any other organization or legal entity.

Practitioner means (1) an attorney or agent registered to practice before the Office in patent matters, (2) an individual authorized under 5 U.S.C. 500(b) or otherwise as provided by §§ 11.14(b), (c), and (e), to practice before the Office in trademark matters or other non-patent matters, or (3) an individual authorized to practice before the Office in a patent case or matters under §§ 11.9(a) or (b). A ''suspended or excluded practitioner'' means a practitioner who is suspended or excluded under § 11.47. A ''non-practitioner'' means an individual who is not a practitioner.

Proceeding before the Office means an application for patent, an application to register a trademark, an appeal, a petition, a reexamination, a protest, a public use matter, a patent interference, an inter partes trademark matter, correction of a patent, correction of inventorship, and any other matter that is pending before the Office.

Professional disciplinary action means public reprimand, suspension, disbarment, resignation from the bar of any State or Federal court while under investigation, and any other event resulting in the loss of a license to practice law on ethical grounds.

Professional legal corporation means a corporation authorized by state law to practice law for profit.

Reasonable or *reasonably* when used in relation to conduct by a practitioner means the conduct of a reasonably prudent and competent practitioner.

Reasonably should know when used in reference to a practitioner means that a practitioner of reasonable prudence

and competence would ascertain the matter in question.

Registration means registration to practice before the Office in patent proceedings.

Roster means a list of individuals who have been registered as either a patent attorney or patent agent.

Serious crime means (1) any criminal offense classified as a felony under the laws of the United States, or of any state, district, or territory of the United States, or of a foreign country where the crime occurred, and (2) any crime a necessary element of which, as determined by the statutory or common law definition of such crime in the jurisdiction where the crime occurred, that includes interference with the administration of justice, false swearing, misrepresentation, fraud, willful failure to file income tax returns, deceit, bribery, extortion, misappropriation, theft, or an attempt or a conspiracy or solicitation of another to commit a ''serious crime.''

Significant evidence of rehabilitation means clear and convincing evidence that is significantly more probable than not that there will be no reoccurrence in the foreseeable future of the practitioner's prior disability or addiction.

State means any of the 50 states of the United States of America, the District of Columbia, and other territories and possessions of the United States of America.

Substantial when used in reference to degree or extent means a material matter of clear and weighty importance.

Suspend or *suspension* means a temporary debarring from practice before the Office.

Tribunal means a court, the Office, a regulatory agency, commission, hearing officer, and any other body authorized by law to render decisions of a judicial or quasi-judicial nature, based on information presented before it, regardless of the degree of formality or informality of the proceedings.

United States means the United States of America, and the territories and possessions the United States of America.

USPTO Director means the Director of the United States Patent and Trademark Office, or an employee of the Office delegated authority to act for the Director of the United States Patent and Trademark Office in matters arising under this Part.

§ 11.2 Director of the Office of Enrollment and Discipline.

(a) *Appointment.* The USPTO Director shall appoint a Director of the Office of Enrollment and Discipline (OED Director). In the event of the absence of the OED Director or a vacancy in the office of the OED Director, the USPTO Director may designate an employee of the Office to serve as acting OED Director. The OED Director and any acting OED Director shall be an active member in good standing of the bar of a State.

(b) *Duties.* The OED Director shall:

(1) Supervise such staff as may be necessary for the performance of the OED Director's duties.

(2) Receive and act upon applications for registration, prepare and grade the examination provided for in § 10.7(b), maintain the register provided for in § 10.5, and perform such other duties in connection with enrollment and recognition of attorneys and agents as may be necessary.

(3) Conduct investigations into the moral character and reputation of any individual seeking to be registered as an attorney and agent, or of any individual seeking limited recognition, deny registration or recognition of individuals failing to demonstrate present possession of good moral character, and perform such other duties in connection with investigations and enrollment proceedings as may be necessary.

(4) Conduct investigations of all matters involving possible violations by practitioners and persons granted limited recognition of an imperative Rule of Professional Conduct coming to the attention of the OED Director as information or a complaint, whether from within or from outside the USPTO, where the apparent facts, if true, may warrant discipline. Conduct investigations of all matters involving possible violations of §§ 11.303(a)(1), 11.304, 11.305(a), or 11.804 by other individuals identified in § 11.19(a)(2) coming to the attention of the OED Director as information or a complaint, whether from within or from outside the USPTO, where the apparent facts, if true, may warrant discipline. Except in matters meriting summary dismissal because the complaint is clearly unfounded on its face or falls outside the disciplinary jurisdiction of the USPTO, no disposition shall be recommended or undertaken by the OED Director until the accused practitioner shall have been afforded an opportunity to respond to the information or complaint received by the OED Director.

(5) With the consent of three members of the Committee on Discipline, initiate disciplinary proceedings under § 11.32, and perform such other duties in connection with investigations and disciplinary proceedings as may be necessary.

(6) Without the prior approval of a member of the Committee on Discipline, dismiss a complaint or close an investigation without issuing a warning; and otherwise conclude an investigation as provided for in §§ 11.22(e) or (m)

(7) File with the USPTO Director certificates of convictions of practitioners or other individual practicing before the Office who have been convicted of crimes, and certified copies of disciplinary orders concerning attorneys issued in other jurisdictions.

(c) *Petition to OED Director.* Any petition from any action or requirement of the staff of OED reporting to the OED Director shall be taken to the OED Director. Any such petition not filed within 30 days from the action complained of may be dismissed as untimely. The filing of a petition will not stay the period for taking other action, including the timely filing of an application for registration, which may be running, or act as a stay of other proceedings. Any request for reconsideration waives a right to appeal by petition to the USPTO Director under paragraph (d) of this section, and if not filed within 30 days after the final decision of the OED Director may be dismissed as untimely.

(d) *Review of OED Director's decision.* An individual dissatisfied with a final decision of the OED Director, except for a decision dismissing a complaint pursuant to § 11.22(f) or closing an investigation under § 11.22(m)(1), may seek review of the decision upon petition to the USPTO Director accompanied by payment of the fee set forth in § 1.21(a)(5). A decision dismissing a complaint or closing an investigation is not subject to review by petition. Any such petition to the USPTO Director waives a right to seek reconsideration. Any petition not filed within 30 days after the final decision of the OED Director may be dismissed as untimely. Any petition shall be limited to the facts of record. Briefs or memoranda, if any, in support of the petition shall accompany or be embodied therein. The petition will be decided on the basis of the record made before the OED Director. The USPTO Director in deciding the petition will consider no new evidence. Copies of documents already of record before the OED Director shall not be submitted with the petition. No oral hearing on the petition will be held except when considered necessary by the USPTO Director. Any request for reconsideration of the decision of the USPTO Director may be dismissed as untimely if not filed within 30 days after the date of said decision.

(e) *Reconsideration of matters decided by a former OED Director or USPTO Director.* Matters which have been decided by one OED Director or USPTO Director will not be reconsidered by his or her successor except if a request for reconsideration of the decision is filed within the 30-day period permitted to request reconsideration of said decision provided for in paragraphs (c) and (d) of this section.

§ 11.3 Suspension of rules, qualified immunity.

(a) Except as provided in paragraph (b) of this section, in an extraordinary situation, when justice requires, any requirement of the regulations of this Part which is not a requirement of statute may be suspended or waived by the USPTO Director or the designee of the USPTO Director, *sua sponte* or on petition of any party, including the OED Director or the OED Director's representative, subject to such other requirements as may be imposed.

(b) No petition to waive any provision of §§ 11.19, 11.24, 11.100 through 11.901, or to waive the provision in this paragraph shall be granted for any reason.

(c) No petition under this section shall stay a disciplinary proceeding unless ordered by the USPTO Director or a hearing officer.

(d) Complaints submitted to the OED Director or any other official of the Office shall be qualifiedly privileged for the purpose that no claim or action in tort predicated thereon may be instituted or maintained. The OED Director, and all staff, assistants and employees of the Office of General Counsel, Solicitor's Office, the Office of Enrollment and Discipline, and the members of the Committee on Discipline, the Committee on Enrollment, the employees of the Office providing regrades of examinations, and employees of the Office developing questions for the registration examination shall be immune from disciplinary complaint under this Part for any conduct in the course of their official duties.

Subpart B—Recognition To Practice Before the USPTO

Patents, Trademarks, and Other Non-Patent Law

§ 11.4 Committee on Enrollment.

(a) The USPTO Director shall establish a Committee on Enrollment composed of one or more employees of the Office.

(b) The Committee on Enrollment shall, as necessary:

(1) Advise the OED Director in connection with the OED Director's duties under § 11.2(b)(1), and

(2) In circumstances provided for in § 11.7(j)(2), determine the moral character and reputation of an individual whom the OED Director does not accept as having good moral character and reputation.

§ 11.5 Register of attorneys and agents in patent matters; practice before the Office.

(a) *Register of attorneys and agents.* A register of attorneys and agents is kept in the Office on which are entered the names of all individuals recognized as entitled to represent applicants having prospective or immediate business before the Office in the preparation and prosecution of patent applications. Registration in the Office under the provisions of this Part shall entitle the individuals so registered to practice before the Office only in patent matters.

(b) *Practice before the Office.* Practice before the Office includes law-related service that comprehends all matters connected with the presentation to the Office or any of its officers or employees relating to a client's rights, privileges, duties, or responsibilities under the laws or regulations administered by the Office for the grant of a patent, registration of a trademark, or conduct of other non-patent law. Such presentations include preparing necessary documents, corresponding and communicating with the Office, and representing a client through documents or at interviews, hearings, and meetings, as well as communicating with and advising a client concerning matters pending or contemplated to be presented before the Office. Practice before the Office:

(1) In patent matters includes, but is not limited to, preparing and prosecuting any patent application, considering and advising a client as to the patentability of an invention under statutory criteria; considering the advisability of relying upon alternative forms of protection that may be available under State law; participating in drafting the specification or claims of a patent application; participation in drafting an amendment or reply to a communication from the Office that may require written argument to establish the patentability of a claimed invention; participating in drafting a reply to a communication from the Office regarding a patent application, and participating in the drafting of a communication for a public use, interference, or reexamination proceeding;

(2) In trademark matters includes, but is not limited to, preparing and prosecuting an application for trademark registration; preparing an amendment which may require written argument to establish the registrability of the mark; conducting an opposition, cancellation, or concurrent use proceeding; or an appeal to the Trademark Trial and Appeal Board; and

(3) In private as well as other professional matters includes conduct reflecting adversely on a person's fitness to practice law, such as, but not limited to, the good character and integrity essential for a practitioner in patent, trademark, or other non-patent law matters.

§ 11.6 Registration of attorneys and agents.

(a) *Attorneys.* Any citizen of the United States who is an attorney and who fulfills the requirements of this Part may be registered as a patent attorney to practice before the Office. When appropriate, any alien who is an attorney, who lawfully resides in the United States, and who fulfills the requirements of this Part may be registered as a patent attorney to practice before the Office, provided that such registration is not inconsistent with the terms upon which the alien was admitted to, and resides in, the United States and further provided that the alien may remain registered only:

(1) If the alien continues to lawfully reside in the United States and registration does not become inconsistent with the terms upon which the alien continues to lawfully reside in the United States, or

(2) If the alien ceases to reside in the United States, the alien is qualified to be registered under paragraph (c) of this section. *See also* § 11.9(b).

(b) *Agents.* Any citizen of the United States who is not an attorney and who fulfills the requirements of this Part may be registered as a patent agent to practice before the Office. When appropriate, any alien who is not an attorney, who lawfully resides in the United States, and who fulfills the requirements of this Part may be registered as a patent agent to practice before the Office, provided that such registration is not inconsistent with the terms upon which the alien was admitted to, and resides in, the United States, and further provided that the alien may remain registered only:

(1) If the alien continues to lawfully reside in the United States and registration does not become inconsistent with the terms upon which the alien continues to lawfully reside in the United States or

(2) If the alien ceases to reside in the United States, the alien is qualified to be

registered under paragraph (c) of this section. *See also* § 11.9(b).

(c) *Foreigners.* Any foreigner not a resident of the United States who shall file proof to the satisfaction of the OED Director that he or she is registered and in good standing before the patent office of the country in which he or she resides and practices, and who is possessed of the qualifications stated in § 11.7, may be registered as a patent agent to practice before the Office for the limited purpose of presenting and prosecuting patent applications of applicants located in such country, provided that the patent office of such country allows substantially reciprocal privileges to those admitted to practice before the Office. Registration as a patent agent under this paragraph shall continue only during the period that the conditions specified in this paragraph obtain. Upon notice by the patent office of such country that a patent agent registered under this section is no longer registered or no longer in good standing before the patent office of such country, and absent a showing of cause why his or her name should not be removed from the register, the OED Director shall promptly remove the name of the patent agent from the register and publish the fact of removal. Upon ceasing to reside in such country, the patent agent registered under this section is no longer qualified to be registered under this section, and the OED Director shall promptly remove the name of the patent agent from the register and publish the fact of removal.

(d) *Interference matters.* The Chief Administrative Patent Judge or Deputy Chief Administrative Patent Judge of the Board of Patent Appeals and Interferences shall determine whether and the circumstances under which an attorney who is not registered may take testimony for an interference under 35 U.S.C. 24, or under § 1.672 of this subchapter.

§ 11.7 Requirements for registration.

(a) No individual will be registered to practice before the Office unless he or she has:

(1) Applied to the USPTO Director in writing on a form supplied by the OED Director and furnished all requested information and material; and

(2) Established to the satisfaction of the OED Director that he or she is:

(i) Presently possessed of good moral character and reputation;

(ii) Possessed of the legal, scientific, and technical qualifications necessary to enable him or her to render applicants valuable service; and

(iii) Otherwise competent to advise and assist applicants for patents in the presentation and prosecution of their applications before the Office; and

(b)(1) In order that the OED Director may determine whether an individual seeking to have his or her name placed on the register has the qualifications specified in paragraph (a)(2) of this section, the individual shall:

(i) File a complete application for admission to each administration of the registration examination. A complete registration application includes:

(A) A form supplied by the OED Director wherein all requested information and supporting documents are furnished,

(B) Payment of the fees required by § 1.21(a)(1) of this subchapter,

(C) Satisfactory proof of sufficient basic training in scientific and technical matters, and

(D) For aliens, proof that recognition is not inconsistent with the terms of their visa or entry into the United States.

(2) An individual failing to file a complete application will not be admitted to the examination. Applications that are incomplete as originally submitted will be considered as filed only when they have been completed and received by OED within 60 days of notice of incompleteness. Thereafter, a new and complete application must be filed. Until an individual has been registered, that individual is under a continuing obligation to keep his or her application current and must update responses whenever there is an addition to or a change to information previously furnished the OED Director;

(3) Submit to the OED Director satisfactory proof of the individual's scientific and technical training;

(4) Pass the registration examination, unless the taking and passing of the examination is waived as provided in paragraph (d) of this section. Unless waived pursuant to paragraph (d) of this section, each individual seeking registration must take and pass the registration examination that is held from time-to-time to enable the OED Director to determine whether the individual possesses the legal and competence qualifications specified in paragraphs (a)(2)(ii) and (a)(2)(iii) of this section. The examination will not be administered as a mere academic exercise. An individual failing the examination may reapply no sooner than 30 days after the date of notice of failure is sent to the individual and may again take the examination no sooner than 60 days after the date of said notice. An individual reapplying shall:

(A) File the application form supplied by the OED Director wherein all requested information and supporting documents are furnished,

(B) Pay the fees required by § 1.21(a)(1) of this subchapter, and

(C) For aliens, proof that recognition continues to be not inconsistent with the terms of their visa or entry into the United States;

(5) If an individual first reapplies more than one year after said notice, that individual must again comply with paragraphs (b)(1)(i) and (b)(3) of this section; and

(6) Provide satisfactory proof of present possession of good moral character and reputation.

(c) *Petition to the OED Director.* An individual dissatisfied with any action by a member of the staff of OED refusing to register an individual, refusing to recognize an individual, refusing to admit an individual to the registration examination, refusing to reinstate an administratively suspended practitioner, refusing to refund or defer any fee, or any other action may seek review of the action upon petition to the OED Director and payment of the fee set forth in § 1.21(a)(5) of this subchapter. Any petition, even if accompanied by the required fee, but not filed within thirty days after the date of the action complained of may be dismissed as untimely. Any request for reconsideration of a decision by the OED Director on a petition not filed within thirty days after the decision may be dismissed as untimely.

(d)(1) *Former patent examiners who by [INSERT DATE 60 DAYS FOLLOWING PUBLICATION OF FINAL RULE] had not actively served four years in the patent examining corps, and were serving in the corps at the time of their separation.* The OED Director would waive the taking of a registration examination in the case of any individual meeting the requirements of paragraph (b)(3) of this section who is a former patent examiner who by *[INSERT DATE 60 DAYS FOLLOWING PUBLICATION OF FINAL RULE]* had not served four years in the patent examining corps, if the individual demonstrates that he or she:

(i) Actively served in the patent examining corps of the Office;

(ii) Received a certificate of legal competency and negotiation authority;

(iii) After receiving the certificate of legal competency and negotiation authority, was rated at least fully successful in each quality performance element of his or her performance plan for the last two complete fiscal years as a patent examiner; and

(iv) Was not under an oral or written warning regarding the quality performance elements at the time of

separation from the patent examining corps.

(v) The OED Director may waive the taking of the examination for registration in the case of said individual who does not meet all the criteria of paragraphs (d)(1)(i), (d)(1)(ii), (d)(1)(iii) and (d)(1)(iv) of this section upon a showing of good cause.

(2) *Former patent examiners who [INSERT DATE 60 DAYS FOLLOWING PUBLICATION OF FINAL RULE] had actively served four years in the patent examining corps, and were serving in the corps at the time of their separation.* The OED Director would waive the taking of a registration examination in the case of any individual meeting the requirements of paragraph (b)(3) of this section who is a former patent examiner who by *[INSERT DATE 60 DAYS FOLLOWING PUBLICATION OF FINAL RULE]* had served four years in the patent examining corps, if the individual demonstrates that he or she:

(i) Actively served for at least four years in the patent examining corps of the Office by *[INSERT DATE 60 DAYS FOLLOWING PUBLICATION OF FINAL RULE];*

(ii) Was rated at least fully successful in each quality performance element of his or her performance plan for the last two complete fiscal years as a patent examiner in the Office; and

(iii) Was not under an oral or written warning regarding the quality performance elements at the time of separation from the patent examining corps.

(vi) The OED Director may waive the taking of the examination for registration in the case of said individual who does not meet all the criteria of paragraphs (d)(2)(i), (d)(2)(ii), and (d)(2)(iii) of this section upon a showing of good cause.

(3) *Certain former Office employees who were not serving in the patent examining corps upon their separation from the Office.* The OED Director would waive the taking of a registration examination in the case of a former Office employee meeting the requirements of paragraph (b)(3) of this section who by petition demonstrates possession of the necessary legal qualifications to render to patent applicants and others valuable service and assistance in the preparation and prosecution of their applications or other business before the Office by showing that:

(i) He or she has exhibited comprehensive knowledge of patent law equivalent to that shown by passing the registration examination as a result of having been in a position of responsibility in the Office in which he or she:

(A) Provided substantial guidance on patent examination policy, including the development of rule or procedure changes, patent examination guidelines, changes to the Manual of Patent Examining Procedure, or development of training or testing materials for the patent examining corps; or

(B) Represented the Office in patent cases before Federal courts; and

(ii) Was rated at least fully successful in each quality performance element of his or her performance plan for said position for the last two complete rating periods in the Office, and was not under an oral warning regarding performance elements relating to such activities at the time of separation from the Office.

(4) To be eligible for consideration for waiver, an individual within the scope of one of paragraphs (d)(1) through (d)(3) of this section must file a complete application and the fee required by § 1.21(a)(1)(i) of this subchapter within two years of the individual's separation from the Office. All other individuals, including former examiners, filing an application or fee more than two years after separation from the Office, are required to take and pass the examination to demonstrate competence to represent applicants before the Office. If the examination is not waived, the individual or former examiner must pay the examination fee required by § 1.21(a)(1)(ii) of this subchapter within 30 days after notice. Individuals employed by the Office but not meeting the requirements of any one of paragraphs (d)(1) through (d)(3) of this section must file a complete application, pay the fees required by § 1.21(a)(1) of this subchapter, and take and pass the registration examination to be registered.

(e) *Examination results.* Notification to an individual of passing or failing an examination is final. Within two months from the date an individual is notified that he or she failed an examination specified in paragraph (b) of this section, an unsuccessful individual is entitled to inspect, but not copy, the questions and answers he or she incorrectly answered under supervision and without taking notes. Substantive review of the answers or questions may not be pursued. An unsuccessful individual has the right to retake the examination an unlimited number of times upon payment of the fees required by §§ 1.21(a)(1)(i) and (ii) of this subchapter, and a fee charged by a private sector entity administering the examination.

(f) *Application for reciprocal recognition.* An individual seeking reciprocal recognition under § 11.6(c), in addition to satisfying the provisions of paragraphs (a) and (b) of this section, and the provisions of § 11.8(c), shall pay the application fee required by § 1.21(a)(1)(i) upon filing an application.

(g) *Investigation of moral character.* (1) Every individual seeking recognition shall answer all questions; disclose all relevant facts, dates and information; and provide verified copies of documents relevant to their good moral character and reputation. The facts, information and documents include expunged or sealed records necessary for determining whether the individual presently possesses the good moral character and reputation required for registration.

(2) The OED Director shall cause names and business addresses of all individuals seeking registration or recognition who pass the examination or for whom the examination has been waived to be published on the Internet and in the Official Gazette to solicit relevant information bearing on their moral character and reputation.

(3) If the OED Director receives information from any source tending to reflect adversely on the moral character or reputation of an individual seeking registration or recognition, the OED Director shall conduct an investigation into the moral character and reputation of the individual. The investigation will be conducted after the individual has passed the registration examination, or after the registration examination has been waived for the individual, whichever is later. If the individual seeking registration or recognition is an attorney, the individual is not entitled to a disciplinary proceeding under §§ 11.32–11.57 in lieu of moral character proceedings under paragraphs (j) through (m) of this section. An individual failing to timely answer questions or respond to an inquiry by the OED Director shall be deemed to have withdrawn his or her application, and shall be required to reapply, pass the examination, and otherwise satisfy all the requirements of this section. No individual shall be certified for registration or recognition by the OED Director until the individual demonstrates present possession of good moral character and reputation. The OED Director shall refer to the Committee on Enrollment the application and all records of individuals not certified for registration or recognition following investigation whose applications have not been withdrawn.

(h) *Moral character and good reputation.* Moral character is the possession of honesty and truthfulness,

trustworthiness and reliability, and a professional commitment to the legal process and the administration of justice. Lack of moral character exists when evidence shows acts and conduct which would cause a reasonable person to have substantial doubts about an individual's honesty, fairness, and respect for the rights of others and the laws of states and nation. Evidence showing lack of moral character may include, but is not limited to, conviction of a violent felony, a crime involving moral turpitude, and a crime involving breach of fiduciary duty; drug and alcohol abuse and dependency problems; lack of candor; suspension or disbarment on ethical grounds from a State bar; and resignation from a State bar while under investigation. An individual for registration who has been convicted of a crime involving moral turpitude or which would clearly necessitate suspension or disbarment must have served his or her sentence, and must have been released from parole supervision or probation for the offense before an application for will be considered.

(1) *Conviction of felony or misdemeanor.* An individual who has been convicted in a court of record of a felony, or a crime involving moral turpitude or breach of trust, including, but not limited to, a misdemeanor involving interference with the administration of justice, false swearing, misrepresentation, fraud, deceit, bribery, extortion, misappropriation, or theft, or any misdemeanor involving an attempt, conspiracy or solicitation of another to commit any misdemeanor, is presumed not to be of good moral character in the absence of a pardon or a compelling showing of reform and rehabilitation. Any individual convicted in a court of record of a felony, or a crime involving moral turpitude or breach of trust shall file with an application for registration the fees required by §§ 1.21(a)(1)(ii) and (10) of this subchapter. The OED Director shall determine whether individuals convicted for said felony, or crime involving moral turpitude or breach of trust have produced compelling proof of reform and rehabilitation, including at a minimum a lengthy period of exemplary conduct.

(i) An individual who has been convicted in a court of record of a felony or any misdemeanor identified in paragraph (h)(1) of this section shall not be eligible for registration or to apply for registration during the time of any sentence (including confinement or commitment to imprisonment), deferred adjudication, and period of probation or parole as a result of the conviction and for a period of two years after the date of successful completion of said sentence, deferred adjudication, and probation or parole.

(ii) The following provisions apply to the determination of present good moral character of an individual convicted of said felony or misdemeanor:

(A) The court record or docket entry of conviction is conclusive evidence of guilt;

(B) An individual convicted of a felony or misdemeanor identified in paragraph (h)(l) of this section is conclusively deemed not to have present good moral character and shall not be eligible to apply for or be registered for a period of two years after completion of the sentence, deferred adjudication, and period of probation or parole, whichever is later; and

(C) The individual, upon applying for registration, shall prove by clear and convincing evidence that he or she is of present good moral character.

(iii) Upon proof that a conviction has been set aside or reversed, the individual shall be eligible to file an application and, upon passing the registration examination, have the OED Director determine, in accordance with paragraph (h)(1) of this section, whether, absent the conviction, the individual possesses present good moral character and reputation.

(2) *Moral character involving drug or alcohol abuse or dependency.* An individual's record is reviewed as a whole to see if there is a drug or alcohol abuse or dependency issue. An individual appearing to abuse drugs or alcohol, or being dependent on a drug or alcohol may be asked to undergo an evaluation, at the individual's expense, by a qualified professional selected by the OED Director. In instances where there is evidence of a present dependency or an individual has not established a record of recovery, the OED Director, in lieu of registration, may offer the individual the opportunity to place his or her application in abeyance for a specified period of time while agreed to conditions regarding treatment and recovery are initiated and confirmed.

(3) *Moral character involving lack of candor.* An individual's lack of candor in disclosing facts bearing on or relevant to issues concerning moral character when completing the application or any time thereafter may be found to be cause to deny registration on moral character grounds.

(4) *Moral character involving suspension, disbarment, or resignation from a State bar.* An individual who has been disbarred by a disciplinary court from practice of law or has resigned in lieu of a disciplinary proceeding (excluded or disbarred on consent) shall not be eligible to apply for registration for a period of five years from the date of disbarment or resignation. An individual who has been suspended by a disciplinary court on ethical grounds from the practice of law shall not be eligible to apply for registration until expiration of the period of suspension. An individual who was not only disbarred, suspended or resigned, but also convicted in a court of record of a felony, or a crime involving moral turpitude or breach of trust, shall be ineligible to apply for registration until the conditions both in paragraph (h)(1) of this section and this paragraph (h)(4) are fully satisfied. The OED Director may waive the two-year ineligibility period provided for in paragraph (h)(1)(A) of this section following conviction of a felony or crime only if the individual demonstrates that he or she has been reinstated to practice law in the State where he or she had been disbarred or suspended, or had resigned. An individual who has been disbarred or suspended, or who resigned in lieu of a disciplinary proceeding shall file with an application for registration the fees required by §§ 1.21(a)(1)(ii) and (10) of this subchapter; a full and complete copy of the proceedings in the disciplinary court that led to the disbarment, suspension, or resignation; and written proof that he or she has filed an application for reinstatement in the disciplining jurisdiction and obtained a final determination on that application. The following provisions shall govern the determination of present good moral character of an individual who has been licensed to practice law in any jurisdiction and has been disbarred or suspended on ethical grounds, or allowed to resign in lieu of discipline, in that jurisdiction.

(i) A copy of the record resulting in disbarment, suspension or resignation is *prima facie* evidence of the matters contained in said record, and the imposition of disbarment or suspension, or the acceptance of the resignation of the individual in question shall be deemed conclusive that the individual has committed professional misconduct.

(ii) An individual who has been disbarred or suspended, or who resigned in lieu of disciplinary action is ineligible for registration and is deemed not to have present good moral character during the period of such discipline imposed by the disciplinary court.

(iii) The individual who has been disbarred or suspended, or who resigned in lieu of disciplinary action,

shall submit proof that he or she has filed an application for reinstatement in the disciplining jurisdiction and obtained a final determination on that application.

(iv) The only defenses available to the individual in question are set out below, and must be proven by the individual by clear and convincing evidence:

(A) The procedure in the disciplinary court was so lacking in notice or opportunity to be heard as to constitute a deprivation of due process;

(B) There was such infirmity of proof establishing the misconduct as to give rise to the clear conviction that the Office could not, consistently with its duty, accept as final the conclusion on that subject; or

(C) The finding of lack of present good moral character by the Office would result in grave injustice.

(v) The individual, upon applying for registration, shall prove by clear and convincing evidence that he or she is of present good moral character.

(i) *Factors that may be taken into consideration when evaluating rehabilitation of an applicant seeking a moral character determination.* When considering whether an applicant has the good moral character required for registration, the OED Director evaluates whether an applicant possesses the qualities of honesty, fairness, candor, trustworthiness, observance of fiduciary responsibility, respect for and obedience to the laws of the States and the nation, and respect for the rights of others and for the judicial process. Involvement in activity that constitutes an act of misconduct or an act of moral turpitude does not necessarily preclude an applicant from registration; however, an applicant who has committed such acts must demonstrate rehabilitation prior to registration. An act of misconduct may include, but is not limited to, behavior that results in a criminal conviction, a sustained accusation of fraud, or a sustained allegation of unauthorized practice of law, violation of a school's honor code that involves moral turpitude or results in expulsion, professional discipline, license revocation or disbarment, as well as material omissions from a moral character application, or misstatements in the registration application and misrepresentations during the application process.

(1) Individuals convicted of violent felonies, felonies involving moral turpitude and crimes involving a breach of fiduciary duty are presumed not to be of good moral character in the absence of a pardon or a showing of complete reform and rehabilitation. The OED Director shall exercise discretion to determine whether applicants convicted of violent felonies, felonies involving moral turpitude, and crimes involving a breach of fiduciary duty have produced overwhelming proof of reform and rehabilitation, including at a minimum, a lengthy period of not only unblemished, but exemplary conduct.

(2) The factors enumerated below are guidelines that may be taken into consideration when evaluating whether an applicant has demonstrated rehabilitation. Not all factors listed below will be applicable to every single case nor will each factor necessarily be given equal weight in evaluating the rehabilitation of an applicant. The factors, taken as a whole although not exclusive, assist the OED Director in determining whether an applicant has demonstrated rehabilitation from an act of misconduct or moral turpitude. The factors include:

(i) The nature of the act of misconduct, including whether it involved moral turpitude, whether there were aggravating or mitigating circumstances, and whether the activity was an isolated event or part of a pattern;

(ii) The age and education of the applicant at the time of the act of misconduct and the age and education of the applicant at the present time;

(iii) The length of time that has passed between the act of misconduct and the present, absent any involvement in any further acts of moral turpitude, the amount of time and the extent of rehabilitation being dependent upon the nature and seriousness of the act of misconduct under consideration;

(iv) Restitution by the applicant to any person who has suffered monetary losses through acts or omissions of the applicant;

(v) Expungement of a conviction;

(vi) Successful completion or early discharge from probation or parole;

(vii) Abstinence from the use of controlled substances or alcohol for not less than two years if the specific act of misconduct was attributable in part to the use of a controlled substance or alcohol, where abstinence may be demonstrated by, but is not necessarily limited to, enrolling in and complying with a self-help or professional treatment program;

(viii) Evidence of remission for not less than two years if the specific act of misconduct was attributable in part to a medically recognized mental disease, disorder or illness, where evidence of remission may include, but is not limited to, seeking professional assistance and complying with the treatment program prescribed by the professional and submission of letters from the psychiatrist/psychologist verifying that the medically recognized mental disease, disorder or illness is in remission;

(ix) Payment of the fine imposed in connection with any criminal conviction;

(x) Correction of behavior responsible in some degree for the act of misconduct;

(xi) Completion of, or sustained enrollment in, formal education or vocational training courses for economic self-improvement and thereby eliminating economics as a cause for unethical conduct;

(xii) Significant and conscientious involvement in community, church or privately sponsored programs designed to provide social benefits or to ameliorate social problems; and

(xiii) Change in attitude from that which existed at the time of the act of misconduct in question as evidenced by any or all of the following:

(A) Statements of the applicant;

(B) Statements from family members, friends or other persons familiar with the applicant's previous conduct and with subsequent attitudes and behavioral patterns;

(C) Statements from probation or parole officers or law enforcement officials as to the applicant's social adjustments; and

(D) Statements from persons competent to testify with regard to neuropsychiatry or emotional disturbances.

(j) *Hearing.* If, following investigation of moral character, the OED Director believes any evidence suggests lack of good moral character and reputation, the OED Director shall give the individual notice to show cause fairly apprising the individual of the OED Director's reasons for failing to be convinced of the individual's good character and reputation, and an opportunity to be heard before a final decision is issued. The notice shall also give the individual the choice of withdrawing the application. The individual shall be given no less than 10 days to reply. The notice shall be given by certified mail at the address appearing on the application if the address is in the United States, and by any other reasonable means if the address is outside the United States.

(1) *Evidence supplied or confirmed by individual.* When the evidence suggesting lack of good moral character and reputation is information supplied or confirmed by the individual, or the evidence is of an undisputed documentary character disclosed to the individual, the OED Director, with the concurrence of a majority of the

Committee on Enrollment, shall enter a decision based solely upon said information or documentary evidence. In determining an individual's moral character and reputation, the OED Director and Committee may act without requiring the individual to appear before it to be sworn and interrogated. If the OED Director and a majority of the Committee are of the opinion that an adverse decision should be made, the procedure set forth in paragraphs (j)(3) through (j)(5) of this section shall be followed.

(2) *Evidence supplied by person or source whose reliability or veracity is questioned.* When the evidence suggesting lack of good moral character and reputation depends on information supplied by a particular person whose reliability or veracity is brought into question by the individual, the individual shall be informed in the notice to show cause of the opportunity to confront and cross-examine the person in an oral hearing. If the individual does not request an oral hearing within the time fixed by the notice, the OED Director, with the concurrence of a majority of the Committee on Enrollment, shall enter a recommendation. If, within the fixed time, the individual requests an oral hearing, the Committee on Enrollment shall conduct the hearing under the following rules of procedure:

(i) The Committee shall give the individual no less than 10 days notice of:

(A) The date, time and place of an oral hearing;

(B) The individual's right to be represented by counsel;

(C) The individual's right at an oral hearing to examine and cross-examine witnesses;

(D) The individual's right at an oral hearing to adduce evidence bearing on the individual's moral character and fitness to practice before the Office. Testimony at an oral hearing shall be under oath and a complete stenographic record of the hearing shall be kept; and

(E) The OED Director and Committee may act without the individual agreeing to be sworn and interrogated.

(ii) A hearing shall be conducted in a formal manner according to the rights listed in paragraph (j)(2)(A) of this section; however, the Committee shall not be bound by formal rules of evidence. It may, in its discretion, take evidence in other than testimonial form and determine whether evidence to be taken in testimonial form shall be taken in person at the hearing or by deposition. The proceedings shall be recorded and the individual may order a transcript at the individual's expense. If the OED Director and a majority of the Committee are of the opinion that an adverse decision should be made, the procedure set forth in paragraphs (j)(3) through (j)(5) of this section shall be followed.

(3) The recommendation shall include the findings and conclusions of the OED Director and Committee, and shall be served on the individual, or his or her attorney, a copy of the decision containing their findings and conclusions. The recommendation shall permit the individual, within 15 days of the date of the recommendation, to withdraw the application, or to appeal the recommendation. If the individual elects to withdraw the application, written notice thereof shall be given to the OED Director within the time fixed, and no further action will be necessary to close the matter.

(4) If the individual elects to appeal the recommendation, written notice thereof shall be given to the OED Director within the time fixed, and an appeal brief shall be filed within 30 days of the date of the recommendation. The individual's appeal brief shall show cause why registration should not be denied. The OED Director and Committee shall deliver to the USPTO Director their recommendation, together with the record in either paragraphs (j)(1) or (j)(2) of this section.

(5) The USPTO Director on the basis of the record shall determine whether the individual should be denied registration for lack of good moral character and reputation. The USPTO Director shall issue a decision on the basis of the record made in accordance with paragraphs (j)(1) or (j)(2) of this section. The USPTO Director will consider no new evidence. The individual shall not submit copies of documents already of record before the OED Director and Committee with any appeal to the USPTO Director.

(k) *Reapplication for admission.* An individual who has been refused registration for lack of present good moral character in a USPTO Director's decision, or in the absence of a USPTO Director's decision, in a recommendation of the OED Director and Committee on Enrollment, the individual may reapply for registration five years after the date of the decision, unless a shorter period is otherwise ordered by the USPTO Director. An individual under investigation for moral character may elect to withdraw his or her application, and may reapply for registration five years after the date of withdrawal. Upon reapplication, the individual shall pay the fees required by §§ 1.21(a)(1)(ii) and (10) of this subchapter, and have the burden of showing by clear and convincing evidence the individual's fitness to practice as prescribed in paragraph (b) of this section. Upon reapplication, the individual also shall complete successfully the examination prescribed in paragraph (b) of this section, even though the individual has previously passed a registration examination.

§ 11.8 Oath, registration fee, and annual fee.

(a) A passing grade on the registration examination may be a basis for registration for a period of no more than two years from the date notice thereof is sent to the individual. After an individual passes the examination, or the examination is waived for an individual, the OED Director shall promptly publish a solicitation for information concerning the individual's moral character and reputation. The solicitation shall include the individual's name, and business or communication postal address.

(b) An individual shall not be registered as an attorney under § 11.6(a), registered as an agent under §§ 11.6(b) or (c), or granted limited recognition under § 11.9(b) unless the individual files the following in OED within 2 years of the issuance of a notice of passing registration examination; a completed Data Sheet; a completed form to obtain the Office's authorization to use a digital signature; an oath or declaration prescribed by the USPTO Director; the registration fee set forth in § 1.21(a)(2) of this subchapter; and a certificate of good standing of the bar of the highest court of a State provided the certificate is no more than six months old.

(c) An individual, including a former patent examiner, is responsible for updating all information and answers submitted in or with his or her application based upon anything occurring between the date the application is signed by the individual, and the date he or she is registered or recognized to practice before the Office in patent matters. The update shall be filed within thirty days after the date of the occasion that necessitates the update.

(d) *Annual fee.* A registered patent attorney or agent shall annually pay to the USPTO Director a fee in the amount required by § 1.21(a)(7) of this subchapter. The payment period for registered patent attorneys and agents shall be based on the first initial of each individual's last name. The payment period for last names beginning with A–E shall be every January 1 through March 31; the payment period for last names beginning with F–K shall be

every April 1 through June 30; the payment period for last names beginning with L through R shall be every July 1 through September 30; and the payment period for last names beginning with S through Z shall be every October 1 through December 31. Payment shall be for the following twelve months. Payment shall be due by the last day of the payment period. Persons newly registered to practice before the Office shall be permanently assigned to the appropriate payment period based on the first initial of their last name on the date of recognition. Persons newly registered shall not be liable for dues during the calendar year they are first registered. Failure to comply with the provisions of this paragraph (d) shall require the OED Director to subject a registered patent attorney or agent to a delinquency fee penalty set forth in § 11.11(b)(1), and further financial penalties and administrative suspension as set forth in § 11.11(b)(2).

§ 11.9 Limited recognition in patent matters.

(a) Any individual not registered under § 11.6 may, upon a showing of circumstances which render it necessary or justifiable, and that the individual is of good moral character and reputation, be given limited recognition by the OED Director to prosecute as attorney or agent a specified application or specified applications, but limited recognition under this paragraph shall not extend further than the application or applications specified. Limited recognition shall not be granted to individuals who have passed the examination or for whom the examination has been waived, and who are awaiting registration to practice before the Office in patent matters.

(b) When registration under paragraphs (a) or (b) of § 11.6(a) of an alien residing in the United States is not consistent with the terms on which the alien entered and remains in the United States, the resident alien may be given limited recognition under paragraph (a) of this section if:

(1) The Immigration and Naturalization Service or the Department of State has authorized the resident alien to be employed in the capacity of representing a patent applicant by preparing and prosecuting the applicant's patent application; and

(2) The resident alien fulfills the provisions of §§ 11.7(a), (b), and either § 11.7(c) or § 11.7(d). Limited recognition shall be granted in maximum increments of one year, fashioned to be consistent with the terms of authorized employment, and require the resident alien to be employed by or associated with a registered practitioner. Limited recognition shall not be granted or extended to an alien residing abroad. If granted, limited recognition shall automatically expire when the resident alien leaves the United States. Any person admitted to the United States to be trained in patent law shall not be admitted to the registration examination or granted recognition until completion of that training.

(c) An individual not registered under § 11.6 may, if appointed by applicant to do so, prosecute an international application only before the United States International Searching Authority and the United States International Preliminary Examining Authority, provided that the individual has the right to practice before the national office with which the international application is filed as provided in PCT Art. 49, Rule 90 and § 1.455, or before the International Bureau when the USPTO is acting as Receiving Office pursuant to PCT Rules 83.1 bis and 90.1.

(d) *Limited recognition fee and annual dues.* An individual, within 30 days after being notified of being granted limited recognition under paragraph (b) or (c) of this section, shall pay to the USPTO Director a fee set forth in § 1.21(a)(2) of this subchapter. The individual also shall pay annually a fee in the amount required by § 1.21(a)(8) of this subchapter upon extension, renewal, or new grant of limited recognition, provided that the individual granted limited recognition for the first time during a fiscal year shall not be liable for the annual fee during that calendar year. Failure to comply with the provisions of this paragraph (d) shall subject the individual to loss of recognition.

§ 11.10 Restrictions on practice in patent matters.

(a) Only practitioners who are registered under § 11.6 or individuals given limited recognition under § 11.9 are permitted to prosecute patent applications of others before the Office; or represent others in a reexamination proceeding, correction of a patent, correction of inventorship, protest, or other proceeding before the Office.

(b) *Undertaking for registration by former Office employee.* No individual not previously registered will be registered as an attorney or agent while employed by the Office. No individual who has served in the patent examining corps or elsewhere in the Office may practice before the Office after termination of his or her service, unless he or she signs the following written undertaking:

(1) To not knowingly act as agent or attorney for, or otherwise represent, or aid in any manner the representation of, any other person in any formal or informal appearance before the Office, or with the intent to influence, make or assist in any manner the making of any oral or written communication on behalf of any other person:

(i) To the United States,

(ii) In connection with any particular patent or patent application involving a specific party, or

(iii) In which said employee participated personally and substantially as an employee of the Office; and

(2) To not knowingly act within two years after terminating employment by the United States as agent or attorney for, otherwise represent or assist in any manner the representation of any other person in any formal or informal appearance before the Office, or with the intent to influence, make or aid in any manner the making of any oral or written communication on behalf of any other person:

(i) To the United States,

(ii) In connection with any particular patent or patent application matter involving a specific party, or

(iii) If such matter was actually pending under the employee's responsibility as an officer or employee within a period of one year prior to the termination of such responsibility.

(3) The words and phrases in paragraphs (b)(1) and (b)(2) of this section are construed as follows:

(i) *Represent* and *representation* means acting as patent attorney or patent agent or other representative in any appearance before the Office, or communicating with an employee of the Office with intent to influence.

(A) Patent attorneys and patent agents. This provision is directed to the former employee who participates in a particular matter, *e.g.,* patent application while employed by the Office and later either enters a ''revolving door'' by representing the applicant on the same matter, or ''switches sides'' by representing another person on the same matter. Note: The examples in this section do not incorporate the special statutory restrictions on ''Senior Employees.''

Example 1: An attorney in the Solicitor's Office personally works on an appeal in the United States Court of Appeals for the Federal Circuit with respect to a patent application owned by Company X. After leaving the Office, she is registered as a patent attorney, and asked by Company X to represent it in that case. She may not do so.

(B) *Assist in any manner* means aid or help another person on a particular matter involving representation. This provision is directed to the person who, as an employee, participates in a particular matter, *e.g.,* patent application, while employed by the Office and after separation from the Office, behind the scenes, either enters a ''revolving door'' by assisting the applicant on the same matter, or ''switches sides'' by assisting another person on the same matter.

Example 1: A primary patent examiner allows a patent application owned by Company X. After leaving the Office, he is registered as a patent agent, and is asked by Company X to assist its attorneys in filing and prosecuting a reissue patent application. He may neither participate in the drafting of claims to be included in the reissue application, nor advise Company X on tactics and procedure, including the form and content of the oath needed for the reissue application, nor participate in drafting amendments to be filed in the application, even if another registered practitioner signs the documents filed in the Office.

Example 2: A patent examiner, shortly before resigning from the Office, signs an Office action rejecting claims in an inventor's patent application. The inventor replies, and a new examiner sends the inventor another Office action containing a final rejection of claims in the application. After resigning, the former examiner becomes registered as a patent agent. The inventor asks the former examiner—now registered patent agent for advice in replying to the Office action and to ghostwrite a reply for the inventor to sign and file as the inventor's own reply to the Office action. The former examiner may not do so.

(C) A former Office employee is not prohibited from providing in-house assistance that does not involve representation, but is prohibited from providing in-house assistance involving representation of another person.

Example 1: An Office employee examined a patent application of Company X, and allowed the application, which matured into a patent. Upon separation from the Office, he is hired by Company X, and becomes registered as a patent attorney. He works on licensing the technology covered by the claims in the patent, but has no direct contact with the Office. At the request of a company vice president, he prepares a paper describing the persons at the Office who should be contacted regarding reexamination of the patent, and what they consider persuasive for a favorable reexamination ruling. He may do so.

Example 2: A patent examiner examined a patent application of Company Z, and allowed an original application, which matured into a patent. Upon separation from the Office, he is hired by Company Z, and becomes registered as a patent attorney. Company Z filed a continuation-in-part application based on the original application. Another registered practitioner is prosecuting the CIP application. A company vice president requests the former patent examiner to assist the other practitioner by preparing an amendment for the CIP application to overcome outstanding rejections or objections. The amendment is to be signed by the other registered practitioner, and the former examiner is to have no direct contact with the Office. This would be a communication with intent to influence. The former patent examiner may not do so.

(D) *Appearance* means that an individual is physically present before the Office in either a formal or informal setting, or the individual conveys material to the Office in connection with a formal proceeding or application; the appearance must occur in regard to a communication that is intended to influence. A communication is broader than an appearance and includes, for example, correspondence, or telephone calls.

Example 1: An appearance occurs when a former patent examiner, now a registered patent agent, meets with a current patent examiner or group director in either the Office or a restaurant to discuss a patent application; or when the former examiner submits a communication, *e.g.,* an amendment, appeal brief, or petition, bearing his or her name.

Example 2: A former patent examiner, now a registered patent agent, makes a telephone call to a present patent examiner to discuss an Office action in an application to reissue a patent which the former patent examiner examined; or ghostwrites an amendment to be signed and filed by an inventor. The former examiner has made a communication.

(E) Elements of ''influence'' and potential controversy are required. Communications that do not include an ''intent to influence'' are not prohibited. Moreover, a routine request not involving a potential controversy is not prohibited. For example, the following are not prohibited: inquiring into the status of a pending application being prosecuted by the practitioner's law firm; a request for publicly available documents; or a communication by a former examiner, not in regard to an adversarial proceeding, imparting purely factual information.

Example 1: A member of the Board of Patent Appeals and Interferences personally works on an interference between a patent application of Company X and a patent application of Company Y. After leaving the Office, he is registered as a patent attorney, and asked by Company X and Company Y to act as arbitrator between the parties regarding the same interfering applications. The arbitration award is filed with the Office, and necessarily has the intent to influence that it meets all requirements to be dispositive and acceptable to the Office. The former member of the Board, through the award, in effect, represents both parties. He may not do so.

(F) Project responses not included. In a context not involving a potential controversy involving the United States, no finding of ''intent to influence'' shall be based on whatever influential effect inheres in an attempt to formulate a meritorious proposal or program.

Example 1: The employee of Company X in the previous example is asked some ten years after being hired by the company to improve upon the claimed subject matter in the patent, which he does, and a patent application for the improvement is filed. This is not prohibited despite the fact that his improvement may be inherently influential on a question of patentability. However, he may not argue for its patentability.

(ii) ''Particular patent or patent application involving a specific party or parties.'' (A) Particular patent or patent application. Like the prohibitions of sections (a) and (b) of 18 U.S.C. 207, the prohibitions of this section would be based on the former employee's, *e.g.,* patent examiner's or assistant solicitor's, prior participation in or responsibility for a ''judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest, or other particular matter involving a specific party or parties'' in which the United States is a party or has a direct and substantial interest. Such matters typically involve a specific proceeding affecting the legal rights of the parties or an isolatable transaction or related set of transactions between identifiable parties.

All patent issues, including the filing and prosecution of a patent application, are applications, claims, or other matters in which the United States is a directly or indirectly interested. For a patent examiner, a particular matter includes any patent application of a specific party, including a provisional, substitute, international, continuation, divisional, continuation-in-part, or reissue patent application, as well as any protest, reexamination, petition, appeal, or interference based on the patent application of a specific party. A ''specific party'' includes the applicant, owner, or assignee of the application.

Example 1: A patent examiner reviews and allows a particular patent application for an invention. After leaving the Office, and becoming registered as a patent agent, the former patent examiner may not represent the owner of the patent before the Office in an application for reissue of the patent, in a reexamination of the patent, in an interference involving the patent, in a divisional or continuation-in-part application, and the like.

Example 2: A patent examiner participates by recommending an interference between an application she examined and an application that she did not examine. After leaving the Office and becoming a registered patent attorney, she may not represent the owner of

the application that she did not examine in the interference since her participation was by way of recommendation in a particular matter affecting a specific party or parties.

(B) Relationship of personal participation to specificity. In certain cases, whether a patent or patent application should be treated as a ''particular patent or patent application matter involving specific parties'' depends on the employee's own participation in events. Participation may result in particularity and specificity to the patent or patent application.

Example 1: A patent examiner without any signatory authority drafts the first Office action in an application filed by Company X. After drafting the Office action containing rejections of several claims over prior art, and a rejection of other claims under 35 U.S.C. 112, she submits it to her supervisor for review. The supervisor reviews the draft and suggests changes. On her last day of employment at the Office, the examiner does not have an opportunity to make the changes. The application and drafted action are later assigned to another examiner, who is taking over her art. After she separates from the Office, the other examiner prepares the Office action, including the rejections she had urged, and signs the Office action. Thereafter, the Office action is duly mailed. The former patent examiner is then registered as a patent agent, and is asked by Company X to represent it before the Office on the same patent application. She may not do so.

(C) The particular patent or patent application includes related patents and applications. The requirement of a ''particular patent or patent application involving a specific party'' applies both at the time that the Office employee acts in an official capacity and at the time in question after service in the Office. The same particular patent or application may continue in another form or in part. In determining whether two particular patents or applications are related, the Department of Commerce considers the extent to which the matters involve the same basic facts, related issues, the same or related parties, time elapsed, the same confidential information, and the continuing existence of an important Federal interest.

Example 1: A patent examiner was substantially involved in the granting of a patent to Z Company for the development of alternative energy sources. Six years after he terminates Office employment, the patent is still in effect, but much of the technology has changed as have many of the personnel. An employee of the Q Company has invented an improvement on the original patent. The former patent examiner, now a registered patent attorney, may represent Q Company in its patent application for the improvement, since Q Company's patent application is a different matter from the patent granted to Z Company. The former employee should first consult the Office and request a written determination before undertaking any representation in the matter.

Example 2: A patent examiner reviewed the claims in an initial patent application, and allowed the claims in the application. The prosecution in a divisional application of claims directed to subject matter disclosed but not originally sought to be claimed in the initial application must be regarded as part of the same particular matter as the initial application. The reason is that the validity of the patent may be put in issue, and many of the facts, *e.g.,* benefit of priority to antedate any intervening prior art, giving rise to the patent would be involved.

Example 3: An attorney in the Solicitor's Office personally works on an appeal in the Court of Appeals for the Federal Circuit of a patent application owned by Company X. A patent is later granted on the application. After leaving the Office, he is registered as a patent attorney, and asked by Company X to represent it in an infringement suit against an alleged infringer. He may not do so.

Example 4: A member of the Board of Patent Appeals and Interferences personally works on an appeal of a patent application of Company X. After leaving the Office, he is registered as a patent attorney, and asked by Company X to represent it in an interference proceeding before the Office between the patent granted on the application, and an application of another party. He may not do so. Other examples: *See* paragraph (b)(3)(i)(A) of this section, Example 1, and paragraph (b)(3)(ii)(A) of this section, Examples 1 and 2.

(D) United States must be a party or have an interest. The particular patent or patent application must be one in which the United States is a party, such as in a judicial or administrative proceeding or a contract, or in which it has a direct and substantial interest. The importance of the Federal interest in a matter can play a role in determining whether two matters are the same particular matter. All patent issues, including the filing and prosecution of a patent application, are matters in which the United States is directly or indirectly interested. The United States is not only interested in the grant of a patent. Its interest continues. The United States may bring suit to cancel patents obtained by fraud.

Example 1: A patent examiner participated in examining a patent application filed by the Z Company. After leaving the Office and becoming a registered patent attorney, she may not represent Z Company in a request for reexamination of the patent granted on the application, or assist other attorneys in drafting the request. The interest of the United States in preventing both inconsistent results and the appearance of impropriety in the same factual matter involving the same party, Z Company, is direct and substantial.

(iii) ''Participate personally and substantially.'' (A) Basic requirements. The restrictions of section 207(a) apply only to those patents and applications in which a former patent examiner had ''personal and substantial participation,'' exercised ''through decision, approval, disapproval, recommendation, the rendering of advice, investigation or otherwise.'' To participate *personally* means directly, and includes the participation of a subordinate when actually directed by the former Office employee in the matter. *Substantially* means that the examiner's involvement must be of significance to the matter, or form a basis for a reasonable appearance of such significance. It requires more than official responsibility, knowledge, perfunctory involvement, or involvement on an administrative or peripheral issue. A finding of substantiality should be based not only on the effort devoted to a matter, but also on the importance of the effort. While a series of peripheral involvements may be insubstantial, the single act of approving or participation in a critical step may be substantial. It is essential that the participation be related to a ''particular patent or patent application involving a specific party.'' (*See* paragraph (b)(3)(ii)(A) of this section.)

Example 1: A primary examiner is not in charge of patent applications assigned to another examiner having partial signatory authority. The primary examiner is asked by the supervisory patent examiner to be the acting supervisory patent examiner while the latter is on vacation. The primary examiner reviews and approves the second action final rejection in an Office action in a patent application (belonging to the Z Company) of the other examiner having partial signatory authority. Later, the other examiner, with the approval of the supervisory patent examiner, allows the application, and a patent is granted to the Z Company on the application. After retiring and being registered as a patent agent, the former primary examiner is asked by the Z Company to represent the patent owner in filing a reissue application to correct an error in the patent. The primary examiner, having personally and substantially participated by decision, or approval in the particular matter, may not do so.

Example 2: A primary examiner is not in charge of, nor has official responsibility for the patent applications of new patent examiners she is training. However, she is frequently consulted as to searches, interpreting the scope of the claims, and drafting Office actions for the applications. Such an individual, as well as the new patent examiners, has personally and substantially participated in the matters.

Example 3: A supervisory primary examiner signs a restriction requirement in an Office action prepared by a patent examiner having no signatory authority. The supervisory primary examiner and the patent examiner having no signatory authority have

each personally and substantially participated in the matter.

Example 4: A primary patent examiner, having concluded that all the claims in a first application are allowable, conducts an interference search and finds interfering subject matter being claimed in a second application. The examiner has personally and substantially participated in the first and second applications, whether the second application is assigned to and being examined by the same examiner or another patent examiner.

(B) Participation on ancillary matters. An Office employee's participation on subjects not directly involving the substantive merits of a matter may not be ''substantial,'' even if it is time-consuming. An employee whose responsibility is the review of a matter solely for compliance with administrative control or budgetary considerations and who reviews a particular matter for such a purpose should not be regarded as having participated substantially in the matter, except when such considerations also are the subject of the employee's proposed representation. (*See* paragraph (b)(3)(i)(C) of this section). Such an employee could theoretically cause a halt in a program for noncompliance with standards under his or her jurisdiction, but lacks authority to initiate a program or to disapprove it on the basis of its substance.

Example 1: A primary examiner is asked to review the Office actions of another examiner having partial signatory authority for compliance with procedures to ascertain if the other examiner qualifies for full signatory authority. Such participation is not ''substantial.''

(C) Role of official responsibility in determining substantial participation. *Official responsibility* is defined in paragraph (b)(3)(v) of this section. ''Personal and substantial participation'' is different from ''official responsibility.'' One's responsibility may, however, play a role in determining the ''substantiality'' of an Office employee's participation. For example, ordinarily a patent examiner's forbearance on a matter is not substantial participation. If, however, a primary patent examiner is charged with responsibility for review of a patent application assigned to him, and action cannot be undertaken over his objection, the result may be different. If the primary patent examiner reviews Office actions of a new examiner whose Office actions, after several months, are deemed reliable, and passes them on, his participation may be regarded as ''substantial'' even if he claims merely to have engaged in inaction.

(iv) Official responsibility in complex cases. In certain complex factual cases, the Office is likely to be in the best position to make a determination as to certain issues, for example, the identity or existence of a particular matter. Designated ethics officials at the Department of Commerce, in consultation with the Office when deemed beneficial, should provide advice promptly to former Office employees who make inquiry on any matter arising under these regulations.

(v) *Official responsibility* is defined in 18 U.S.C. 202 as, ''the direct administrative or operating authority, whether intermediate or final, and either exercisable alone or with others, and either personally or through subordinates, to approve, disapprove, or otherwise direct Government actions.''

(A) Determining official responsibility. Ordinarily, those areas assigned by statute, regulation, Executive Order, job description, or delegation of authority determine the scope of an employee's ''official responsibility''. All particular matters under consideration in the Office are under the ''official responsibility'' of the Director of the Office, and each is under that of any intermediate supervisor having responsibility for an employee who actually participates in the matter within the scope of his or her duties. A patent examiner would have ''official responsibility'' for the patent applications assigned to him or her.

Example 1: A patent examiner, to whom a new application is assigned, is officially responsible for reviewing the application for compliance with statutory, regulatory, and procedural requirements. Upon assignment of the application, the application became a particular matter for which the examiner is officially responsible.

(B) Ancillary matters and official responsibility. *Administrative* authority as used in the foregoing definition means authority for planning, organizing and controlling matters rather than authority to review or make decisions on ancillary aspects of a matter such as the regularity of budgeting procedures, public or community relations aspects, or equal employment opportunity considerations. Responsibility for such an ancillary consideration does not constitute responsibility for the particular matter, except when such a consideration is also the subject of the employee's proposed representation.

Example 1: A supervisory patent examiner would not have official responsibility for all patent applications in a technology center or the Office even though she must review the records of all the applications to locate a missing file.

Example 2: Within two years after terminating employment, a supervisory patent examiner, now a registered patent attorney, is asked to represent Q Company in a continuation patent application of an application which was pending during the last year of the supervisory patent examiner's tenure. The continuation application contains a rejection that was first imposed in the parent application by a primary examiner who reported to the supervisory patent examiner. The supervisory patent examiner did not review the Office actions prepared by the primary examiner for the application. She may not represent Q Company on this matter.

(C) Knowledge of matter pending required. In order for a former employee, *e.g.,* former patent examiner, to be barred from representing another as to a particular matter, he or she need not have known, while employed by the Office, that the matter was pending under his or her official responsibility. However, the former employee is not subject to the restriction unless at the time of the proposed representation of another, he or she knows or learns that the matter had been under his or her responsibility. Ordinarily, a former employee who is asked to represent another on a matter will become aware of facts sufficient to suggest the relationship of the prior matter to his or her former office, *e.g.,* technology center, group or art unit. If so, he or she is under a duty to make further inquiry, including direct contact with an agency's designated ethics official where the matter is in doubt. It would be prudent for a patent examiner to maintain a record of only application numbers of the applications actually acted upon by decision, recommendation, as well as those applications in the examiner's art which he or she has not acted upon.

(D) Self-disqualification. A former employee, *e.g.,* former patent examiner, cannot avoid the restrictions of this section on the ground by self-disqualification with respect to a matter for which he or she otherwise had official responsibility. However, as in § 207(a), self-disqualification is effective to eliminate the restrictions.

(vi) *Actually pending* means that the matter was in fact referred to or under consideration by persons within the employee's area of responsibility, not that it merely could have been.

Example 1: A staff lawyer in the Office of General Law is consulted by procurement officers on the correct resolution of a contractual matter involving Q Company. The lawyer renders an opinion resolving the question. The same legal question arises later in several contracts with other companies, but none of the disputes with such companies is referred to the Office of General Law. The Office of General Law has official responsibility for the determination of the Q Company matter. The other matters were

never ''actually pending'' under that responsibility, although as a theoretical matter, such responsibility extended to all legal matters within the department.

(vii) Other essential requirements. All other requirements of the statute must be met before the restriction on representation applies. The same considerations apply in determining the existence of a ''particular matter involving a specific party,'' a representation in an ''appearance,'' or ''intent to influence,'' and so forth as set forth under paragraph (b)(1) of this section.

Example 1: During her tenure as Director of the Office, the Director's subordinates undertook major changes in application of new rules for processing patent applications. Eighteen months after terminating employment, she is asked to represent before the Office Z Company, which believes it is being unfairly treated under the application of the rules. The Z Company matter first arose on patent applications filed after the Director terminated her employment. She may represent Z Company because the matter pending under her official responsibility was not one involving ''a specific party.'' (Moreover, the time-period covered by 18 U.S.C. 207(c) has elapsed).

(viii) Measurement of two-year restriction period. The statutory two-year period is measured from the date when the employee's responsibility in a particular area ends, not from the termination of service in the Office, unless the two occur simultaneously. The prohibition applies to all particular matters subject to such responsibility in the one-year period before termination of such responsibility.

Example 1: A Group Director retires after 26 years of service and enters private industry as a consultant. He will be restricted for two years with respect to all matters that were actually pending under his official responsibility in the year before his retirement.

Example 2: A patent examiner transfers from a position in a first Group to a position in a second Group, and she leaves the Office for private employment nine months later. As a registered patent attorney or agent, after 15 months she will be free of restriction insofar as matters that were pending under her responsibility in the first Group in the year before her transfer. She will be restricted for two years in respect of the second Group matters that were pending in the year before her departure for private employment.

(c) *Former employees of the Office.* Former employees of the Office, whether they are or are not a practitioner, are subject to the post-employment provisions of 18 U.S.C. 207(a) and (b)(1), and the provisions of 5 CFR 2637.201 and 2637.202. A former employee who is a practitioner is subject to the provisions of § 11.111.

(d) A practitioner who becomes an employee of the Office may not prosecute or aid in any manner in the prosecution of any patent application before the Office. Noncompliance with this provision shall constitute misconduct under § 11.804(i)(19).

(e) Practice before the Office by Government employees is subject to any applicable conflict of interest laws, regulations or codes of professional responsibility. Noncompliance with said conflict of interest laws, regulations or codes of professional responsibility shall constitute misconduct under §§ 11.804(b) or 11.804(h)(8). A practitioner who is a Government employee must so inform the OED Director, and must provide his or her complete Government address as his or her business address in every communication to OED.

§ 11.11 Administrative suspension, inactivation, resignation, and readmission.

(a) Registered attorneys and agents must notify the OED Director of their postal address for his or her office, e-mail address for his or her business, and business telephone number, and of every change to any of said addresses, or telephone numbers within 30 days of the date of the change. A registered attorney or agent shall separately provide written notice to the OED Director in addition to any notice of change of address and telephone number filed in individual applications. A registered practitioner who is an attorney in good standing with the bar of the highest court of one or more states shall provide the OED Director with the state bar identification number associated with each membership. The OED Director shall publish from the roster a list containing the name, postal business addresses, business telephone number, registration number, and registration status as an attorney or agent of each registered practitioner recognized to practice before the Office in patent cases.

(b) *Administrative suspension.* (1) Whenever it appears that a registered patent attorney or agent has failed to comply with § 11.8(d) or §§ 11.12(a) and (e), the OED Director shall mail a notice to the attorney or agent advising of the noncompliance and demanding:

(i) Compliance within sixty days after the date of such notice, and

(ii) Payment of a delinquency fee set in § 1.21(a)(9)(i) of this subchapter for each rule violated. The notice shall be communicated to the attorney or agent by mail or e-mail, according to the manner by which the practitioner last communicated his or her business postal or e-mail address to the OED Director, or by other service for practitioners located out of the United States, its possessions or territory.

(2) In the event a registered patent attorney or agent fails to comply with the notice of paragraph (b)(1) of this section within the time allowed, the OED Director shall send notice in the manner provided for in paragraph (b)(1) of this section to the attorney or agent at the practitioner's most recent business postal or e-mail address on file advising:

(i) That his or her registration has been administratively suspended, and

(ii) That the attorney or agent may no longer practice before the Office in patent matters or in any way hold himself or herself out as being registered to practice before the Office in patent matters.

(iii) Following administrative suspension, the suspended practitioner may be reinstated only upon demonstrating to the OED Director satisfaction that the practitioner has complied with the rules relating to registration, and upon payment of a reinstatement fee set by § 1.21(a)(9)(ii) of this subchapter for each rule violated.

(3) Whenever the OED Director notifies an attorney or agent that his or her registration has been administratively suspended, the OED Director shall publish notice of the administrative suspension in the Official Gazette.

(4) An administratively suspended attorney or agent remains responsible for paying his or her annual fee required by § 11.8(d), and for completing the required continuing training programs.

(5) An administratively suspended attorney or agent is subject to investigation and discipline for his or her conduct prior to, during, or after the period his or her name was administratively suspended.

(6) An administratively suspended attorney or agent is prohibited from continuing to practice before the Office in patent cases while administratively suspended. Failure to comply with this rule will subject the attorney or agent to discipline.

(c) *Administrative Inactivation.* (1) Any registered practitioner who shall become employed by the Office shall comply with § 11.116 for withdrawal from the applications, patents, and trademark matters wherein he or she is an attorney or agent of record, and notify the OED Director in writing of said employment on the first day of said employment. The name of any registered practitioner employed by the Office shall be endorsed on the roster as administratively inactive. The practitioner shall not be responsible for

payments of the annual fee each complete fiscal year while in administratively inactive status. Upon separation from the Office, the practitioner may request reactivation by completing and filing an application, Data Sheet, signing a written undertaking required by § 11.10, paying the fee required by § 1.21(a)(1)(i) of this subchapter, and completing the required continuing training programs if the practitioner did not pass the recertification tests required for patent examiners during the practitioner's employment at the Office and appropriate to the practitioner's grade and position in the Office. Upon restoration to active status, the practitioner shall be responsible for the annual fee for the fiscal year in which he or she is restored to active status. An administratively inactive practitioner remains subject to the provisions of §§ 11.100–11.806, and to proceedings and sanctions under §§ 11.19–11.58 for conduct that violates a provision of §§ 11.100–11.806 prior to or during employment at the Office.

(2) Any registered practitioner who is a judge of a court of record, full time court commissioner, U.S. bankruptcy judge, U.S. magistrate judge, or a retired judge who is eligible for temporary judicial assignment and is not engaged in the practice of law should request, in writing, that his or her name be endorsed on the roster as administratively inactive. Upon acceptance of the request, the OED Director shall endorse the name as administratively inactive. The practitioner shall not be responsible for payment of the annual fee or completion of the required continuing training programs for each complete fiscal year the practitioner continues to be in administratively inactive status. Following separation from the bench, the practitioner may request restoration to active status by completing and filing an application, Data Sheet, signing a written undertaking required by § 11.10, and paying the fee required by § 1.21(a)(1)(i) of this subchapter. Upon restoration to active status, the practitioner shall be responsible for the annual fee and required continuing training for the fiscal year in which he or she is restored to active status.

(d) *Voluntary Inactivation.* (1) Except as provided in paragraph (d)(4) of this section, any registered practitioner may voluntarily enter inactive status by filing a request, in writing, that his or her name be endorsed on the roster as inactive. Upon acceptance of the request, the OED Director shall endorse the name as inactive.

(2) A practitioner in voluntary inactive status shall be responsible for payment of the annual fee for voluntary inactive status required by § 1.21(a)(7)(ii) of this subchapter, and for completing the required continuing training programs for each complete fiscal year the practitioner continues to be in voluntary inactive status.

(3) A practitioner who seeks or enters into voluntary inactive status is subject to investigation and discipline for his or her conduct prior to, during, or after the period of his or her inactivation.

(4) A practitioner who is in arrears in dues or under administrative suspension for fee delinquency is ineligible to seek or enter into voluntary inactive status.

(5) A practitioner in voluntary inactive status is prohibited from continuing to practice before the Office in patent cases while in inactive status. Failure to comply with the provisions of this paragraph (d)(5) will subject the practitioner to discipline.

(6) Any registered practitioner who has been voluntarily inactivated pursuant to paragraph (d) of this section and not under investigation, not subject to a disciplinary proceeding, not in arrears for annual fees or in arrears for complying with the continuing legal education requirements may be restored to active status to the register as may be appropriate provided that the practitioner files a written request for reinstatement, a completed application for registration on a form supplied by the OED Director furnishing all requested information and material, including information and material pertaining to the practitioner's moral character under §§ 11.7(a)(2)(i) and (iii) during the period of inactivation, evidence of completion of all continuing legal education programs required by the USPTO Director under § 11.12(a) for up to the past six years from the date of application for restoration to active status, a declaration or affidavit attesting to the fact that the practitioner has read the most recent revisions of the Patent Act and the rules of practice before the Office, and pays the fees set forth in §§ 1.21(a)(7)(iii) and (iv) of this subchapter.

(e) *Resignation.* A registered practitioner or a practitioner under § 11.14, who is neither under investigation under § 11.22 for a possible violation of the Rules of Professional Conduct, nor a practitioner against whom probable cause has been found by a panel of the Committee on Discipline under § 11.23(b), may resign by notifying the OED Director in writing that he or she desires to resign. Upon acceptance in writing by the OED Director of such notice, that registered practitioner or practitioner under § 11.14 shall no longer be eligible to practice before the Office, but shall continue to file a change of address for five years thereafter in order that he or she may be located in the event information regarding the practitioner's conduct comes to the attention of the OED Director, or any complaint is made about his or her conduct while he or she engaged in practice before the Office. The name of any registered practitioner whose resignation is accepted shall be removed from the register, endorsed as resigned, and notice thereof published in the Official Gazette. Upon acceptance of the resignation by the OED Director, the practitioner must comply with the provisions of § 11.116(d). A resigned practitioner may be again registered only in accordance with § 11.7. A resigned practitioner's willful failure to comply with the provisions of this rule or § 11.116(d) constitutes grounds for denying his or her application for registration until complete compliance with said rules is achieved.

(f) *Administrative reinstatement.* (1) Any registered practitioner who has been administratively suspended pursuant to paragraph (b) of this section or 11.12(e), or who has resigned pursuant to paragraph (d) of this section, may be reinstated on the register provided the practitioner has applied for reinstatement on an application form supplied by OED Director, demonstrated compliance with the provisions of §§ 11.7(a)(2)(i) and (iii), has completed the training programs required by the USPTO Director under § 11.12(a) since the Office's fiscal year the practitioner was last registered, and paid the fees set forth in §§ 1.21(a)(3), (a)(7), and (a)(9). Any reinstated practitioner is subject to investigation and discipline for his or her conduct that occurred prior to, during, or after the period of his or her administrative suspension or resignation.

(2) Any registered practitioner whose registration has been inactivated pursuant to paragraph (c) of this section may be reinstated to the register as may be appropriate provided that a request for reinstatement, a completed application for registration on a form supplied by the OED Director furnishing all requested information and material, and payment of the fees set forth in § 1.21(a)(3) of this subchapter are filed within two years after his or her employment with the Office or in a judicial capacity ceases. Any registered practitioner inactivated or reinstated is subject to investigation and discipline for his or her conduct before, during, or

after the period of his or her inactivation.

§ 11.12 Mandatory continuing training for licensed practitioners.

(a) *Continuing education requirements.* (1) All practitioners licensed under §§ 11.6 or 11.9 to practice before the Office shall complete a continuing education program as required from time-to-time by the USPTO Director, except those registered practitioners expressly exempted in paragraph (b) of this section from the requirement of this regulation. The USPTO Director will announce each fiscal year whether an education program will be required, and the dates for the program. No more than one mandatory continuing education program would be required each fiscal year and the requirement may be as infrequent as once every three years. The fiscal year is October 1 through September 30.

(2) Only continuing education programs pre-approved by the OED Director as meeting the requirements set forth in § 11.13 will be deemed eligible to satisfy the requirements set forth in paragraph (a)(1) of this section. Eligible continuing education programs and the starting date for completing each program will be announced in the Official Gazette and on the OED Web site. Failure to consult the foregoing locations for said announcement will not excuse a practitioner from completing the mandatory continuing education program.

(3) Each practitioner shall be responsible for ascertaining whether the USPTO Director has required completion of a mandatory continuing education program during a fiscal year, and complying with the requirement.

(b) *Exemptions.* Each practitioner shall comply with the provisions of paragraphs (a) and (b) of this section except as follows:

(1) A newly registered practitioner shall be exempt from completing the mandatory continuing education program during the fiscal year he or she is first registered.

(2) A practitioner who becomes inactive in accordance with § 11.11(c)(1) shall be exempt from completing the mandatory continuing education program if, while qualifying for inactive status, the practitioner passed the recertification program for patent examiners required during the practitioner's employment in the Office and appropriate to practitioner's grade and position in the Office.

(3) A practitioner who becomes inactive in accordance with § 11.11(c)(2) shall be exempt from completing the continuing education program while qualifying for inactive status as a judge.

(4) A practitioner who has obtained a waiver of the deadline for completing a program for good cause shown. A practitioner dissatisfied with a final decision of the OED Director may seek review of the decision upon petition to the USPTO Director accompanied by payment of the fee set forth in § 1.21(a)(5). *See* § 11.2(d).

(c) *Reinstatement.* A person who, after having resigned in accordance with § 11.11(e), having been transferred to disability inactive status under § 11.28, or having been suspended or excluded from practice before the Office under §§ 11.24, 11.25, 11.27, 11.55, or 11.56, seeks to be reinstated shall arrange with the OED Director to complete the continuing education programs for currency in patent laws, practices, policies and procedures. Thereafter, the person shall have the same continuing education program requirement as is required of a registered practitioner.

(d) *Administrative suspension for failure to complete continued education program requirement.* Any practitioner in active status who fails to complete the requirement within the time allowed by paragraph (a) of this section shall be delinquent in meeting the requirement, and the practitioner shall be subject to the provisions of § 11.11(b) to overcome a delinquency. Failure to pass each continuing education program within the permitted sixty-day period set in § 11.11(b)(1) shall subject the practitioner to the fees required by § 1.21(a)(9) of this subchapter and administrative suspension in accordance with the procedure of § 11.11(b)(2).

§ 11.13 Eligible mandatory continuing education programs.

(a) *Eligibility.* (1) A continuing education program is eligible to satisfy the mandatory continuing education requirements of § 11.12(a)(1) if either:

(i) the Office provides the program via Web-delivery or, if Web-delivery is unavailable, via a traditional or other appropriate distance delivery method, or

(ii) a USPTO pre-approved sponsor offers a course pre-approved by the OED Director as providing the legal, procedural and policy subject matter identified by the USPTO Director as being required to satisfy the mandatory continuing education program.

(b) *USPTO-delivered program.* A continuing education program provided by the USPTO in accordance with paragraph (a)(1) of this section will include narrative material, such as notices, rule packages, or the Manual of Patent Examining Procedure, and questions regarding the material. A practitioner choosing this educational mode shall complete the program, including answering the questions, on the Internet unless the latter is unavailable to the practitioner. A practitioner completing the program by traditional or other appropriate distance delivery method shall obtain and pay the fee required by § 1.21(a)(12) of this subchapter for the program and furnished materials.

(c) *USPTO pre-approved sponsor of a mandatory continuing education program.* A continuing education program provided by a USPTO pre-approved sponsor in accordance with paragraph (a)(2) of this section shall include the topics and content required to satisfy the mandatory continuing education program, and shall complete presentation of the program.

(d) *Certificate of completion.* (1) Upon completion of a required continuing education program in accordance with paragraph (b)(2) of this section, the OED Director shall credit the practitioner with completing the program.

(2) Upon completion of a required continuing education program in accordance with paragraph (b)(2) of this section, the pre-approved program sponsor shall file with the OED Director a certificate of completion of the program for each practitioner attending and completing the mandatory continuing education program. Upon receipt of the certificate the OED Director shall credit the practitioner with completing the program.

(3) The OED Director will not give credit for completion by practitioners of programs which have not been pre-approved by the OED Director as providing the legal, procedural and policy subject matter identified by the USPTO Director as being required to satisfy the mandatory continuing education program.

(e) *Standards for approval of USPTO pre-approved sponsor-delivered mandatory continuing education programs.* (1) The OED Director shall review and approve the content of all sponsor-delivered education programs.

(2) A sponsor-delivered mandatory continuing education program is approved as eligible to satisfy the mandatory education requirements of § 11.12(a)(1) if the OED Director has specifically approved it.

(3) To be approved, the program must have significant intellectual or practical content and be directed to legal, procedural and policy subject matter identified by the USPTO Director as being required to satisfy the mandatory continuing education program. Its

primary objective must be to enhance the attendee's professional competence and skills as a patent practitioner, and to enhance the quality of legal services rendered to the public.

(4) All sponsor-delivered mandatory continuing education programs must be conducted in a setting physically suitable to the program. If not Web-delivered, a suitable writing surface should be provided.

(5) Where USPTO instructional material is available, a pre-approved sponsor will provide copies of the same or the equivalent thereof.

(f) *Procedure for approval of programs.* (1) A sponsor desiring approval of a delivered education program shall submit to the OED Director all information called for by the ''Application by Sponsor for Pre-approval of a Continuing Education Program,'' and the fee required by § 1.21(a)(13) of this subchapter. The content of this application will be promulgated by the OED Director and may be changed from time-to-time.

(2) If the program proposed by a sponsor is approved, the OED Director also shall notify the requesting sponsor of the decision within 60 days after receipt of the completed application. The OED Director shall maintain and make available on the Office Web site a list of all approved programs for each completion period. Approval of a program is only effective for the completion period for which it is approved.

(3) The sponsor of a pre-approved continuing education program should include in its brochures or course descriptions the information contained in the following illustrative statement: ''This course or program has been pre-approved by the United States Patent and Trademark Office for Mandatory Continuing Education Program.'' An announcement is permissible only after the program has been specifically approved pursuant to an application submitted directly by the sponsor.

(g) *Procedure for approval of sponsors.* (1) Any sponsor may apply for approval of individual courses by complying with the criteria of paragraphs (e) and (f) of this section.

(2) A USPTO-approved sponsor shall be subject to and governed by the applicable provisions of these regulations, including the quality standards of paragraph (f) of this section and the recordkeeping and reporting requirements. The OED Director may at any time review a USPTO-approved sponsor's program and reserves the right to withdraw approval when the standards for approval are not met or maintained. If the OED Director finds there is a basis for revocation of the approval granted, the OED Director shall send notice by certified mail to that sponsor of the revocation within thirty days of the OED Director's decision.

(3) A USPTO-approved sponsor must notify the OED Director at least two weeks in advance of a program of the name, date, and location of a particular continuing education program. The OED Director may request additional information regarding a program.

(4) Law firms, professional corporations, and corporate law departments are not eligible to become approved sponsors.

§ 11.14 Individuals who may practice before the Office in trademark and other non-patent matters.

(a) *Attorneys.* Any individual who is an attorney may represent others before the Office in trademark and other non-patent matters. An attorney is not required to apply for registration or recognition to practice before the Office in trademark and other non-patent matters. Registration as a patent attorney does not entitle an individual to practice before the Office in trademark matters.

(b) *Non-lawyers.* Individuals who are not attorneys are not recognized to practice before the Office in trademark and other non-patent matters, except that individuals not attorneys who were recognized to practice before the Office in trademark matters under this chapter prior to January 1, 1957, will be recognized as agents to continue practice before the Office in trademark matters.

(c) *Foreigners.* Any foreign attorney or agent not a resident of the United States who shall prove to the satisfaction of the OED Director that he or she is registered or in good standing before the patent or trademark office of the country in which he or she resides and practices, may be recognized for the limited purpose of representing parties located in such country before the Office in the presentation and prosecution of trademark matters, provided: the patent or trademark office of such country allows substantially reciprocal privileges to those permitted to practice in trademark matters before the Office. Recognition under this paragraph shall continue only during the period that the conditions specified in this paragraph obtain.

(d) Recognition of any individual under this section shall not be construed as sanctioning or authorizing the performance of any act regarded in the jurisdiction where performed as the unauthorized practice of law.

(e) No individual other than those specified in paragraphs (a), (b), and (c) of this section will be permitted to practice before the Office in trademark matters. Any individual may appear in a trademark or other non-patent matter in his or her own behalf. Any individual may appear in a trademark matter for:

(1) A firm of which he or she is a member,

(2) A partnership of which he or she is a partner, or

(3) A corporation or association of which he or she is an officer and which he or she is authorized to represent, if such firm, partnership, corporation, or association is a party to a trademark proceeding pending before the Office.

(f) *Application for reciprocal recognition.* An individual seeking reciprocal recognition under paragraph (c) of this section, in addition to providing evidence satisfying the provisions of paragraph (c) of this section, shall apply in writing to the OED Director for reciprocal recognition, and shall pay the application fee required by §§ 1.21(a)(1)(i) and (a)(6) of this subchapter.

§ 11.15 Refusal to recognize a practitioner.

Any practitioner authorized to appear before the Office may be suspended, excluded, or reprimanded in accordance with the provisions of this Part. Any practitioner who is suspended or excluded under this part or removed under § 11.11(b) shall not be entitled to practice before the Office in patent, trademark, or other non-patent matters.

§ 11.16 Financial books and records.

A practitioner, in return for being registered under § 11.6, granted limited recognition under § 11.9, or recognized to practice before the Office under § 11.14, agrees that the OED Director may examine financial books and records maintained by or for the practitioner for the practice before the Office, including, without limitation, any and all trust accounts, including any trust account that may not be in compliance with the Rules of Professional Conduct, fiduciary accounts, and operating accounts maintained by the practitioner or his or her law firm. The OED Director may also examine any trust account maintained by a practitioner whenever the OED Director reasonably believes that the trust account may not be in compliance with the Rules of Professional Conduct.

§ 11.17 [Reserved]

§ 11.18 Signature and certificate for correspondence filed in the Office.

(a) For all documents filed in the Office in patent, trademark, and other non-patent matters, and all documents filed with a hearing officer in a disciplinary proceeding, except for correspondence that is required to be signed by the applicant or party, each piece of correspondence filed by a practitioner in the Office must bear a signature, personally signed by such practitioner, in compliance with § 1.4(d)(1) of this subchapter.

(b) By presenting to the Office or hearing officer in a disciplinary proceeding (whether by signing, filing, submitting, or later advocating) any paper, the party presenting such paper, whether a practitioner or non-practitioner, is certifying that—

(1) All statements made therein of the party's own knowledge are true, all statements made therein on information and belief are believed to be true, and all statements made therein are made with the knowledge that whoever, in any matter within the jurisdiction of the Office, knowingly and willfully falsifies, conceals, or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be subject to the penalties set forth under 18 U.S.C. 1001, and violations of the provisions of this section may jeopardize the validity of the application or document, or the validity or enforceability of any patent, trademark registration, or certificate resulting therefrom; and

(2) To the best of the party's knowledge, information and belief, formed after an inquiry reasonable under the circumstances,

(i) The paper is not being presented for any improper purpose, such as to harass someone or to cause unnecessary delay or needless increase in the cost of prosecution before the Office;

(ii) The other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;

(iii) The allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and

(iv) The denials of factual contentions are warranted on the evidence, or if specifically so identified, are reasonably based on a lack of information or belief.

(c) Violations of paragraph (b)(1) of this section by a practitioner or non-practitioner may jeopardize the validity of the application or document, or the validity or enforceability of any patent, trademark registration, or certificate resulting therefrom. Violations of any of paragraphs (b)(2)(i) through (iv) of this section are, after notice and reasonable opportunity to respond, subject to such sanctions as deemed appropriate by the USPTO Director, or hearing officer, which may include, but are not limited to, any combination of—

(1) Holding certain facts to have been established;

(2) Returning papers;

(3) Precluding a party from filing a paper, or presenting or contesting an issue;

(4) Imposing a monetary sanction;

(5) Requiring a terminal disclaimer for the period of the delay; or

(6) Terminating the proceedings in the Office.

(d) Any practitioner violating the provisions of this section may also be subject to disciplinary action. *See* § 11.303(e)(4).

Subpart C—Investigations and Disciplinary Proceedings

Jurisdiction, Sanctions, Investigations, and Proceedings

§ 11.19 Disciplinary jurisdiction.

(a) *Individuals subject to disciplinary jurisdiction.* The following individuals are subject to the disciplinary jurisdiction of the Office:

(1) *Practitioners.* All practitioners engaged in practice before the Office; all practitioners administratively suspended under § 11.11(b); all practitioners who have resigned under § 11.11(d); all practitioners inactivated under § 11.11(c); all practitioners authorized under § 11.6(d) to take testimony; and all practitioners reprimanded, suspended, or excluded from the practice of law by a duly constituted authority, including by the USPTO Director.

(2) *Other individuals.* An applicant for patent (§ 1.41(b) of this subchapter) representing himself, herself, or representing himself or herself and other individuals who are applicants pursuant to §§ 1.31 or 1.33(b)(4) of this subchapter; an individual who is an assignee as provided for under § 3.71(b) of this subchapter; and an individual appearing in a trademark or other non-patent matter pursuant to § 11.14(e), whether representing a firm, corporation, or association are subject to the disciplinary jurisdiction of the Office, including §§ 11.19(c)(2), (d) and (e); 11.20(a)(2), and (b); 11.21–11.23; 11.24; 11.25 –11.28, 11.32–11.45, and 11.49–11.60.

(b) *Jurisdiction of courts and voluntary bar associations.* Nothing in these rules shall be construed to deny to any State or Federal Court such powers as are necessary for that court to maintain control over proceedings conducted before it, such as the power of contempt. Further, nothing in these rules shall be construed to prohibit any State or Federal Court, or a voluntary or mandatory bar association from censuring, reprimanding, suspending, disbarring, or otherwise disciplining its members, including registered practitioners for conduct regarding practice before the Office in any matter.

(c) *Misconduct—grounds for discipline.* (1) *Practitioners.* Acts or omissions by a practitioner (including a suspended, excluded, or inactive practitioner), acting individually or in concert with any other person or persons constituting gross misconduct, violating the imperative USPTO Rules of Professional Conduct, or the oath taken by practitioner shall constitute misconduct and shall be grounds for discipline, whether or not the act or omission occurred in the course of providing legal services to a client, or in a matter pending before the Office. Grounds for discipline include:

(i) Conviction of a crime (*see* §§ 11.24, 11.803(d) and 11.804(b));

(ii) Discipline imposed in another jurisdiction (*see* §§ 11.24 and 11.803(e)(1) and (f)(4));

(iii) Failure to comply with any order of a Court disciplining a practitioner, or any order of the USPTO Director disciplining a practitioner;

(iv) Failure to respond to a written inquiry from OED Director in the course of an investigation into whether there has been a violation of the imperative USPTO Rules of Professional Conduct without asserting, in writing, the grounds for refusing to do so; or

(v) Violation of the imperative USPTO Rules of Professional Conduct. *See* § 11.100(a).

(2) *Other individuals.* Acts or omissions by applicants for patent (§ 1.41(b) of this subchapter) representing themselves, or an individual applicant representing himself or herself and other individuals who are applicants pursuant to §§ 1.31 or 1.34(b)(4) of this subchapter; an individual who an assignee as provided for under § 3.71(b) of this subchapter; and an individual appearing in a trademark or other non-patent matter pursuant to § 11.14(e), whether

representing a firm, corporation, or association who violate the provisions of §§ 11.303(a)(1), 11.304, 11.305(a), or 11.804 shall constitute misconduct and shall be grounds for discipline.

(d) Petitions to disqualify a practitioner in ex parte or inter partes matters in the Office are not governed by §§ 11.19 through 11.806 and will be handled on a case-by-case basis under such conditions as the USPTO Director deems appropriate.

(e) Unauthorized practice of law matters may be referred to the appropriate authority in the jurisdiction(s) where the act(s) occurred.

§ 11.20 Disciplinary sanctions.

(a) *Types of discipline.* (1) *For practitioners.* The USPTO Director, after notice and opportunity for a hearing, may impose on a practitioner shown to be incompetent or disreputable, who is guilty of gross misconduct, or who violates a Rule of Professional Conduct currently in effect in the Office, any of the following types of discipline:

(i) Exclusion from practice before the Office in patent, trademark or other non-patent law;

(ii) Suspension from practice before the Office in patent, trademark or other non-patent law for an indefinite period, or appropriate fixed period of time not to exceed five years. Any order of suspension may include a requirement stated in the order that the practitioner satisfy certain conditions prior to reinstatement, including furnishing proof of rehabilitation;

(iii) Reprimand, or

(iv) Probation for not more than three years. Probation may be imposed in lieu of or in addition to any other disciplinary sanction. Any conditions of probation shall be stated in writing in the order imposing probation. The order shall also state whether, and to what extent, the practitioner or other person shall be required to notify clients of the probation. The order shall establish procedures for the supervision of probation. Violation of any condition of probation shall make the practitioner subject to revocation of probation, and the disciplinary sanction stated in the order imposing probation.

(2) *For Other Individuals.* In regard to a patent applicant representing himself or herself, or representing himself or herself and other individual who are applicants under §§ 1.31 or 1.33(b)(4) of this subchapter; an individual who is an assignee as provided for under § 3.71(b) of this subchapter; an individual appearing in a trademark or other non-patent matter pursuant to § 11.14(e), whether representing a firm, corporation, or association, the USPTO Director, after notice and opportunity for a hearing, may impose on said applicant, assignee, person, or individual appearing in a trademark or other non-patent matter shown to have violated a provision of §§ 11.303(a)(1), 11.304, 11.305(a), or 11.804, may be appropriately sanctioned by, but not limited to, requiring the individual to be represented by counsel, striking the filing of any document, or dismissing the filing of an application with prejudice.

(b) *Conditions imposed with discipline.* When imposing discipline, the practitioner, or other individual may be required to make restitution either to persons financially injured by the practitioner's, or other individual's conduct or to an appropriate client's security trust fund, or both, as a condition of probation or of reinstatement. Any other reasonable condition may also be imposed, including a requirement that the practitioner or other individual take and pass a professional responsibility examination.

§ 11.21 Warnings.

Warning. A warning is not a disciplinary sanction. The OED Director, in consultation with and consent from a panel of the Committee on Discipline, may conclude an investigation with the issuance of a warning. The warning shall contain a brief statement of facts and relevant imperative USPTO Rules of Professional Conduct upon which the warning is based. The warning shall be final and not reviewable.

§ 11.22 Investigations.

(a) The OED Director is authorized to investigate possible violations of an imperative Rule of Professional Conduct by practitioners; or possible violations of §§ 11.303(a)(1), 11.304, 11.305(a), or 11.804 by other individuals identified in § 11.19(a)(2). *See* § 11.2(b)(2). The investigation may be based on information from any source whatsoever, or on a complaint where alleged or presented facts, if true, may warrant discipline. The information need not be in the form of a complaint.

(b) Any practitioner, other individual (*see* § 11.19(a)(2)), or nonpractitioner possessing knowledge or information concerning a possible violation of an imperative Rule of Professional Conduct currently in effect before the Office by a practitioner may report the violation to the OED Director. The OED Director may require that the report be presented in the form of an affidavit or declaration.

(c) *Initiation of investigations.* An investigation may be initiated upon complaint or information. A staff attorney under the supervision of the OED Director shall conduct all investigations. Neither unwillingness nor neglect by a complainant to prosecute a charge, nor settlement, compromise, or restitution, shall in itself justify abatement of an investigation.

(d)(1) *Complaints.* A complaint is a communication by a person outside the Office alleging or presenting facts of possible misconduct by a practitioner or other individual (*see* § 11.19(a)(2)). A complaint shall be in writing and shall contain a brief statement of the facts upon which the complaint is based. The complaint need not be a sworn statement.

(2) *Information.* Information is one or more written communications from any source alleging or containing facts that, if true, may warrant discipline for misconduct by a practitioner or other individual (*see* § 11.19(a)(2)). The information need not be a sworn statement.

(e) *Preliminary screening of complaints and information.* Under the supervision of the OED Director, a staff attorney shall examine all complaints and information. The staff attorney, after such preliminary inquiry as appears appropriate, shall determine whether the complaint or information is to be docketed. A complaint or information shall be docketed if it:

(1) Is not unfounded on its face;

(2) Contains allegations or information which, if true, would constitute a violation of the practitioner's oath or an imperative Rule of Professional Conduct currently in effect before the Office that would merit discipline; and

(3) Is within the jurisdiction of the Office.

(f) *Decision not to docket and notice to complainant.* If OED Director determines that a matter is not to be docketed, the OED Director shall so notify the complainant and the practitioner or other individual (*see* § 11.19(a)(2)), giving a brief statement of the reasons therefor. The OED Director's decision is final and not subject to review.

(g) *Docketing of complaint or information; notification to complainant.* A docketed complaint or information shall be assigned a docket number with the first two digits showing the fiscal year in which the complaint is docketed. Complainants shall be promptly advised in writing by the OED Director or a staff attorney of the docketing of the complaint.

(h) *Notification.* The OED Director or staff attorney shall promptly notify the practitioner or other individual (*see* § 11.19(a)(2)) in writing when a formal investigation into a practitioner's or other individual's conduct has been initiated. This notice shall include a copy of the complaint, information, or other relevant documents upon which the investigation is based, a request for a written response from the practitioner or other individual, and any questions reasonably likely to elicit answers, records, and information helpful in the conduct of the investigation.

(i) *Duty to reply; response.* A practitioner, or other individual (*see* § 11.19(a)(2)) under investigation has an obligation to reply to the OED Director's written inquiries in the conduct of an investigation. The reply shall set forth the position of the practitioner or other individual under investigation with respect to allegations contained in the complaint, facts contained in the information, and all inquiries by the OED Director. The reply shall be filed with the OED Director within thirty calendar days after the mailing date of the notice in paragraph (h) of this section. A single extension of time shall be granted to reply to an inquiry upon written request of the practitioner or other individual (*see* § 11.19(a)(2)), and in no case shall the extension of time exceed thirty days.

(j) *Request for information by OED Director.* (1) In the course of the investigation, the OED Director may request information concerning the practitioner's actions from:

(i) The complainant,

(ii) The practitioner,

(iii) Another individual as defined by § 11.19(a)(2), or

(iv) Any party who may reasonably be expected to have information.

(2) The OED Director, or staff attorney or other representative may also request information from a noncomplaining client after obtaining either the consent of the practitioner or, upon a written showing of good cause, the authorization of the Director (*see* § 11.23(a)). Neither a request for, nor disclosure of, information shall constitute a violation of any of the Rules of Professional Conduct contained in §§ 11.100 *et seq.*

(k) *Request for financial records by OED Director.* In the course of an investigation, the OED Director, alone or through a staff attorney, may examine financial books and records maintained by a practitioner for the practice before the Office, including, without limitation, any and all trust accounts, fiduciary accounts, and operating accounts maintained by the practitioner or his or her law firm. The OED Director, alone or through a staff attorney, may also examine any trust account maintained by a practitioner whenever the OED Director reasonably believes that the trust account may not be in compliance with the Rules of Professional Conduct. In the exercise of this authority, the OED Director or staff attorney may seek the assistance of State bar counsel to obtain such summons and subpoenas as he or she may reasonably deem necessary for the effective conduct of an investigation or an examination of a trust account. In every case in which the OED Director or staff attorney initiates examination of a trust account, or seeks any summons or subpoena in the conduct of an examination of or an investigation concerning said trust account, other than on the basis of a complaint against the practitioner, the OED Director or staff attorney shall file a written statement as part of the record in the case setting forth the reasons supporting the belief that the subject trust account may not be in compliance with the Rules of Professional Conduct. After State bar counsel agrees to seek such summons and subpoenas, a copy of the written statement shall be delivered to the practitioner whose trust account is the subject of the investigation.

(l) *Failure to reply to OED Director.* If a practitioner, or other individual (*see* § 11.19(a)(2)) fails to reply to the request for information sought under paragraph (j) of this section, fails to provide requested financial records sought under paragraph (k) of this section, or replies evasively in the conduct of an investigation, the OED Director may request the Committee on Discipline to enter an appropriate finding of probable cause of violating § 11.804(d).

(m) *Disposition of investigation.* Upon the consideration of an investigation, the OED Director may:

(1) Close the investigation with neither a warning, nor disciplinary action; or

(2) Issue a warning to the practitioner or other individual (*see* § 11.19(a)); or

(3) Institute formal charges with the prior approval of the Committee on Discipline; or

(4) Enter into a diversion agreement with the approval of the USPTO Director (*see* § 11.26).

(n) *Closing investigation with no warning.* The OED Director shall terminate an investigation and decline to refer a matter to the Committee on Discipline if the OED Director determines that:

(1) The complaint is unfounded; or

(2) The complaint is not within the jurisdiction of the Office; or

(3) As a matter of law, the conduct questioned or alleged does not constitute misconduct, even if the conduct may involve a legal dispute; or

(4) The available evidence shows that the practitioner, or other individual (*see* § 11.19(a)(2)) did not engage or did not willfully engage in the misconduct questioned or alleged; or

(5) There is no credible evidence to support any allegation of misconduct on the part of the practitioner, or other individual (*see* § 11.19(a)(2)), or

(6) The available evidence could not reasonably be expected to support any allegation of misconduct under a ''clear and convincing'' evidentiary standard.

§ 11.23 Committee on Discipline.

(a) The USPTO Director shall appoint a Committee on Discipline. The Committee on Discipline shall consist of at least three employees of the Office, plus at least three alternate members who also are employees of the Office. None of the Committee members or alternates shall report directly or indirectly to the OED Director or the General Counsel. Each Committee member and the alternates shall be a member in good standing of the bar of the highest court of a State. The Committee members and alternates shall select a Chairperson from among themselves. The Committee or its panels shall meet at regular intervals with the OED Director. Three Committee members or alternates so selected will constitute a panel of the Committee.

(b) *Powers and duties of the Committee on Discipline.* The Committee shall have the power and duty:

(1) To appoint two or more panels of its members and alternates, each consisting of at least three Committee members or alternates, who shall review information and evidence presented by the OED Director;

(2) To meet as a panel at the request of the OED Director and, after reviewing evidence presented by the OED Director, shall by majority vote, to determine whether there is probable cause to bring charges under § 11.32 against a practitioner or other individual (*see* § 11.19(a)(2)). When probable cause is found regarding a practitioner or other individual (*see* § 11.19(a)(2)), no Committee member or alternate on the panel, employee under the direction of the OED Director, or employee under the direction of the Deputy General Counsel for Intellectual Property shall participate in rendering a decision on any complaint filed against the practitioner or other individual;

(3) To assign a Contact Member to review and approve or suggest

modifications of recommendations by the OED Director for dismissals, and warnings; and

(4) To prepare and forward its own probable cause findings and recommendations to the OED Director.

(c) No discovery shall be authorized of, and no member of or alternate to the Committee on Discipline shall be required to testify about, deliberations of the Committee on Discipline or of any panel.

§ 11.24 Interim suspension and discipline based upon reciprocal discipline.

(a) *Notification.* A practitioner who has been disbarred (including disbarred or excluded on consent) or suspended by a disciplinary court, or who has resigned in lieu of a disciplinary proceeding before or while an investigation is pending shall notify the OED Director in writing of the same within ten days from the date he or she is so suspended, disbarred, excluded or disbarred on consent, or has resigned. Upon learning that a practitioner subject to the disciplinary jurisdiction of the Office has been disbarred, suspended or has resigned in lieu of disciplinary action, the OED Director shall obtain a certified copy of the record of the suspension, disbarment or resignation from the disciplinary court, and file the same with the USPTO Director and the hearing officer if a disciplinary proceeding is pending at the time. Every attorney who has been suspended, or disbarred, or who has resigned shall be disqualified from practicing before the Office in patent, trademark, and other non-patent cases, as a practitioner, during the time of suspension, disbarment, or resignation.

(b) *Notice to Show Cause and Interim Suspension.* (1) Following receipt of a certified copy of the record, the USPTO Director shall enter an order suspending the practitioner from practice before the Office and afford the practitioner an opportunity to show cause, within 40 days, why an order for identical disciplinary action should not be entered. Upon response, and any reply by the OED Director authorized by the USPTO Director, or if no response is timely filed, the USPTO Director will enter an appropriate order.

(2) After said notice and opportunity to show cause why identical disciplinary action should not be taken, and if one or more material facts set forth in paragraphs (c)(1) through (c)(4) of this section are in dispute, the USPTO Director may enter any appropriate disciplinary sanction upon any practitioner who is admitted to practice before the Office for failure to comply with the Rules of Professional Responsibility.

(3) The other provisions of this part providing a procedure for the discipline of a practitioner do not apply to proceedings pursuant to this section.

(c) *Proof of misconduct.* (1) In all proceedings under this section, a final adjudication in a disciplinary court shall establish conclusively the misconduct clearly disclosed on the face of the record upon which the discipline is predicated. A certified copy of the record of suspension, disbarment, or resignation shall be conclusive evidence of the commission of professional misconduct in any reciprocal disciplinary proceeding based thereon. However, nothing this paragraph (c) shall preclude the practitioner from demonstrating at the hearing provided for under paragraph (b) of this section by clear and convincing evidence the existence of one or more of material facts in paragraphs (c)(1)(i) through (c)(1)(iv) of this section as a reason for not imposing the identical discipline. The practitioner shall bear the burden of demonstrating, by clear and convincing evidence that the identical discipline should not be imposed because:

(i) The procedure elsewhere was so lacking in notice or opportunity to be heard as to constitute a deprivation of due process; or

(ii) There was such infirmity of proof establishing the misconduct as to give rise to the clear conviction that the Office could not, consistently with its duty, accept as final the conclusion on that subject; or

(iii) The imposition of the same discipline by the Office would result in grave injustice; or

(iv) The misconduct established warrants substantially different discipline in the Office.

(2) If the practitioner does not satisfy the practitioner's burden of showing the existence of one of material facts of paragraphs (c)(1)(i), (c)(1)(ii) or (c)(1)(iii) of this section, then a final determination by a disciplinary court that a practitioner has been guilty of professional misconduct shall conclusively establish the misconduct for the purpose of a reciprocal disciplinary proceeding in the Office.

(d) *Reciprocal discipline-action where practice has ceased.* (1) If the practitioner has promptly notified the OED Director of his or her discipline in another jurisdiction, and otherwise establishes to the satisfaction of the USPTO Director, by affidavit or otherwise, that the practitioner has voluntarily ceased all practice before the Office, and the OED Director confirms the same, the USPTO Director will favorably consider that the effective date of any suspension or disbarment be imposed *nunc pro tunc* to the date respondent voluntarily ceased all practice before the Office. The USPTO Director will not favorably consider retroactive effectiveness of a suspension or disbarment if the practitioner has not also complied with the provisions of § 11.58, as such section would apply if voluntary cessation from all practice before the Office were treated as a suspension ordered by the USPTO Director.

(2) *Action when reciprocal discipline is not recommended.* If the USPTO Director concludes that reciprocal discipline should not be imposed, the USPTO Director shall accept the facts found by the disciplinary court unless he or she makes a finding under paragraphs (c)(1)(i), (c)(1)(ii) or (c)(1)(iii) of this section. In the absence of such a finding, the USPTO Director shall enter an appropriate order.

(e) *Appropriate Order.* The USPTO Director may impose the identical discipline unless the practitioner demonstrates by clear and convincing evidence, or the USPTO Director finds said evidence on the face of the record on which the discipline is predicated, that one or more of the grounds set forth in paragraph (a) of this section exists. If the USPTO Director determines that the identical discipline should not be imposed, the USPTO Director shall enter an appropriate order, including entry of a different sanction on the practitioner, or referral of the matter to a hearing officer for further consideration and recommendation.

(f) *Reinstatement following discipline.* A practitioner may petition for reinstatement under conditions set forth in § 11.60 no sooner than after completion of the suspension, disbarment, or probation, and conditions for reinstatement to the bar of the highest court of the State where the practitioner was suspended or disbarred.

§ 11.25 Interim suspension and discipline based upon conviction of committing a serious crime or other crime coupled with confinement or commitment to imprisonment.

(a) *Serious crimes.* If the serious crime for which the practitioner was convicted involves moral turpitude *per se*, the practitioner shall be excluded, or if the conduct underlying the offense involved moral turpitude, the practitioner shall be excluded. A conviction shall be deemed a felony if the judgment was entered as a felony irrespective of any subsequent order suspending sentence or granting probation.

(b) *Other crime coupled with confinement or commitment to imprisonment.* Every practitioner convicted of a crime in a court of the United States, or of any state, district, territory of the United States, or of a foreign country shall be disqualified from practicing before the Office in patent, trademark or other non-patent law matters as attorney or patent agent during the actual time of confinement or commitment to imprisonment and during release from actual confinement on condition of probation or parole.

(c) *Notification.* A practitioner who has been convicted of a serious crime in a court of the United States, or of any state, district, territory of the United States, or of a foreign country, except as to misdemeanor traffic offenses or traffic ordinance violations, not including the use of alcohol or drugs, or a practitioner who is convicted of any other crime and is confined or committed to imprisonment shall inform the OED Director within ten days from the date of such conviction. Upon learning that a practitioner has been convicted of a serious crime or another crime coupled with confinement or commitment to imprisonment, the OED Director shall obtain a certified copy of the conviction or docket entry, and file the same with the USPTO Director.

(d) *Notice to show cause and interim suspension.* (1) Following receipt of a certified copy of the court record or docket entry of the conviction, the USPTO Director shall enter an order suspending the practitioner in the interim from practice before the Office until the time for appeal has elapsed, if no appeal has been taken, or until the judgment or conviction has been affirmed on appeal, or has otherwise become final, and until further order of the USPTO Director. The USPTO Director may, *sua sponte,* decline to impose or may set aside, the suspension when it appears to be in the interest of justice to do so, with due regard being given to maintaining the integrity of, and confidence in, the profession of law. Upon a conviction becoming final, or imposition of a sentence or probation, the USPTO Director shall afford the practitioner an opportunity to show cause, within 40 days, why an order disciplining the practitioner should not be entered. Upon response, or if no response is timely filed, the USPTO Director shall enter an appropriate order.

(2) After said opportunity to show cause why disciplinary action should not be taken, and if one or more material facts are in dispute, the USPTO Director may enter an order disciplining any practitioner recognized to practice before the Office for failure to comply with the Rules of Professional Responsibility.

(3) The other provisions of this Part providing a procedure for the discipline of a practitioner do not apply to proceedings pursuant to this section to discipline a practitioner convicted of a serious crime or a practitioner who is convicted of a crime and is confined or committed to imprisonment.

(e) *Proof of guilt.* A certified copy of the court record or docket entry of the conviction shall be conclusive evidence of the guilt of the crime of which the practitioner has been convicted, and of any imposed confinement or commitment to imprisonment. However, nothing this paragraph (e) shall preclude the practitioner from demonstrating in said hearing afforded by the USPTO Director, by clear and convincing evidence, material facts to be considered when determining if a serious crime was committed and whether a disciplinary sanction should be entered.

(f) If the USPTO Director finds that the offense involves moral turpitude *per se,* or that the conduct underlying the offense involves moral turpitude, the practitioner shall be excluded. If the USPTO Director finds that the practitioner was convicted of a crime and has been incarcerated, regardless of whether the offense involved moral turpitude, the practitioner shall be suspended or excluded and shall not be eligible for reinstatement during the time of confinement or commitment to imprisonment or release from actual confinement on conditions of probation or parole. If the USPTO Director finds that the practitioner has been convicted of a serious crime without being incarcerated, the USPTO Director may either continue the suspension or exclude the practitioner from practice before the Office. A copy of the USPTO Director's decision shall be served on the practitioner by certified mail, or any other available means, and upon the OED Director.

(g) *Crime determined not to be serious crime.* If the USPTO Director determines under paragraph (d) of this section not only that the crime is not a serious crime, but also that the practitioner has not been confined or committed to imprisonment, an order shall be entered reinstating the practitioner immediately. The proceeding shall continue (without referral of the matter to the Committee on Discipline under § 11.23) on a complaint pursuant to § 11.34 that the OED Director files within the time set by the order, and an answer pursuant to § 11.35 that the practitioner files within the time set by the order. A disciplinary proceeding may continue before the hearing officer, and the hearing officer may hold such hearings and receive such briefs and other documents under §§ 11.35 through 11.53, as the hearing officer deems appropriate. However, the proceeding before the hearing officer shall not be concluded until all direct appeals from conviction of the crime have been completed.

(h) *Reinstatement.*—(1) *Upon reversal, vacation or setting aside of conviction.* A practitioner suspended or excluded under this section may file with the USPTO Director, at any time, a certificate demonstrating that the conviction, for which interim suspension was imposed, has been reversed, vacated or set aside by a court having jurisdiction of the criminal matter. Upon the filing of the certificate, the USPTO Director shall promptly enter an order reinstating the practitioner, but the reinstatement shall not terminate any other disciplinary proceeding then pending against the practitioner, the disposition of which shall be determined by the USPTO Director or hearing officer before whom the matter is pending, on the basis of all available evidence.

(2) *Following conviction of a crime coupled with confinement or commitment to imprisonment.* Any practitioner convicted of a crime and confined or committed to imprisonment, and who is disciplined in whole or in part in regard thereto, may petition for reinstatement under conditions set forth in § 11.60 no sooner than five years following discharge after completion of service of his or her sentence, or after completion of service under probation or parole, whichever is later.

(i) *Other crimes not coupled with confinement or commitment to imprisonment.* Upon being notified by a practitioner or upon receipt of a certified copy of a court record demonstrating that a practitioner has been found convicted of a crime other than a serious crime, and that the practitioner has not been confined or committed to imprisonment, the OED Director shall investigate the matter under § 11.22 and proceed as appropriate under §§ 11.26, 11.27, 11.28, and/or 11.32.

§ 11.26 Diversion.

(a) *Availability of diversion.* Subject to the limitations in paragraph (b) of this section, the OED Director may offer diversion to a practitioner under investigation for a disciplinary violation.

(b) *Limitations on diversion.* Diversion shall be available in matters

of alleged minor misconduct, but shall not be available where:

(1) The alleged misconduct resulted in, or is likely to result in, prejudice to a client or another person; or

(2) Discipline previously has been imposed, diversion previously has been offered and accepted, or a warning was previously issued, unless the OED Director finds the presence of exceptional circumstances justifying a waiver of this limitation; or

(3) The alleged misconduct involves fraud, dishonesty, deceit, misappropriation or conversion of client funds or other things of value, or misrepresentation; or

(4) The alleged misconduct constitutes a criminal offense under applicable law.

(c) *Procedures for diversion.* At the conclusion of an investigation, the OED Director, at his or her sole discretion, may offer to a practitioner being investigated for misconduct the option of entering a diversion program in lieu of other procedures available to the OED Director. The OED Director shall be free to accept or reject a request by the practitioner for diversion. If the practitioner accepts diversion, a written diversion agreement shall be entered into by both parties including, *inter alia,* the time of commencement and completion of the diversion program, the content of the program, and the criteria by which successful completion of the program will be measured. The diversion agreement shall state that it is subject to review by the USPTO Director, to whom it shall be submitted for review and approval after execution by the OED Director and the practitioner.

(d) *Content of diversion program.* The diversion program shall be designed to rehabilitate the practitioner's practices or procedures leading to the alleged misconduct of the practitioner. It may include participation in formal courses of education sponsored by a voluntary bar organization, a law school, or another organization; completion of an individualized program of instruction specified in the agreement or supervised by another entity; or any other arrangement agreed to by the parties which is designed to improve the ability of the practitioner to practice in accordance with the Rules of Professional Conduct.

(e) *Proceedings after completion or termination of diversion program.* Except as provided in paragraph (b)(2) of this section, if the practitioner successfully completes a diversion program, the OED Director's investigation shall be closed. The practitioner shall have a record of the misconduct that was investigated, and the record may be considered in determining the discipline, if any, to be imposed based on other charges of misconduct brought against the practitioner in the future. If the practitioner does not successfully complete the diversion program, the OED Director shall take such other action as is authorized and prescribed under § 11.32.

§ 11.27 Exclusion by consent.

(a) *Required affidavit.* The OED Director may confer with a practitioner concerning possible violations by the practitioner of the Rules of Professional Conduct whether or not a disciplinary proceeding has been instituted. A practitioner who is the subject of an investigation or a pending disciplinary proceeding based on allegations of misconduct, and who desires to resign or settle the matter may only do so by consenting to exclusion and delivering to the OED Director an affidavit declaring the consent of the practitioner to exclusion and stating:

(1) That the consent is freely and voluntarily rendered, that the practitioner is not being subjected to coercion or duress, and that the practitioner is fully aware of the implication of consenting to exclusion;

(2) That the practitioner is aware that there is currently pending an investigation into, or a proceeding involving, allegations of misconduct, the nature of which shall be specifically set forth in the affidavit;

(3) That the practitioner submits the consent because the practitioner knows that if disciplinary proceedings based on the alleged misconduct were brought, the practitioner could not successfully defend against them; and

(4) That it may be conclusively presumed, for the purpose of determining any request for reinstatement under § 11.60, that the alleged facts on which the complaint was based are true and that the practitioner violated one or more Rules of Professional Conduct.

(b) *Action by the USPTO Director.* Upon receipt of the required affidavit, the OED Director shall file the affidavit and any related papers with the USPTO Director for review and approval. Upon such approval, the USPTO Director will enter an order excluding the practitioner on consent.

(c) When an affidavit under paragraph (a) of this section is received after a complaint under § 11.34 has been filed, the OED Director shall notify the hearing officer. The hearing officer shall enter an order transferring the disciplinary proceeding to the USPTO Director, who may enter an order excluding the practitioner on consent.

(d) *Reinstatement.* Any practitioner excluded by consent under this section cannot petition for reinstatement for five years. A practitioner excluded on consent who intends to reapply for admission to practice before the Office must comply with the provisions of § 11.58, and apply for reinstatement in accordance with § 11.60. Willful failure to comply with the provisions of § 11.58 constitutes grounds for denying an application for reinstatement.

§ 11.28 Incompetent and incapacitated practitioners.

(a) *Scope of disability proceedings.* This section applies to all disability matters, specifically including those to determine:

(1) Whether a practitioner has been judicially declared to be mentally incompetent or involuntarily committed to a mental hospital as an inpatient;

(2) Whether the hearing officer should apply to a Court for an order requiring a practitioner to submit to an examination by qualified medical experts regarding an alleged disability or addiction;

(3) Whether a practitioner is incapacitated from continuing to practice before the Office by reason of disability or addiction;

(4) Whether the OED Director should hold in abeyance a disciplinary investigation, or a hearing officer should hold in abeyance a disciplinary proceeding because of a practitioner's alleged disability or addiction;

(5) Whether a practitioner, having previously been suspended solely on the basis of a judicial order declaring the practitioner to be mentally incompetent, has subsequently been judicially declared to be competent and is therefore entitled to have the prior suspension terminated;

(6) Whether a practitioner, having previously been suspended solely on the basis of an involuntary commitment to a mental hospital as an inpatient, has subsequently been discharged from inpatient status and is therefore entitled to have the prior order of suspension terminated; and

(7) Whether a practitioner, having previously acknowledged or having been found by the hearing officer or USPTO Director to have suffered from a prior disability or addiction sufficient to warrant suspension (whether or not any suspension has yet occurred), has recovered to the extent, and for the period of time, sufficient to justify the conclusion that the practitioner is fit to resume or continue the practice before the Office and/or is fit to defend the

alleged charges against the practitioner in a disciplinary investigation or disciplinary proceeding that has been held in abeyance pending such recovery.

(b) *Appointment of counsel.* In a disability matter wherein the OED Director contends that the practitioner should be excluded or suspended from practice before the Office, subjected to probationary conditions, or required to submit to a medical examination, the hearing officer shall authorize the OED Director to apply to a court of competent jurisdiction for an order appointing counsel to represent the practitioner whose disability or addiction is under consideration if it appears to the hearing officer's satisfaction, based on the practitioner's motion or notice of the OED Director, that otherwise the practitioner will appear pro se and may therefore be without adequate representation.

(c) *Proceedings before the hearing officer.* (1) *Motions.* All proceedings addressing disability matters before a hearing officer shall be initiated by motion filed by the OED Director or practitioner. In addition to any other requirement of § 11.43, each such motion shall include or have attached thereto:

(i) A brief statement of all material facts;

(ii) A proposed petition and/or recommendation to be filed with the USPTO Director if the movant's motion is granted by the hearing officer; and

(iii) Affidavits, medical reports, official records, or other documents setting forth or establishing any of the material facts on which the movant is relying.

(2) *Response.* The non-moving party shall file a response to any motion hereunder setting forth the following:

(i) All objections, if any, to the actions requested in the motion;

(ii) An admission, denial or allegation of lack of knowledge with respect to each of the material facts in the movant's papers; and

(iii) Affidavits, medical reports, official records, or other documents setting forth facts on which the non-moving party intends to rely for purposes of disputing or denying any material fact set forth in the movant's papers.

(iv) Except as the hearing officer may otherwise order, the response shall be served and filed within fourteen (14) days after service of the motion unless such time is shortened or enlarged by the hearing officer for good cause shown.

(d) *Mentally disabled practitioners.* (1) *Action by OED Director.* The OED Director, upon obtaining proof that a practitioner has been judicially declared to be mentally incompetent or has been involuntarily committed to a mental hospital as an inpatient, shall either

(i) Promptly request authority from a panel of the Committee on Discipline to submit evidence (appropriate affidavits and/or other documentary proof) to a hearing officer seeking, pursuant to this section, an order from the USPTO Director directing that the practitioner's name be transferred to disability inactive status, and that the practitioner cease practicing before the Office effective immediately and for an indefinite period of time until further ordered by the USPTO Director; or

(ii) Notify a panel of the Committee on Discipline of the OED Director's intention not to file a petition under paragraph (d)(1)(i) of this section and the reasons therefor. All further proceedings shall be pursuant to paragraph (f) of this section.

(e) *Incapacitation due to disability or addiction.*—(1) *OED Director's request.* If the OED Director receives information providing reason to believe that a practitioner is incapacitated from continuing to practice before the Office because of disability or addiction and the practitioner is nonetheless likely to offer or attempt to perform legal services while so incapacitated, the OED Director may request a panel of the Committee on Discipline to find probable cause authorizing the OED Director to petition the USPTO Director for an order transferring the practitioner to disability inactive status effective immediately for an indefinite period until further ordered by the USPTO Director, or possibly imposing probationary conditions with or without a period of suspension. All further proceedings shall be pursuant to paragraph (f) of this section, unless the practitioner agrees to have his or her name transferred to disability inactive status, and to cease practicing before the Office effective immediately and for an indefinite period of time until further ordered by the USPTO Director.

(2) *Required evidence.* In the absence of unusual circumstances, probable cause sufficient to support the OED Director's request under paragraph (e)(1) of this section shall include, either a written acknowledgment of the practitioner or a report of an examination by one or more qualified medical experts confirming the existence of the alleged disability or addiction and otherwise indicating the practitioner to be incapacitated as alleged.

(f) *Further proceedings for matters in paragraphs (d) and (e) of this section.*—(1) *Action by Committee on Discipline panel.* A panel of the Committee on Discipline may issue a probable cause determination granting or denying the OED Director's request based on written acknowledgments, affidavits, and other documentary proof.

(2) *Action by OED Director.* Upon issuance of a finding of probable cause, the OED Director shall file a motion provided for in paragraph (c) of this section with the hearing officer. A copy of the motion shall be served on the practitioner in accordance with § 11.35, and upon the practitioner's guardian, if any and known.

(3) *Response by Practitioner.* The practitioner may respond with a motion in accordance with paragraph (c) of this section. The hearing officer will otherwise follow the procedures set forth in §§ 11.37 through 11.54.

(4) *Initial decision by the hearing officer.* The hearing officer shall urge a practitioner who is not represented by counsel to obtain counsel of his or her own choice to represent the practitioner if it is determined that the practitioner is without adequate representation. The hearing officer shall enter a recommendation to grant or deny the OED Director's motion based on the affidavits and other documentary proof of the parties, unless the hearing officer determines that there is a genuine issue concerning one or more of the material facts, and issues an order for an evidentiary hearing. A copy of the hearing officer's recommendation shall be served on the practitioner, the practitioner's guardian, if any, and the OED Director.

(5) *Appeal.* The OED Director or practitioner may, as a matter of right, appeal the hearing officer's recommendation in accordance with the provisions of § 11.55.

(6) *Action by USPTO Director.* When a practitioner has been judicially declared to be mentally incompetent or has been involuntarily committed to a mental hospital as an inpatient, the USPTO Director, upon proper proof of that fact, shall enter an order directing that the practitioner's name be transferred to disability inactive status, and that the practitioner cease practicing before the Office in patent, trademark, and other non-patent law effective immediately and for an indefinite period of time until further ordered by the USPTO Director. A copy of the order shall be served upon the practitioner's guardian or counsel, or in the absence thereof, upon the practitioner and the director of the mental hospital, if any, in such manner as the USPTO Director may direct. If at any time thereafter the practitioner is

judicially declared to be competent or discharged from inpatient status in the mental hospital, the USPTO Director may dispense with further evidence that the disability has ended and may direct the reinstatement of the practitioner's former recognition or registration upon such terms as is deemed appropriate. In a case of addiction to drugs or intoxicants, the USPTO Director alternatively may consider the possibility of probationary conditions.

(g) *Self-reported incapacitation due to disability or addiction; no intent to continue representation.*—(1) *OED Director's request.* If the OED Director receives from a practitioner or the practitioner's guardian either a written acknowledgment of the practitioner or guardian confirming the existence of the alleged disability or addiction, and otherwise showing the practitioner is incapacitated as alleged, or a report of an examination by one or more qualified medical experts providing reason to believe that a practitioner is incapacitated from continuing to practice before the Office because of disability or addiction, and the practitioner does not intend to offer or attempt to perform legal services while so incapacitated, the OED Director shall petition the USPTO Director for an order directing that the practitioner's name be transferred to disability inactive status, and that the practitioner cease practicing before the Office in patent, trademark, and other non-patent law effective immediately and for an indefinite period of time until further ordered by the USPTO Director. In the case of addiction to drugs or intoxicants, the OED Director may petition the USPTO Director to prohibit reinstatement absent satisfaction of specified conditions.

(2) *Action by the USPTO Director.* When a practitioner is incapacitated from continuing to practice before the Office because of disability or addiction, and reports the same to the OED Director, the USPTO Director, upon proper proof of that disability or addiction, shall enter an order directing that the practitioner's name be transferred to disability inactive status, and that the practitioner cease practicing before the Office in patent, trademark, and other non-patent law effective immediately and for an indefinite period of time until further ordered by the USPTO Director. A copy of the order shall be served upon the practitioner, and the practitioner's guardian, if any, in such manner as the USPTO Director may direct. In a case of addiction to drugs or intoxicants, the USPTO Director may prohibit reinstatement absent satisfaction of specified conditions.

(h) *Holding in abeyance a disciplinary proceeding because of disability or addiction.*—(1) *Practitioner's motion.* In the course of a disciplinary proceeding under § 11.32, but before an initial decision is mailed, the practitioner therein may file a motion requesting the hearing officer to enter an order holding such proceeding in abeyance based on the contention that the practitioner is suffering from a disability or addiction that makes it impossible for the practitioner to adequately defend the charges in the disciplinary proceeding. The practitioner's motion shall be accompanied by all pertinent medical records and in all cases must include a signed form acknowledging the alleged incapacity by reason of disability or addiction.

(2) *Disposition of practitioner's motion.* The hearing officer shall decide the motion and any response thereto. If the motion satisfies paragraph (h)(1) of this section, the hearing officer shall:

(i) Enter a temporary order holding the disciplinary proceeding in abeyance (but not any investigation instituted by the OED Director with respect to the practitioner);

(ii) Submit to the USPTO Director a report that includes a petition, prepared by the OED Director, seeking from the USPTO Director an order immediately transferring the practitioner to disability inactive status and otherwise precluding the practitioner from practice before the Office in patent, trademark and other non-patent law until a determination is made of the practitioner's capability to resume practice before the Office in a proceeding instituted by the practitioner under paragraph (h)(2)(i) of this section; and

(iii) If the OED Director raises a genuine issue as to any material fact concerning the practitioner's self-alleged disability or addiction, to enter an order referring such issue(s) to the hearing officer for an evidentiary hearing pursuant to paragraph (e) of this section. The temporary abeyance order shall remain in effect until a determination is made by the hearing officer that the practitioner is not incapacitated and that resumption of the matters held in abeyance would be proper and advisable.

(i) *Determination of practitioner's recovery and removal of disability or addiction.*—(1) *Scope of rule.* This section applies to disability matters involving allegations that a practitioner's prior disability or addiction has been removed, including proceedings for reactivation or for resumption of disciplinary matters being held in abeyance.

(2) *Reactivation.* Any practitioner transferred to disability inactive status for incapacity by reason of disability or addiction shall be entitled to file a motion for reactivation once a year beginning at any time not less than one year after the initial effective date of suspension, or once during any shorter interval provided by the USPTO Director's order of suspension or any modification thereof. In addition to complying with all applicable rules, such motion shall conform to the requirements of paragraph (f)(3) of this section, and include all alleged facts showing that the practitioner's disability or addiction has been removed and that the practitioner is fit to resume practice before the Office.

(3) *Contents of motion for reactivation.* A motion for reactivation alleging that a practitioner has recovered from a prior disability or addiction shall be accompanied by all available medical reports or similar documents relating thereto and shall also include allegations specifically addressing the following matters:

(i) The nature of the prior disability or addiction, including its beginning date and the most recent date (both dates approximate if necessary) on which the practitioner was still afflicted with the prior disability;

(ii) The relationship between the prior disability or addiction and the practitioner's incapacity to continue to practice before the Office during the period of such prior disability or addiction;

(iii) In the case of prior addiction, for an appropriate prior period (including the entire period following any suspension thereof), the dates or period (approximate if necessary) for each and every occasion on or during which the practitioner used any drugs or intoxicants having the potential to impair the practitioner's capacity to practice before the Office, whether or not such capacity was in fact impaired;

(iv) A brief description of the supporting medical evidence (including names of medical or other experts) that the practitioner expects to submit in support of the alleged recovery and rehabilitation;

(v) A written statement disclosing the name of every medical expert (such as psychiatrist, psychologist, or physician) or other expert and hospital by whom or in which the practitioner has been examined or treated during the period since the date of suspension for disability or addiction;

(vi) The practitioner's written consent, to be provided to each medical

or other expert or hospital identified in paragraph (i)(3)(v) of this section, to divulge such information and records as may be required by any medical experts who are appointed by the hearing officer or who examine the practitioner pursuant to his or her consent at the OED Director's request; and

(vii) The practitioner's written consent (without further order from a hearing officer, the USPTO Director, or the OED Director) to submit to an examination of qualified medical experts (at the practitioner's expense) if so requested by the OED Director.

(4) *Resumption of disciplinary proceeding held in abeyance.* The OED Director may file a motion requesting the hearing officer to terminate a prior order holding in abeyance any pending proceeding because of the practitioner's disability or addiction. The hearing officer shall decide the matter presented by the OED Director motion hereunder based on the affidavits and other admissible evidence attached to the OED Director's motion or the practitioner's response. If there is any genuine issue as to one or more material facts, the hearing officer will hold an evidentiary hearing in which the following procedures shall apply:

(i) If the prior order of abeyance was based solely on the practitioner's self-alleged contention of disability or addiction, the OED Director's motion under paragraph (e)(1) of this section shall operate as a show cause order placing the burden on the practitioner to establish by a preponderance of the evidence that the prior self-alleged disability or addiction continues to make it impossible for the practitioner to defend himself/herself in the underlying proceeding being held in abeyance; and

(ii) If such prior order of abeyance was based on a finding supported by affirmative evidence of the practitioner's disability or addiction, the burden shall be on the OED Director to establish by a preponderance of the evidence that the prior evidence of disability or addiction was erroneous or that the practitioner's disability or addiction has been removed and full recovery therefrom has been achieved.

(j) *Action by the hearing officer when practitioner is not incapacitated.* If, in the course of a proceeding under this section or a disciplinary proceeding, the hearing officer determines that the practitioner is not incapacitated from defending himself/herself, or is not incapacitated from practicing before the Office, the hearing officer shall take such action as is deemed appropriate, including the entry of an order directing the resumption of the disciplinary proceeding against the practitioner.

§§ 11.29–11.31 [Reserved]

§ 11.32 Initiating a disciplinary proceeding; reference to a hearing officer.

If after conducting an investigation under § 11.22(a) the OED Director is of the opinion that a practitioner has violated an imperative USPTO Rule of Professional Conduct, or that an other individual (*see* § 11.19(a)(2)) has violated any of §§ 11.303(a)(1), 11.304, 11.305(a), or 11.804, the OED Director, except for complying with the provisions of §§ 27 or 28 for a practitioner, shall, after complying where necessary with the provisions of 5 U.S.C. 558(c), call a meeting of a panel of the Committee on Discipline. The panel of the Committee on Discipline shall then determine as specified in § 11.23(b) whether a disciplinary proceeding shall be instituted under paragraph (b) of this section. If the panel of the Committee on Discipline determines that probable cause exists to believe that a Rule of Professional Conduct has been violated, the OED Director shall institute a disciplinary proceeding by filing a complaint under § 11.34. The complaint shall be filed in the Office of the USPTO Director. A disciplinary proceeding may result in a reprimand, or suspension or exclusion of a practitioner from practice before the Office. Upon the filing of a complaint under § 11.34, the USPTO Director will refer the disciplinary proceeding to a hearing officer.

§ 11.33 [Reserved]

§ 11.34 Complaint.

(a) A complaint instituting a disciplinary proceeding shall:

(1) Name the practitioner or other individual (*see* § 11.19(a)(2)) who may then be referred to as the ''respondent'';

(2) Give a plain and concise description of the respondent's alleged violations of the imperative USPTO Rules of Professional Conduct;

(3) State the place and time, not less than thirty days from the date the complaint is filed, for filing an answer by the respondent;

(4) State that a decision by default may be entered if an answer is not timely filed by the respondent; and

(5) Be signed by the OED Director.

(b) A complaint will be deemed sufficient if it fairly informs the respondent of any violation of the imperative USPTO Rules of Professional Conduct that form the basis for the disciplinary proceeding so that the respondent is able to adequately prepare a defense. If supported by the facts presented to the Committee on Discipline, the complaint may include alleged violations even if the specific violations were not in the finding of the probable cause decision.

§ 11.35 Service of complaint.

(a) A complaint may be served on a respondent in any of the following methods:

(1) By delivering a copy of the complaint personally to the respondent, in which case the individual who gives the complaint to the respondent shall file an affidavit with the OED Director indicating the time and place the complaint was handed to the respondent.

(i) A respondent who is a registered practitioner at the address for which separate notice was last received by the OED Director, or

(ii) A respondent who is a nonregistered practitioner at the last address for the respondent known to the OED Director.

(3) By any method mutually agreeable to the OED Director and the respondent.

(4) In the case of a respondent who resides outside the United States, by sending a copy of the complaint by any delivery service that provides ability to electronically follow the progress of delivery or attempted delivery, to:

(i) A respondent who is a registered practitioner at the last address for which separate notice was last received by the OED Director; or

(ii) A respondent who is a nonregistered practitioner at the last address for the respondent known to the OED Director.

(5) In the case of a respondent being an other individual (*see* § 11.19(a)(2)) by sending a copy of the complaint by any delivery service providing tracking and delivery or attempted delivery records, including the U.S. Postal Service to:

(i) The last address for the other individual (*see* § 11.19(a)(2)) for which notice was last received by the Office in an application; or

(ii) At the last address for the other individual (*see* § 11.19(a)(2)) known to OED; or

(b) If a copy of the complaint cannot be delivered to the respondent through any one of the procedures in paragraph (a) of this section, the OED Director shall serve the respondent by causing an appropriate notice to be published in the Official Gazette for two consecutive weeks, in which case the time for filing an answer shall be thirty days from the second publication of the notice. Failure to timely file an answer will constitute an admission of the allegations in the complaint in accordance with paragraph

(d) of § 11.34, and the hearing officer may enter an initial decision on default.

(c) If the respondent is known to the OED Director to be represented by an attorney under § 11.40(a), a copy of the complaint shall also be served on the attorney in the manner provided for in paragraph (a) or (b) of this section, in addition to the complaint being served on respondent.

§ 11.36 Answer to complaint.

(a) *Time for answer.* An answer to a complaint shall be filed within the time set in the complaint that shall be not less than thirty days.

(b) *With whom filed.* The answer shall be filed in writing with the hearing officer. The hearing officer may extend the time for filing an answer once for a period of no more than thirty days upon a showing of good cause, provided a motion requesting an extension of time is filed within thirty days after the date the complaint is served on respondent. A copy of the answer shall be served on the OED Director.

(c) *Content.* The respondent shall include in the answer a statement of the facts that constitute the grounds of defense and shall specifically admit or deny each allegation set forth in the complaint. The respondent shall not deny a material allegation in the complaint that the respondent knows to be true or state that respondent is without sufficient information to form a belief as to the truth of an allegation when in fact the respondent possesses that information. The respondent shall also state affirmatively special matters of defense.

(d) *Failure to deny allegations in complaint.* Every allegation in the complaint that is not denied by a respondent in the answer shall be deemed to be admitted and may be considered proven. The hearing officer at any hearing need receive no further evidence in respect of that allegation. Failure to timely file an answer will constitute an admission of the allegations in the complaint, and may result in entry of default judgment.

(e) *Reply by the OED Director.* No reply to an answer is required by the OED Director unless ordered by the hearing officer, and any affirmative defense in the answer shall be deemed to be denied. The OED Director may, however, file a reply if he or she chooses.

(f) *Notice of intent to raise disability in mitigation.*—(1) *Respondent's notice.* If respondent intends to raise an alleged disability in mitigation pursuant to § 11.28, respondent shall file by delivery to the OED Director and hearing officer notice of said allegation no later than the date that the answer to the complaint is due. The notice shall specify the disability, its nexus to the misconduct, and the reason it provides mitigation. Failure to deliver the notice of intent to raise an alleged disability in mitigation shall operate as a waiver of the right to raise an alleged disability in mitigation, subject to the provisions of paragraph (f)(3) of this section.

(2) *Conditions of practice.* If a respondent files a notice pursuant to paragraph (f)(1) of this section, the hearing officer, after providing the OED Director with an opportunity to reply to said notice, shall forthwith issue an order providing for appropriate conditions under which the respondent shall practice before the Office. Said order may include the appointment of monitor(s) depending upon the particular circumstances of the case.

(i) *Monitors.* Should the hearing officer appoint monitors, the monitor(s) shall report to the hearing officer and OED Director on a periodic basis to be determined by the hearing officer. The monitoring shall remain in effect during the pendency of the disciplinary proceeding or until order of the USPTO Director. The monitor(s) shall respond to the OED Director's inquiries concerning such monitoring and may be called by the OED Director or respondent to testify regarding sanctions.

(ii) *Waiver.* The filing of the notice pursuant to paragraph (f)(1) of this section is deemed to constitute a waiver by respondent of any claim of the right to withhold from the OED Director information coming to the attention of a monitor.

(3) *Late-filed notice.*—(i) *Notice filed 30 or more days before scheduled hearing.* If respondent wishes to raise an alleged disability in mitigation after the date prescribed in paragraph (f)(1) of this section, but no later than 30 days before the date scheduled by the hearing officer for the hearing, respondent shall file a motion with the hearing officer, on notice to the OED Director, setting forth good cause why respondent should be allowed to raise a plea in mitigation out of time. The OED Director may consent in writing to the grant of the motion. The hearing officer may grant or deny the motion, with or without an evidentiary hearing. Leave to assert the plea in mitigation shall be freely granted when justice so requires, and in the absence of a showing of prejudice by the OED Director. An order by the hearing officer granting such a motion may include the provisions in paragraphs (f)(2), (f)(2)(i), and (f)(2)(ii) of this section, or, in circumstances where the hearing officer determines it to be just and appropriate, may be conditioned upon respondent's consent to an interim suspension pending disposition of the disciplinary proceeding.

(ii) *Notice filed within 30 days after scheduled hearing.* If a respondent wishes to raise an alleged disability in mitigation after the date prescribed in paragraph (f)(3)(i) of this section, respondent shall file a motion with the hearing officer, containing the showing prescribed in paragraph (f)(3)(i) of this section; however, such a motion will be granted only on the condition that respondent consent to an interim suspension pending disposition of the disciplinary proceeding.

(4) *Violations of conditions of practice.* If a monitor reports that respondent has violated a term or condition under which respondent is continuing to practice, the OED Director may request the hearing officer to schedule the matter for a hearing on the issue of whether the monitoring shall be lifted, and respondent suspended, pending final disposition of the disciplinary proceeding.

(5) *Motion to vacate or modify suspension.* A respondent suspended pursuant to paragraphs (f)(3)(i) or (f)(4) of this section may file a motion at any time with the hearing officer to vacate or modify the suspension. If respondent's motion presents a prima facie case that respondent is significantly rehabilitated from the alleged disability, the matter will be considered by the hearing officer at an evidentiary hearing on the issue of rehabilitation. Reinstatement pursuant to this paragraph shall be subject to monitoring and waiver provisions of paragraphs (f)(2), (f)(2)(i), and (f)(2)(ii) of this section. Respondent shall have the burden of proving, by clear and convincing evidence, significant rehabilitation from the alleged disability.

§ 11.37 Supplemental complaint.

False statements in an answer, motion, notice, or other filed communication may be made the basis of a supplemental complaint.

§ 11.38 Contested case.

Upon the filing of an answer by the respondent, a disciplinary proceeding shall be regarded as a contested case within the meaning of 35 U.S.C. 24. Evidence obtained by a subpoena issued under 35 U.S.C. 24 shall not be admitted into the record or considered unless leave to proceed under 35 U.S.C. 24 was previously authorized by the hearing officer.

§ 11.39 Hearing officer; appointment; responsibilities; review of interlocutory orders; stays.

(a) *Appointment.* A hearing officer, appointed by the USPTO Director under 5 U.S.C. 3105 or 35 U.S.C. 32, shall conduct disability or disciplinary proceedings as provided by this part.

(b) *Independence of the Hearing Officer.* (1) A hearing officer appointed in accordance with paragraph (a) of this section shall not be subject to first level and second level supervision, review or direction of the USPTO Director.

(2) A hearing officer appointed in accordance with paragraph (a)(1) of this section shall not be subject to supervision, review or direction of the person(s) investigating or prosecuting the case.

(3) A hearing officer appointed in accordance with paragraph (a)(1) of this section shall be impartial, shall not be an individual who has participated in any manner in the decision to initiate the proceedings, and shall not have been employed under the immediate supervision of the practitioner.

(4) A hearing officer appointed in accordance with paragraph (a) of this section shall be admitted to practice law and have suitable experience and training to conduct the hearing, reach a determination and render an initial decision in an equitable manner.

(c) *Responsibilities.* The hearing officer shall have authority, consistent with specific provisions of these regulations, to:

(1) Administer oaths and affirmations;

(2) Make rulings upon motions and other requests;

(3) Rule upon offers of proof, receive relevant evidence, and examine witnesses;

(4) Authorize the taking of a deposition of a witness in lieu of personal appearance of the witness before the hearing officer;

(5) Determine the time and place of any hearing and regulate its course and conduct;

(6) Hold or provide for the holding of conferences to settle or simplify the issues;

(7) Receive and consider oral or written arguments on facts or law;

(8) Adopt procedures and modify procedures from time-to-time as occasion requires for the orderly disposition of proceedings;

(9) Make initial decisions under §§ 11.24, 11.25, and 11.154;

(10) Engage in no ex parte discussions with any party on the merits of the complaint, beginning with appointment and until the final agency decision is issued; and

(11) Perform acts and take measures as necessary to promote the efficient, timely and impartial conduct of any disciplinary proceeding.

(d) *Time for making initial decision.* The hearing officer shall set times and exercise control over a disciplinary proceeding such that an initial decision under § 11.54 is normally issued within nine months of the date a complaint is filed. The hearing officer may, however, issue an initial decision more than nine months after a complaint is filed if in his or her opinion there exist unusual circumstances which preclude issuance of an initial decision within nine months of the filing of the complaint.

(e) *Review of interlocutory orders.* The USPTO Director will not review an interlocutory order of a hearing officer except:

(1) When the hearing officer shall be of the opinion:

(i) That the interlocutory order involves a controlling question of procedure or law as to which there is a substantial ground for a difference of opinion, and

(ii) That an immediate decision by the USPTO Director may materially advance the ultimate termination of the disciplinary proceeding, or

(2) In an extraordinary situation where the USPTO Director deems that justice requires review.

(f) *Stays pending review of interlocutory order.* If the OED Director or a respondent seeks review of an interlocutory order of a hearing officer under paragraph (b)(2) of this section, any time period set for taking action by the hearing officer shall not be stayed unless ordered by the USPTO Director or the hearing officer.

§ 11.40 Representative for OED Director or respondent.

(a) A respondent may represent himself or herself, or be represented by an attorney before the Office in connection with an investigation or disciplinary proceeding. The attorney shall file a written declaration that he or she is an attorney within the meaning of § 11.1(e) and shall state:

(1) The address to which the attorney wants correspondence related to the investigation or disciplinary proceeding sent, and

(2) A telephone number where the attorney may be reached during normal business hours.

(b) The USPTO Director shall designate at least two disciplinary attorneys under the aegis of the General Counsel to act as representatives for the OED Director. The disciplinary attorneys prosecuting disciplinary proceedings shall not consult with the General Counsel and the Deputy General Counsel for General Law regarding the proceeding. The General Counsel and the Deputy General Counsel for General Law shall remain insulated from the investigation and prosecution of all disciplinary proceedings in order that they shall be available as counsel to the USPTO Director in deciding disciplinary proceedings. However, the Deputy General Counsel for Intellectual Property Law and Solicitor shall not remain insulated from the investigation and prosecution of disciplinary proceedings, and thus shall not be available to counsel the USPTO Director in deciding such proceedings.

(c) Upon serving a complaint pursuant to § 11.34, the members of the Committee on Discipline, and the disciplinary attorneys prosecuting a disciplinary proceeding shall not participate in rendering a decision on the charges contained in the complaint.

§ 11.41 Filing of papers.

(a) The provisions of § 1.8 of this subchapter do not apply to disciplinary proceedings. All papers filed after the complaint and prior to entry of an initial decision by the hearing officer shall be filed with the hearing officer at an address or place designated by the hearing officer.

(b) All papers filed after entry of an initial decision by the hearing officer shall be filed with the USPTO Director. A copy of the paper shall be served on the OED Director. The hearing officer or the OED Director may provide for filing papers and other matters by hand, by ''Express Mail,'' or by facsimile followed in a specified time by the original hard copy.

§ 11.42 Service of papers.

(a) All papers other than a complaint shall be served on a respondent who is represented by an attorney by:

(1) Delivering a copy of the paper to the office of the attorney; or

(2) Mailing a copy of the paper by first-class mail, ''Express Mail,'' or other delivery service to the attorney at the address provided by the attorney under § 11.40(a)(1); or

(3) Any other method mutually agreeable to the attorney and a representative for the OED Director.

(b) All papers other than a complaint shall be served on a respondent who is not represented by an attorney by:

(1) Delivering a copy of the paper to the respondent; or

(2) Mailing a copy of the paper by first-class mail, ''Express Mail,'' or other delivery service to the respondent at the address to which a complaint may be served or such other address as may be

designated in writing by the respondent; or

(3) Any other method mutually agreeable to the respondent and a representative of the OED Director.

(c) A respondent shall serve on the representative for the OED Director one copy of each paper filed with the hearing officer or the OED Director. A paper may be served on the representative for the OED Director by:

(1) Delivering a copy of the paper to the representative; or

(2) Mailing a copy of the paper by first-class mail, ''Express Mail,'' or other delivery service to an address designated in writing by the representative; or

(3) Any other method mutually agreeable to the respondent and the representative.

(d) Each paper filed in a disciplinary proceeding shall contain therein a certificate of service indicating:

(1) The date of which service was made; and

(2) The method by which service was made.

(e) The hearing officer or the USPTO Director may require that a paper be served by hand or by ''Express Mail.''

(f) Service by mail is completed when the paper mailed in the United States is placed into the custody of the U.S. Postal Service.

§ 11.43 Motions.

Motions may be filed with the hearing officer. The hearing officer will determine on a case-by-case basis the time period for response to a motion and whether replies to responses will be authorized. No motion shall be filed with the hearing officer unless such motion is supported by a written statement by the moving party that the moving party or attorney for the moving party has conferred with the opposing party or attorney for the opposing party in an effort in good faith to resolve by agreement the issues raised by the motion and has been unable to reach agreement. If the parties prior to a decision on the motion resolve issues raised by a motion by the hearing officer, the parties shall promptly notify the hearing officer.

§ 11.44 Hearings.

(a) The hearing officer shall preside at hearings in disciplinary proceedings. The hearing officer shall set time and place for a hearing. In setting a time and place, the hearing officer shall normally give preference to a Federal facility in the district where the Office's principal office is located or Washington, DC, for all respondents recognized or registered to practice before the Office, and otherwise shall give due regard to the convenience and necessity of the parties or their representatives. In cases involving an incarcerated respondent, any necessary oral hearing may be held at the location of incarceration. Oral hearings will be stenographically recorded and transcribed, and the testimony of witnesses will be received under oath or affirmation. The hearing officer shall conduct hearings in accordance with 5 U.S.C. 556. A copy of the transcript of the hearing shall become part of the record. A copy of the transcript shall be provided to the OED Director and the respondent at the expense of the Office.

(b) If the respondent to a disciplinary proceeding fails to appear at the hearing after a notice of hearing has been given by the hearing officer, the hearing officer may deem the respondent to have waived the right to a hearing and may proceed with the hearing in the absence of the respondent.

(c) A hearing under this section will not be open to the public except that the hearing officer may grant a request by a respondent to open his or her hearing to the public and make the record of the disciplinary proceeding available for public inspection, provided, Agreement is reached in advance to exclude from public disclosure information which is privileged or confidential under applicable laws or regulations. If a disciplinary proceeding results in disciplinary action against a practitioner, and subject to § 11.59(c), the record of the entire disciplinary proceeding, including any settlement agreement, will be available for public inspection.

§ 11.45 Proof; variance; amendment of pleadings.

Whenever in the course of a hearing evidence is presented upon which another charge or charges against the respondent might be made, it shall not be necessary for the Committee on Discipline to find probable cause based on an additional charge or charges on the respondent, but with the consent of the hearing officer, the OED Director shall provide respondent with reasonable notice and an opportunity to be heard, and the hearing officer shall proceed to consider such additional charge or charges as if the same had been made and served at the time of the service of the original charge or charges. Any party who would otherwise be prejudiced by the amendment will be given reasonable opportunity to meet the allegations in the complaint, answer, or reply, as amended, and the hearing officer shall make findings on any issue presented by the complaint, answer, or reply as amended.

§§ 11.46–11.48 [Reserved]

§ 11.49 Burden of proof.

In a disciplinary proceeding, the OED Director shall have the burden of proving his or her case by clear and convincing evidence and a respondent shall have the burden of proving any affirmative defense by clear and convincing evidence.

§ 11.50 Evidence.

(a) *Rules of evidence.* The rules of evidence prevailing in courts of law and equity are not controlling in hearings in disciplinary proceedings. However, the hearing officer shall exclude evidence that is irrelevant, immaterial, or unduly repetitious.

(b) *Depositions.* Depositions of witnesses taken pursuant to Section 11.51 may be admitted as evidence.

(c) *Government documents.* Official documents, records, and papers of the Office, including all papers collected during the disciplinary investigation, are admissible without extrinsic evidence of authenticity. These documents, records, and papers may be evidenced by a copy certified as correct by an employee of the Office.

(d) *Exhibits.* If any document, record, or other paper is introduced in evidence as an exhibit, the hearing officer may authorize the withdrawal of the exhibit subject to any conditions the hearing officer deems appropriate.

(e) *Objections.* Objections to evidence will be in short form, stating the grounds of objection. Objections and rulings on objections will be a part of the record. No exception to the ruling is necessary to preserve the rights of the parties.

§ 11.51 Depositions.

(a) Depositions for use at the hearing in lieu of personal appearance of a witness before the hearing officer may be taken by respondent or the OED Director upon a showing of good cause and with the approval of, and under such conditions as may be deemed appropriate by, the hearing officer. Depositions may be taken upon oral or written questions, upon not less than ten days' written notice to the other party, before any officer authorized to administer an oath or affirmation in the place where the deposition is to be taken. The parties may waive the requirement of ten days' notice and depositions may then be taken of a witness at a time and place mutually agreed to by the parties. When a deposition is taken upon written questions, copies of the written

questions will be served upon the other party with the notice and copies of any written cross-questions will be served by hand or ''Express Mail'' not less than five days before the date of the taking of the deposition unless the parties mutually agree otherwise. A party on whose behalf a deposition is taken shall file a copy of a transcript of the deposition signed by a court reporter with the hearing officer and shall serve one copy upon the opposing party. Expenses for a court reporter and preparing, serving, and filing depositions shall be borne by the party at whose instance the deposition is taken. Depositions may not be taken to obtain discovery.

(b) When the OED Director and the respondent agree in writing, a deposition of any witness who will appear voluntarily may be taken under such terms and conditions as may be mutually agreeable to the OED Director and the respondent. The deposition shall not be filed with the hearing officer and may not be admitted in evidence before the hearing officer unless he or she orders the deposition admitted in evidence. The admissibility of the deposition shall lie within the discretion of the hearing officer who may reject the deposition on any reasonable basis including the fact that demeanor is involved and that the witness should have been called to appear personally before the hearing officer.

§ 11.52 Discovery.

Discovery shall not be authorized except as follows.

(a) After an answer is filed under § 11.36 and when a party establishes in a clear and convincing manner that discovery is necessary and relevant, the hearing officer, under such conditions as he or she deems appropriate, may order an opposing party to:

(1) Answer a reasonable number of written requests for admission or interrogatories;

(2) Produce for inspection and copying a reasonable number of documents; and

(3) Produce for inspection a reasonable number of things other than documents.

(b) Discovery shall not be authorized under paragraph (a) of this section of any matter which:

(1) Will be used by another party solely for impeachment or cross-examination;

(2) Is not available to the party under 35 U.S.C. 122;

(3) Relates to any disciplinary proceeding commenced in the Office prior to March 8, 1985;

(4) Relates to experts except as the hearing officer may require under paragraph (e) of this section.

(5) Is privileged; or

(6) Relates to mental impressions, conclusions, opinions, or legal theories of any attorney or other representative of a party.

(c) The hearing officer may deny discovery requested under paragraph (a) of this section if the discovery sought:

(1) Will unduly delay the disciplinary proceeding;

(2) Will place an undue burden on the party required to produce the discovery sought; or

(3) Is available:

(i) Generally to the public;

(ii) Equally to the parties; or

(iii) To the party seeking the discovery through another source.

(d) Prior to authorizing discovery under paragraph (a) of this section, the hearing officer shall require the party seeking discovery to file a motion (§ 11.43) and explain in detail for each request made how the discovery sought is necessary and relevant to an issue actually raised in the complaint or the answer.

(e) The hearing officer may require parties to file and serve, prior to any hearing, a pre-hearing statement that contains:

(1) A list (together with a copy) of all proposed exhibits to be used in connection with a party's case-in-chief;

(2) A list of proposed witnesses;

(3) As to each proposed expert witness:

(i) An identification of the field in which the individual will be qualified as an expert;

(ii) A statement as to the subject matter on which the expert is expected to testify; and

(iii) A statement of the substance of the facts and opinions to which the expert is expected to testify;

(4) The identity of Government employees who have investigated the case; and

(5) Copies of memoranda reflecting respondent's own statements to administrative representatives.

(f) After a witness testifies for a party, if the opposing party requests, the party may be required to produce, prior to cross-examination, any written statement made by the witness.

§ 11.53 Proposed findings and conclusions; post-hearing memorandum.

Except in cases in which the respondent has failed to answer the complaint or amended complaint, the hearing officer, prior to making an initial decision, shall afford the parties a reasonable opportunity to submit proposed findings and conclusions and a post-hearing memorandum in support of the proposed findings and conclusions.

§ 11.54 Initial decision of hearing officer.

(a) The hearing officer shall make an initial decision in the case. The decision will include:

(1) A statement of findings and conclusions, as well as the reasons or basis therefor with appropriate references to the record, upon all the material issues of fact, law, or discretion presented on the record, and

(2) An order of suspension or exclusion from practice, an order of reprimand, or an order dismissing the complaint. The hearing officer shall transmit a copy of the decision to the OED Director and to the respondent. After issuing the decision, the hearing officer shall transmit the entire record to the OED Director. In the absence of an appeal to the USPTO Director, the decision of the hearing officer will, without further proceedings, become the decision of the USPTO Director thirty (30) days from the date of the decision of the hearing officer.

(b) The initial decision of the hearing officer shall explain the reason for any reprimand, suspension or exclusion. In determining any sanction, the following should normally be considered:

(1) The public interest;

(2) The seriousness of the violation of the imperative USPTO Rules of Professional Conduct;

(3) The deterrent effects deemed necessary;

(4) The integrity of the legal and patent professions; and

(5) Any extenuating circumstances.

§ 11.55 Appeal to the USPTO Director.

(a) Within thirty (30) days from the date of the initial decision of the hearing officer under §§ 11.28, or 11.54, either party may appeal to the USPTO Director. The appeal shall include the appellant's brief. If an appeal is taken, the time for filing a cross-appeal shall expire 14 days after the date of service of the appeal pursuant to § 11.42, or 30 days after the date of the initial decision of the hearing officer, whichever is later. The cross-appeal shall include the cross appellant's brief. An appeal or cross-appeal by the respondent will be filed with the USPTO Director and served on the OED Director, and will include exceptions to the decisions of the hearing officer and supporting reasons for those exceptions. All briefs must include a separate section containing a concise statement of the disputed facts and disputed points of law. Any issue not raised in the concise statement of

disputed facts and disputed points of law will be deemed to have been abandoned by the appellant and may be disregarded by the USPTO Director in reviewing the initial determination, unless the USPTO Director chooses to review the issue on his or her own initiative under § 11.56. If the OED Director, through his or her representative, files the appeal or cross-appeal, the OED Director shall serve on the other party a copy of the appeal or cross-appeal. The other party to an appeal or cross-appeal may file a reply brief. A copy of respondent's reply brief shall be served on the OED Director. The time for filing any reply brief expires thirty (30) days after the date of service pursuant to § 11.42 of an appeal, cross-appeal or copy thereof. If the OED Director files the reply brief, the OED Director shall serve on the other party a copy of the reply brief. Upon the filing of an appeal, cross-appeal, if any, and reply briefs, if any, the OED Director shall transmit the entire record to the USPTO Director. Unless the USPTO Director permits, no further briefs or motions shall be filed.

(b) An appellant's or cross-appellant's brief shall be no more than 30 pages in length on 8½ by 11-inch paper, and shall comply with Rule 28(A)(2), (3), and (5) through (10), and Rule 32(a)(4), (5), (6), and (7) of the Federal Rules of Appellate Procedure. An appellee's or cross appellee's reply brief shall be no more than 15 pages in length on 8½ by 11-inch paper, and shall comply with Rule 28(A)(2), (3), (8), and (9), and Rule 32(a)(4), (5), (6), and (7) of the Federal Rules of Appellate Procedure. If a cross-appeal is filed, the party who files an appeal first is the appellant for purposes of this rule. If appeals are filed on the same day, the respondent is the appellant. The USPTO Director may refuse entry of a nonconforming brief.

(c) The USPTO Director will decide the appeal on the record made before the hearing officer.

(d) The USPTO Director may order reopening of a disciplinary proceeding in accordance with the principles that govern the granting of new trials. Any request to reopen a disciplinary proceeding on the basis of newly discovered evidence must demonstrate that the newly discovered evidence could not have been discovered by due diligence.

(e) In the absence of an appeal by the OED Director, failure by the respondent to appeal under the provisions of this section shall be deemed to be both acceptance by the respondent of the initial decision and waiver by the respondent of the right to further administrative or judicial review.

§ 11.56 Decision of the USPTO Director.

(a) The USPTO Director shall decide an appeal from an initial decision of the hearing officer. The USPTO Director may affirm, reverse, or modify the initial decision or remand the matter to the hearing officer for such further proceedings as the USPTO Director may deem appropriate. In making a final decision, the USPTO Director shall review the record or the portions of the record designated by the parties. The USPTO Director shall transmit a copy of the final decision to the OED Director and to the respondent.

(b) A final decision of the USPTO Director may dismiss a disciplinary proceeding, reprimand a practitioner, or may suspend or exclude the practitioner from practice before the Office.

(c) The respondent or the OED Director may make a single request for reconsideration or modification of the decision by the USPTO Director if filed within 20 days from the date of entry of the decision. No request for reconsideration or modification shall be granted unless the request is based on newly discovered evidence, and the requestor must demonstrate that the newly discovered evidence could not have been discovered by due diligence. Such a request shall have the effect of staying the effective date of the order of discipline in the final decision. The decision by the USPTO Director is effective on its date of entry.

§ 11.57 Review of final decision of the USPTO Director.

(a) Review of the final decision by USPTO Director in a disciplinary case may be had, subject to § 11.55(d), by a petition filed in the United States District Court for the District of Columbia in accordance with the local rule of said court. 35 U.S.C. 32. The Respondent must serve the USPTO Director with the petition. Service upon the USPTO Director is effected (1) by delivering a copy of the petition by registered or certified mail or as otherwise authorized by law on the USPTO to: Director of the USPTO, Office of the General Counsel, United States Patent and Trademark Office, P.O. Box 15667, Arlington, VA 22215; or (2) by hand-delivering a copy of the petition during business hours to: Director of the USPTO, Office of the General Counsel, Crystal Park Two, Suite 905, 2121 Crystal Dr., Arlington, VA 22215.

(b) The USPTO Director may stay an order of discipline in the final decision pending review of the final decision of the USPTO Director.

§ 11.58 Suspended or excluded practitioner.

(a) A practitioner who is suspended or excluded under §§ 11.24, 11.25, 11.27, 11.55, or 11.56, or has resigned from practice before the Office under §§ 11.11(d) shall not engage in practice of patent, trademark and other non-patent law before the Office. No practitioner suspended or excluded under §§ 11.24, 11.25, 11.27, 11.55, or 11.56 will be automatically reinstated at the end of his or her period of suspension. A practitioner who is suspended or excluded, or who resigned under § 11.11(d) must comply with the provisions of this section and §§ 11.12 and 11.60 to be reinstated. Willful failure to comply with the provisions of this section constitutes grounds for denying a suspended or excluded practitioner's application for reinstatement or readmission. Willful failure to comply with the provisions of this section constitutes cause not only for denial of reinstatement, but also cause for further action, including seeking further exclusion, suspension, and for revocation of any pending probation.

(b) Unless otherwise ordered by the USPTO Director, any practitioner who is suspended or excluded from practice before the Office under §§ 11.24, 11.25, 11.55, or 11.56, who has been excluded on consent under provisions of § 11.27, or whose notice of resignation has been accepted under § 11.11(d) shall:

(1) Within 20 days after the date of entry of the order of suspension, exclusion, or exclusion by consent, or of acceptance of resignation:

(i) File a notice of withdrawal as of the effective date of the suspension, exclusion, or exclusion by consent, or acceptance of resignation in each pending patent and trademark application, each pending reexamination and interference proceeding, and every other matter pending in the Office, together with a copy of the notices sent pursuant to paragraphs (b) and (c) of this section;

(ii) Provide notice to all bars of which the practitioner is a member and all clients on retainer having immediate or prospective business before the Office in patent, trademark and other non-patent matters, all clients the practitioner represents before the Office, and all clients having immediate or prospective business before the Office in patent, trademark and other non-patent matters of the order of suspension, exclusion, exclusion by consent, or resignation and of the practitioner's consequent inability to act as a practitioner after the effective date of the order; and that, if not represented by another practitioner, the

client should act promptly to substitute another practitioner, or to seek legal advice elsewhere, calling attention to any urgency arising from the circumstances of the case;

(iii) Provide notice to the practitioner(s) for all opposing parties (or, to the parties in the absence of a practitioner representing the parties) in matters pending before the Office that the practitioner has been excluded or suspended and, as a consequence, is disqualified from acting as a practitioner regarding matters before the Office after the effective date of the suspension, exclusion, exclusion by consent, or resignation, and state in the notice the mailing address of each client of the excluded or suspended attorney who is a party in the pending reexamination or interference matter;

(iv) Deliver to all clients having immediate or prospective business before the Office in patent, trademark or other non-patent matters any papers or other property to which the clients are entitled, or shall notify the clients and any co-practitioner of a suitable time when and place where the papers and other property may be obtained, calling attention to any urgency for obtaining the papers or other property;

(v) Refund any part of any fees paid in advance that has not been earned,

(vi) Close every client account, trust account, deposit account in the Office, or other fiduciary account to the extent the accounts have fees for practice before the Office, and properly disburse or otherwise transfer all client and fiduciary funds for practice before the Office in his or her possession, custody or control; and

(vii) Take any necessary and appropriate steps to remove from any telephone, legal, or other directory any advertisement, statement, or representation which would reasonably suggest that the practitioner is authorized to practice patent, trademark, or other non-patent law before the Office.

(viii) All notices required by paragraphs (b)(1)(i) through (b)(1)(vii) of this section shall be served by certified mail, return receipt requested, unless mailed abroad. If mailed abroad, all notices shall be served with a receipt to be signed and returned to the practitioner.

(2) Within 30 days after entry of the order of suspension, exclusion, or exclusion by consent, or of acceptance of resignation the practitioner shall file with the OED Director an affidavit certifying that the practitioner has fully complied with the provisions of the order, and with the imperative USPTO Rules of Professional Conduct. Appended to the affidavit of compliance shall be:

(i) A copy of each form of notice, the names and addressees of the clients, practitioners, courts, and agencies to which notices were sent, and all return receipts or returned mail received up to the date of the affidavit. Supplemental affidavits shall be filed covering subsequent return receipts and returned mail. Such names and addresses of clients shall remain confidential unless otherwise ordered by the USPTO Director;

(ii) A schedule showing the location, title and account number of every bank account designated as a client, trust, deposit account in the Office, or other fiduciary account, and of every account in which the practitioner holds or held as of the entry date of the order any client, trust, or fiduciary funds regarding practice before the Office;

(iii) A schedule describing the practitioner's disposition of all client and fiduciary funds in the practitioner's possession, custody or control as of the date of the order or thereafter;

(iv) Such proof of the proper distribution of said funds and the closing of such accounts as has been requested by the OED Director, including copies of checks and other instruments;

(v) A list of all other State, Federal, and administrative jurisdictions to which the practitioner is admitted to practice; and

(vi) An affidavit describing the precise nature of the steps taken to remove from any telephone, legal, or other directory any advertisement, statement, or representation which would reasonably suggest that the practitioner is authorized to practice patent, trademark, or other non-patent law before the Office. The affidavit shall also state the residence or other address of the practitioner to which communications may thereafter be directed, and list all State and Federal jurisdictions, and administrative agencies to which the practitioner is admitted to practice. The OED Director may require such additional proof as is deemed necessary. In addition, for five years following the effective date of the suspension, exclusion, exclusion by consent, a suspended, excluded, or excluded-on-consent practitioner shall continue to file a statement in accordance with § 11.11(a), regarding any change of residence or other address to which communications may thereafter be directed, so that the suspended, excluded, or excluded-on-consent practitioner may be located if a complaint is made about any conduct occurring before or after the exclusion or suspension. The practitioner shall retain copies of all notices sent and shall maintain complete records of the steps taken to comply with the notice requirements.

(3) Not hold himself or herself out as authorized to practice law before the Office.

(4) Not advertise the practitioner's availability or ability to perform or render legal services for any person having immediate or prospective business before the Office.

(5) Not render legal advice or services to any person having immediate or prospective business before the Office as to that business.

(6) Promptly take steps to change any sign identifying a practitioner's or the practitioner's firm's office and practitioner's or the practitioner's firm's stationery to delete therefrom any advertisement, statement, or representation which would reasonably suggest that the practitioner is authorized to practice law before the Office.

(c) *Effective date of discipline.* Except as provided in §§ 11.24, 11.25, and 11.28, an order of suspension, exclusion, or exclusion by consent shall be effective immediately upon entry unless the USPTO Director directs otherwise. The practitioner who is suspended, excluded, excluded-on-consent, or who has resigned, after entry of the order, shall not accept any new retainer regarding immediate, pending, or prospective business before the Office, or engage as a practitioner for another in any new case or legal matter regarding practice before the Office. The order shall grant limited recognition for a period of 30 days. During the 30-day period of limited recognition, the practitioner shall conclude other work on behalf of a client on any matters that were pending before the Office on the date of entry. If such work cannot be concluded, the practitioner shall so advise the client so that the client may make other arrangements.

(d) *Required records.* A practitioner who is suspended, excluded or excluded-on-consent, or who has resigned, other than a practitioner suspended under §§ 11.28 (c) or (d), shall keep and maintain records of the various steps taken under this section, so that in any subsequent proceeding proof of compliance with this section and with the exclusion or suspension order will be available. The OED Director will require the practitioner to submit such proof as a condition precedent to the granting of any petition for reinstatement. In the case of a practitioner suspended under §§ 11.28 (c) or (d), the USPTO Director shall

enter such order as may be required to compile and maintain all necessary records.

(e) A practitioner who is suspended, excluded, or excluded-on-consent, or who has resigned, and who aids another practitioner in any way in the other practitioner's practice of law before the Office, may, under the direct supervision of the other practitioner, act as a paralegal for the other practitioner or perform other services for the other practitioner which are normally performed by laypersons, provided:

(1) The practitioner who is suspended, excluded or excluded on consent, or who has resigned is:

(i) A salaried employee of:

(A) The other practitioner;

(B) The other practitioner's law firm; or

(C) A client-employer who employs the other practitioner as a salaried employee;

(2) The other practitioner assumes full professional responsibility to any client and the Office for any work performed by the practitioner who is suspended, excluded, or excluded-on-consent, or who has resigned for the other practitioner;

(3) The practitioner who is suspended, excluded, or excluded-on-consent, or who has resigned does not:

(i) Communicate directly in writing, orally, or otherwise with a client of the other practitioner in regard to any immediate, prospective, or pending business before the Office;

(ii) Render any legal advice or any legal services to a client of the other practitioner in regard to any immediate, prospective, or pending business before the Office; or

(iii) Meet in person or in the presence of the other practitioner in regard to any immediate, prospective, or pending business before the Office, with:

(A) Any Office official in connection with the prosecution of any patent, trademark, or other case;

(B) Any client of the other practitioner, the other practitioner's law firm, or the client-employer of the other practitioner; or

(C) Any witness or potential witness which the other practitioner, the other practitioner's law firm, or the other practitioner's client-employer may or intends to call as a witness in any proceeding before the Office. The term ''witness'' includes individuals who will testify orally in a proceeding before, or sign an affidavit or any other document to be filed in, the Office.

(f) When a practitioner who is suspended, excluded, or excluded-on-consent, or who has resigned, acts as a paralegal or performs services under paragraph (c) of this section, the practitioner shall not thereafter be reinstated to practice before the Office unless:

(1) The practitioner shall have filed with the OED Director an affidavit which:

(i) Explains in detail the precise nature of all paralegal or other services performed by the practitioner, and

(ii) Shows by clear and convincing evidence that the practitioner has complied with the provisions of this section and all imperative USPTO Rules of Professional Conduct; and

(2) The other practitioner shall have filed with the OED Director a written statement which

(i) Shows that the other practitioner has read the affidavit required by paragraph (d)(1) of this section and that the other practitioner believes every statement in the affidavit to be true, and

(ii) States why the other practitioner believes that the practitioner who is suspended, excluded, or excluded-on-consent, or who has resigned has complied with paragraph (c) of this section.

§ 11.59 Notice of suspension or exclusion.

(a) Upon issuance of an order reprimanding a practitioner or suspending, excluding, or excluding on consent a practitioner from practice before the Office, the OED Director shall give notice of the final decision to appropriate employees of the Office, to interested departments, agencies, and courts of the United States, and to the National Discipline Data Bank maintained by the American Bar Association Standing Committee on Professional Discipline. The OED Director shall also give notice to appropriate authorities of any State in which a practitioner is known to be a member of the bar and any appropriate bar association.

(b) *Publication of notices, orders, and decisions.* The OED Director shall cause to be published in the Official Gazette the name of every practitioner who is suspended, excluded, or excluded-on-consent, who resigns from practice, and who is transferred to disability inactive status. The order suspending, excluding, or excluding by consent a practitioner, or accepting resignation, and the decision by the USPTO Director, including an initial decision of a hearing officer under § 11.54(a) that becomes the decision of the USPTO Director, suspending or excluding a practitioner shall be published. Unless otherwise ordered by the USPTO Director, the OED Director shall publish in the Official Gazette the name of any practitioner reprimanded by the USPTO Director, as well as the order and any decision by the USPTO Director, including an initial decision of a hearing officer under § 11.54(a) that becomes the decision of the USPTO Director, reprimanding the practitioner.

(c) *Records available to the public.* Consistent with a retention schedule set for disciplinary records, the OED Director shall maintain records that shall be available for public inspection of every disciplinary proceeding where practitioner is reprimanded, suspended, or excluded, excluded-on-consent, or who resigns while under investigation, unless the USPTO Director orders that the proceeding or a portion of the record be kept confidential. The record of a proceeding that results in a practitioner being transferred to disability inactive status will not be available to the public.

(d) *Access to records of exclusion by consent.* The order excluding a practitioner on consent under § 11.27 shall be a matter of public record. However, the affidavit required under paragraph (a) of § 11.27 shall not be publicly disclosed or made available for use in any other proceeding except by order of the USPTO Director or upon written consent of the practitioner.

§ 11.60 Petition for reinstatement.

(a) *Restrictions on reinstatement.* A practitioner who is suspended, excluded, or excluded on consent is required to furnish proof of rehabilitation under paragraph (d) of this section, and shall not resume practice of patent, trademark, or other non-patent law before the Office until reinstated by order of the OED Director or the USPTO Director.

(b) *Reinstatement of practitioners transferred to disability inactive status.* A practitioner who has been transferred to disability inactive status under § 11.28 may move for reinstatement in accordance with that section, but reinstatement shall not be ordered except on a showing by clear and convincing evidence that the disability has ended, that the practitioner has complied with § 11.12, and that the practitioner is fit to resume the practice of law.

(c) *Petition for reinstatement of practitioners excluded or suspended on other grounds.* A suspended or excluded practitioner shall be eligible to apply for reinstatement only upon expiration of the period of suspension or exclusion and the practitioner's full compliance with § 11.58. A practitioner who is excluded or excluded on consent shall be eligible to apply for reinstatement no earlier than at least five years from the effective date of the exclusion.

(d) *Review of reinstatement petition.* A practitioner suspended, excluded, or excluded-on-consent shall file a petition for reinstatement accompanied by the fee required by § 1.21(a)(10) of this subchapter. The petition for reinstatement by a practitioner suspended, excluded, or excluded-on-consent for misconduct, must provide proof of rehabilitation and compliance with the provisions of § 11.11(d)(2), and it shall be filed with the OED Director. A suspended or excluded practitioner who has violated any provision of § 11.58 shall not be eligible for reinstatement until a continuous period of the time in compliance with § 11.58 that is equal to the period of suspension or exclusion has elapsed. If the suspended, excluded, or excluded-on-consent practitioner is not eligible for reinstatement, or if the OED Director determines that the petition is insufficient or defective on its face, the OED Director may dismiss the petition. Otherwise the OED Director shall consider the petition for reinstatement. The suspended, excluded, or excluded-on-consent practitioner seeking reinstatement shall have the burden of proof by clear and convincing evidence. Such proof shall be included in or accompany the petition, and shall establish:

(1) That the practitioner has the moral character qualifications, competency, and learning in law required under § 11.7 for admission;

(2) That the resumption of practice before the Office will not be detrimental to the administration of justice, or subversive to the public interest; and

(3) That the suspended practitioner has complied with the provisions of § 11.58 for the full period of suspension, or that the excluded or excluded-on-consent practitioner has complied with the provisions of § 11.58 for at least five continuous years.

(e) *Petitions for reinstatement—Action by the OED Director granting reinstatement.* (1) If the petitioner is found fit to resume the practice before the Office, the OED Director shall enter an order of reinstatement, which may be conditioned upon the making of partial or complete restitution to persons harmed by the misconduct which led to the suspension or exclusion, or upon the payment of all or part of the costs of the disciplinary proceedings, the reinstatement proceedings, or any combination thereof.

(2) *Payment of costs of disciplinary or reinstatement proceedings.* Upon petitioning for reinstatement, the practitioner shall pay the costs of the disciplinary proceeding, and costs for the reinstatement proceeding. The costs imposed pursuant to this section include all of the following:

(i) The actual expense incurred by the OED Director or the Office for the original and copies of any reporter's transcripts of the disciplinary proceedings or reinstatement proceedings, and any fee paid for the services of the reporter;

(ii) All expenses paid by the OED Director or the Office which would qualify as taxable costs recoverable in civil proceedings; and

(iii) The charges determined by the OED Director to be ''reasonable costs'' of investigation, hearing, and review. These amounts shall serve to defray the costs, other than fees for services of attorneys and experts, of the Office of Enrollment and Discipline in the preparation or hearing of disciplinary proceeding or reinstatement proceeding, and costs incurred in the administrative processing of the disciplinary proceeding or reinstatement proceeding.

(3) A suspended, excluded, or excluded-on-consent practitioner may be granted relief, in whole or in part, only from an order assessing costs under this section, or may be granted an extension of time to pay these costs, in the discretion of the OED Director, upon grounds of hardship, special circumstances, or other good cause.

(f) *Petitions for reinstatement—Action by the OED Director denying reinstatement.* If the petitioner is found unfit to resume the practice of patent law before the Office, the OED Director shall first provide the suspended, excluded, or excluded-on-consent practitioner with an opportunity to show cause in writing why the petition should not be denied. Failure to comply with § 11.12(d)(2) shall constitute unfitness. If unpersuaded by the showing, the OED Director shall deny the petition. The OED Director may require the suspended, excluded, or excluded-on-consent practitioner, in meeting the requirements of § 11.7, to take and pass an examination under § 11.7(b), ethics courses, and/or the Multistate Professional Responsibility Examination. The OED Director shall provide findings, together with the record. The findings shall include on the first page, immediately beneath the caption of the case, a separate section entitled ''Prior Proceedings'' which shall state the docket number of the original disciplinary proceeding in which the suspension, exclusion, or exclusion by consent was ordered.

(g) *Resubmission of petitions for reinstatement.* If a petition for reinstatement is denied, no further petition for reinstatement may be filed until the expiration of at least one year following the denial unless the order of denial provides otherwise.

(h) *Reinstatement proceedings open to public.* Proceedings on any petition for reinstatement shall be open to the public. Before reinstating any suspended, excluded, or excluded-on-consent practitioner, the OED Director shall publish in the Official Gazette a notice of the suspended, excluded, or excluded-on-consent practitioner's petition for reinstatement and shall permit the public a reasonable opportunity to comment or submit evidence with respect to the petition for reinstatement.

§ 11.61 Savings clause.

(a) A disciplinary proceeding based on conduct engaged in prior to the effective date of these regulations may be instituted subsequent to such effective date, if such conduct would continue to justify suspension or exclusion under the provisions of this Part.

(b) No practitioner shall be subject to a disciplinary proceeding under this Part based on conduct engaged in before the effective date hereof if such conduct would not have been subject to disciplinary action before such effective date.

§ 11.62 Protection of clients interests when practitioner becomes unavailable.

If a practitioner dies, disappears, or is suspended or transferred to inactive status for incapacity or disability, and there is no partner, associate, or other responsible practitioner capable of conducting the practitioner's affairs, a court of competent jurisdiction may appoint a registered practitioner to make appropriate disposition of any patent application files. All other matters should be handled in accordance with the laws of the local jurisdiction.

Subpart D—USPTO Rules of Professional Conduct

§ 11.100 Interpretation of the USPTO Rules of Professional Conduct.

(a) Rules in §§ 11.101 through 11.806 that are imperatives are cast in the terms ''shall'' or ''shall not.'' These define proper conduct for purposes of professional discipline.

(b) Rules in §§ 11.101 through 11.806 that are permissive are cast in the term ''may.'' These define areas under the Rules in which the practitioner has professional discretion. No disciplinary action should be taken when the practitioner chooses not to act or acts within the bounds of such discretion.

(c) Other rules in §§ 11.101 through 11.806 defining the nature of relationships between the practitioner

and others, are thus partly obligatory and disciplinary and partly constitutive and descriptive in that they define a practitioner's professional role.

Client-Practitioner Relationship

§ 11.101 Competence.

(a) A practitioner shall provide competent representation to a client having immediate or prospective business before the Office. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

(b) A practitioner shall serve a client having immediate or prospective business before the Office with skill and care commensurate with that generally afforded to clients by other practitioners in similar matters.

(c) Conduct that constitutes a violation of paragraphs (a) or (b) of this section includes, but is not limited to:

(1) A practitioner handling a legal matter which the practitioner knows or should know that the practitioner, due to legal or scientific training, is not competent to handle, without associating with the practitioner, another practitioner, who is competent to handle the matter;

(2) A practitioner withholding from the Office information identifying a patent or patent application of another from which one or more claims have been copied. *See* §§ 1.604(b) and 1.607(c) of this subchapter;

(3) A practitioner employs one or more procedures that the Office no longer authorizes practitioners to use to present or prosecute a patent application; and

(4) A practitioner filing and/or prosecuting, or assisting in the filing and/or prosecuting an application claiming a frivolous invention; or submitting or assisting in the submission to the Office of a frivolous filing. An application claims a frivolous invention or a filing is frivolous where the claim of patentability or argument is known or should have been known by a reasonably prudent registered practitioner to be unwarranted under existing law, and said claim or argument cannot be supported by good faith argument for an extension, modification, or reversal of existing law.

§ 11.102 Scope of representation.

(a) A practitioner shall abide by a client's decisions concerning the objectives of representation in practice before the Office, subject to paragraphs (c), (d), (e), and (g) of this section, and shall consult with the client as to the means by which they are to be pursued. A practitioner shall abide by a client's decision whether to accept an offer of settlement of a matter.

(b) A practitioner's representation of a client having immediate or prospective business before the Office does not constitute an endorsement of the client's political, economic, social, or moral views or activities.

(c) A practitioner may limit the objectives of the representation if the client having immediate or prospective business before the Office consents in writing after full disclosure by the practitioner.

(d) When a practitioner knows that a client having immediate or prospective business before the Office expects assistance not permitted by the Rules of Professional Conduct or other law, including perpetrating a fraud, disregarding any provision of this Part, or disregarding a decision of the Office made in the course of a proceeding before the Office, the practitioner shall both consult with the client regarding the relevant limitations on the practitioner's conduct, and advise the client of the legal consequences of any proposed course of action.

(e) A practitioner shall not counsel a client having immediate or prospective business before the Office to engage, or assist said client, in conduct that the practitioner knows is criminal or fraudulent, but a practitioner may discuss the legal consequences of any proposed course of conduct with the client and may counsel or assist the client to make a good-faith effort to determine the validity, scope, meaning, or application of the law.

(f) The authority and control of a practitioner, employed by the Federal Government, over decisions concerning the representation may, by statute or regulation, be expanded beyond the limits imposed by paragraphs (a) and (c) of this section.

(g) A practitioner receiving information clearly establishing that the client has, in the course of the representation, perpetrated a fraud upon a person or tribunal in connection with practice before the Office shall promptly call upon the client to rectify the same, and if the client refuses or is unable to do so the practitioner shall reveal the fraud to the affected person or tribunal, except where the information is protected as a privileged communication.

§ 11.103 Diligence and zeal.

(a) A practitioner shall represent a client having immediate or prospective business before the Office zealously and diligently within the bounds of the law.

(b) A practitioner shall act with reasonable promptness in representing a client having immediate or prospective business before the Office.

(c) Conduct that constitutes a violation of paragraphs (a) or (b) of this section includes, but is not limited to, a practitioner:

(1) Neglecting an entrusted legal matter;

(2) Intentionally failing to seek the lawful objectives of a client through reasonably available means permitted by law and the imperative USPTO Rules of Professional Conduct; or

(3) Intentionally prejudicing or damaging a client during the course of the professional relationship.

§ 11.104 Communication.

(a) A practitioner shall keep a client having immediate or prospective business before the Office reasonably informed about the status of a matter, and promptly comply with reasonable requests for information. In particular:

(1) A practitioner who has been engaged to represent or counsel an inventor as a result of a referral from an invention promoter shall communicate directly with the inventor, and promptly report each Office action and communicate directly with the inventor; and

(2) A practitioner who has been engaged to represent or counsel an inventor or other client having immediate, prospective, or pending business before the Office as a result of a referral by a foreign attorney or foreign patent agent located in a foreign country may, with the written and informed consent of said inventor or other client, conduct said communications with the inventor or other client through said foreign attorney or foreign patent agent.

(b) A practitioner shall explain a matter to the extent reasonably necessary to permit the client having immediate or prospective business before the Office to enable the client to make informed decisions regarding the representation.

(c) A practitioner who receives an offer of settlement in an *inter partes* matter before the Office shall inform the client promptly of the substance of the communication.

(d) Conduct that constitutes a violation of paragraph (a) of this section includes, but is not limited to:

(1) Failing to inform a client or former client or failing to timely notify the Office of an inability to notify a client or former client of correspondence received from the Office or the client's or former client's opponent in an *inter partes* proceeding before the Office when the correspondence:

(i) Could have a significant effect on a matter pending before the Office;

(ii) Is received by the practitioner on behalf of a client or former client, and

(iii) Is correspondence of which a reasonable practitioner would believe under the circumstances the client or former client should be notified.

(2) [Reserved]

§ 11.105 Fees.

(a) A practitioner's fee shall be reasonable. The factors to be considered in determining the reasonableness of a fee include the following:

(1) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

(2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the practitioner;

(3) The fee customarily charged in the locality for similar legal services;

(4) The amount involved and the results obtained;

(5) The time limitations imposed by the client or by the circumstances;

(6) The nature and length of the professional relationship with the client;

(7) The experience, reputation, and ability of the practitioner or practitioners performing the service; and

(8) Whether the fee is fixed or contingent.

(b) When the practitioner has not regularly represented the client having immediate or prospective business before the Office, the basis or rate of the fee shall be communicated directly to the client, in writing, before or within a reasonable time after commencing the representation. The communication shall distinguish between and specify the basis or rate for preparation and filing an application in the Office, and for prosecution of the application (including replies to Office actions, petitions, affidavits, appeal briefs, and the like).

(c) A fee in regard to practice before the Office may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (d) of this section or other law. In accordance with paragraph (a) of this section, a contingent fee shall be reasonable. A contingent fee agreement shall be in writing and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the practitioner in the event of grant of a patent, registration of a mark, settlement, hearing or appeal, litigation, and other expenses to be deducted from the recovery, and whether such expenses are to be deducted before or after the contingent fee is calculated. Upon conclusion of a contingent fee matter, the practitioner shall provide the client with a written statement stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.

(d) A division of a fee between practitioners who are not in the same firm may be made in regard to practice before the Office only if:

(1) The division is in proportion to the services performed by each practitioner or by written agreement with the client, each practitioner assumes joint responsibility for the representation;

(2) The client is advised, in writing, of the identity of the practitioners who will participate in the representation, of the contemplated division of responsibility, and of the effect of the association of practitioners outside the firm on the fee to be charged;

(3) The client gives informed consent in writing to the arrangement; and

(4) The total fee is reasonable.

(e) Any fee that is prohibited by law is per se unreasonable.

§ 11.106 Confidentiality of information.

(a) A practitioner, in regard to practice before the Office, shall not:

(1) Reveal information relating to representation of a client unless the client gives informed consent in writing after full disclosure by the practitioner, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraphs (b), (c), or (d) of this section;

(2) Knowingly use information relating to representation of a client to the disadvantage of the client; or

(3) Use a confidence or secret of the practitioner's client for the advantage of the practitioner or of a third person.

(b) A practitioner, in regard to practice before the Office, may reveal such information to the extent the practitioner reasonably believes necessary:

(1) To prevent the client from committing a criminal act that the practitioner believes is likely to result in imminent death or substantial bodily harm; or

(2) To establish a claim or defense on behalf of the practitioner in a controversy between the practitioner and the client, to establish a defense to a criminal charge or civil claim against the practitioner based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the practitioner's representation of a client.

(c) A practitioner, in regard to practice before the Office, shall use or reveal information relating to representation of a client to comply with the provisions of § 1.56 of this subchapter in practice before the Office in patent matters (*see* 11.303(d));

(d) A practitioner, in regard to practice before the Office may use or reveal information relating to representation of a client to comply:

(1) With the informed consent in writing of the client affected, but only after full disclosure by the practitioner to the client;

(2) With rules, law or court order when permitted by these rules or required by law or court order; or

(3) With the law or regulations of the Office, when permitted or authorized by the law or regulations, in connection with representation before the Office, whether or not the practitioner is employed by the Federal Government.

(e) The client of practitioner employed by the Federal Government is the Department, agency, or commission that employs the practitioner unless appropriate law, regulation, or order expressly provides to the contrary.

(f) A practitioner shall exercise reasonable care to prevent the practitioner's employees, associates, and others whose services are utilized by the practitioner from disclosing or using such information of a client, except that such persons may reveal information permitted to be disclosed by paragraphs (c), (d), or (e) of this section.

(g) The practitioner's obligation to preserve in confidence such information continues after termination of the practitioner's employment, except as provided for in § 1.56.

(h) The obligation of a practitioner under paragraph (a) of this section also applies to such information learned prior to becoming a practitioner in the course of providing assistance to another practitioner.

§ 11.107 Conflict of interest: General rule.

(a) A practitioner shall not represent a client having immediate or prospective business before the Office if the representation of that client will be directly adverse to another client having immediate or prospective business before the Office, unless:

(1) The practitioner reasonably believes the representation will not adversely affect the relationship with the other client; and

(2) Each client gives informed consent in writing after full disclosure by the practitioner. When a practitioner has both an inventor and an invention promoter, who referred the inventor to

the practitioner, as clients the disclosure and consent shall be in writing.

(b) A practitioner shall not represent a client if the representation of that client may be materially limited by the practitioner's responsibilities to another client or to a third party, or by the practitioner's own interests, where any of the clients or third party have immediate or prospective business before the Office, unless:

(1) The practitioner reasonably believes the representation will not be adversely affected; and

(2) The client gives informed consent in writing after full disclosure, including implications of the common representation and the advantages and risks involved, by the practitioner.

(c) The requirements of paragraph (b) of this section apply when the third party is an invention promoter, or the practitioner's interests involve receiving payment from an invention promoter.

§ 11.108 Conflict of interest: Prohibited transactions.

(a) A practitioner shall not enter into a business transaction with a client having immediate or prospective business before the Office, or knowingly acquire an ownership, possessory, security, or other pecuniary interest adverse to a client having immediate or prospective business before the Office unless:

(1) The transaction and terms on which the practitioner acquires the interest are fair and reasonable to the client, and are fully disclosed and transmitted in writing by the practitioner to the client in a manner which can be reasonably understood by the client;

(2) The client is advised to and given a reasonable opportunity by the practitioner to seek the advice of independent counsel in the transaction; and

(3) The client gives informed consent in writing thereto after full disclosure by the practitioner.

(b) A practitioner shall not use information relating to representation of a client having immediate or prospective business before the Office to the disadvantage of the client unless the client gives informed consent in writing after full disclosure by the practitioner, except as permitted or required by §§ 11.106 or 11.303.

(c) A practitioner shall not prepare an instrument giving the practitioner or a person related to the practitioner as parent, child, sibling, or spouse any substantial gift from a client having immediate or prospective business before the Office, including a testamentary gift, except where the client is related to the donee.

(d) Prior to the conclusion of representation of a client having immediate or prospective business before the Office, a practitioner shall not make or negotiate an agreement giving the practitioner literary or media rights to a portrayal or account based in substantial part on information relating to the representation.

(e) A practitioner shall not provide financial assistance to a client in connection with pending or contemplated litigation or proceeding before the Office, except that:

(1) A practitioner may advance court costs and expenses of litigation, or a proceeding before the Office, the repayment of which may be contingent on the outcome of the matter;

(2) A practitioner representing an indigent client may pay court or Office costs and expenses of litigation or proceeding before the Office on behalf of the client; and

(3) A practitioner may advance or guarantee the expenses of going forward in a proceeding before the Office including fees required by law to be paid to the Office in connection with the prosecution of the matter, expenses of investigation, expenses of medical examination, and costs of obtaining and presenting evidence, provided the client remains ultimately liable for such expenses. A practitioner may, however, advance any fee required to prevent or remedy an abandonment of a client's application by reason of an act or omission attributable to the practitioner and not to the client, whether or not the client is ultimately liable for such fee.

(f) A practitioner shall not accept compensation for representing a client having immediate or prospective business before the Office from one other than the client unless:

(1) The client gives informed consent, confirmed in writing, after full disclosure by the practitioner;

(2) There is no actual or potential interference with the practitioner's independence of professional judgment or with the attorney-client or agent-client relationship; and

(3) Information relating to representation of a client is protected as required by § 11.106.

(g) A practitioner who represents two or more clients having immediate or prospective business before the Office shall not participate in making an aggregate settlement of the claims of or against the clients, unless each client gives informed consent, confirmed in writing, after full disclosure by the practitioner, including disclosure of the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.

(h) A practitioner, in regard to practice before the Office, shall not:

(1) Make an agreement prospectively limiting the practitioner's liability to a client or former client for malpractice unless permitted by law and the client is independently represented in making the agreement; or

(2) Settle a claim for such liability with an unrepresented client or former client without first advising that person in writing that independent representation is appropriate in connection therewith.

(i) A practitioner related to another practitioner as parent, child, sibling, or spouse shall not represent a client having immediate or prospective business before the Office in a representation directly adverse to a person who the practitioner knows is represented by the other practitioner except upon informed consent by the client, confirmed in writing, after full disclosure by the practitioner regarding the relationship.

(j) A practitioner shall not acquire a proprietary interest in papers received from a client having immediate or prospective business before the Office, or in a proceeding before the Office that the practitioner is conducting for a client, except that the practitioner may:

(1) Acquire a lien granted by law to secure the practitioner's fee or expenses except as provided in § 11.116(d); and

(2) Contract with a client for a reasonable contingent fee in a civil case or proceeding before the Office; or

(3) In a patent case, after complying with the provisions of paragraph (a) of this section, and, in the case of a practitioner who is or has been an officer or employee of the Office, only at such time and insofar as is permitted by 35 U.S.C. 4, take an interest in a patent or in the proceeds from a patent as part or all of his or her fee. However, the fee obtained by said interest may not exceed an amount that is reasonable. *See* § 11.105(a).

(k) If an invention promoter provides the practitioner with access to an inventor-client whom the practitioner undertakes to represent before the Office, the practitioner shall not accept or continue representation of the inventor-client without providing full disclosure of all conflicts in writing to the inventor-client where:

(1) The practitioner has a legal, business, financial, professional, or personal relationship with a company in the same matter; or

(2) The practitioner has or had a legal, business, financial, professional, or personal relationship with another

person the practitioner knows or reasonably should know would be affected substantially by the representation or lack of representation of the inventor-client.

§ 11.109 Conflict of interest: Former client.

(a) A practitioner who, in practice before the Office, has formerly represented a client shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing, after consultation.

(b) A practitioner, in regard to practice before the Office, shall not knowingly represent a person in the same or substantially related matter in which a firm or a member of the firm, with which the practitioner formerly was associated, had previously represented a client,

(1) Whose interests are materially adverse to that person; and

(2) About whom the practitioner has acquired information protected by §§ 11.106 and 11.109(c) that is material to the matter; unless the former client gives informed consent, confirmed in writing, after full disclosure by the practitioner;

(c) A practitioner who has formerly represented a client in a matter before the Office, or whose present or former firm, or a practitioner in the firm, has formerly represented a client in a matter before the Office shall not thereafter:

(1) Use information relating to the representation to the disadvantage of the former client except as §§ 11.106 or 11.303 would permit or require with respect to a client, or when the information has become generally known; or

(2) Reveal information relating to the representation except as §§ 11.106 or 11.303 would permit or require with respect to a client.

§ 11.110 Imputed disqualification: General rule.

(a) While practitioners are associated in a firm, or are associated on a continuing basis with an invention promoter, none of them shall knowingly represent a client having immediate or prospective business before the Office when any one of them practicing alone would be prohibited from doing so by §§ 11.107, 11.108(b), 11.109, or 11.202.

(b) In regard to practice before the Office, when a practitioner has terminated an association with a firm, the firm is not prohibited from thereafter representing a person with interests materially adverse to those of a client represented by the formerly associated practitioner, and not currently represented by the firm, unless:

(1) The matter is the same or substantially related to that in which the formerly associated practitioner represented the client; and

(2) Any practitioner remaining in the firm has information protected by §§ 11.106 and 11.109(c) that is material to the matter.

(c) A disqualification prescribed by this section may be waived by the affected client under the conditions stated in § 11.107.

§ 11.111 Successive Government and private employment.

(a) A practitioner shall not accept private employment in connection with a matter that is the same as, or substantially related to, a matter in which the practitioner participated personally and substantially as an employee of the Office. Such participation includes, but is not limited to, acting on the merits of a matter in an administrative or adjudicative capacity.

(b) If a practitioner is required to decline or to withdraw from employment under paragraph (a) of this section on account of personal and substantial participation in a matter, no partner or associate of that practitioner, or practitioner with an of counsel relationship to that practitioner, may accept or continue such employment except as provided in paragraph (c) of this section. The disqualification of such other practitioners does not apply if the sole form of participation was as a judicial or administrative law clerk, including a law clerk at the Board of Patent Appeals and Interferences, or at the Trademark Trial and Appeal Board.

(c) The prohibition stated in paragraph (b) of this section shall not apply if the personally disqualified practitioner is screened from any form of participation in the matter or representation as the case may be, and from sharing in any fees resulting therefrom, and if the requirements of paragraphs (d) and (e) of this section are satisfied.

(d) Except as law may otherwise expressly permit, a practitioner having information that the practitioner knows is confidential Government information about a person that was acquired when the practitioner was an employee of the Office, may not represent a private client whose interests are adverse to that person in a matter in which the information could be used to the material disadvantage of that person. A firm with which that practitioner is associated may undertake or continue representation in the matter only if the disqualified practitioner is screened from any participation in the matter and is apportioned no part of the fee therefrom.

(e) Except as law may otherwise expressly permit, a practitioner serving as an employee of the Office shall not:

(1) Participate in a matter in which the practitioner participated personally and substantially while in private practice or nongovernmental employment, unless under applicable law no one is, or by lawful delegation may be, authorized to act in the practitioner's stead in the matter; or

(2) Negotiate for private employment with any person who is involved as a party or as practitioner for a party in a matter in which the practitioner is participating personally or substantially, except:

(i) A practitioner serving as a law clerk to a judge, administrative law judge, administrative patent judge, or administrative trademark judge may negotiate for private employment as permitted by § 11.112(b) and subject to the conditions stated in § 11.112(b); and

(ii) A practitioner serving in the Office may negotiate for employment with a party or practitioner involved in a matter in which the practitioner is participating personally and substantially, but only after the practitioner has notified his or her supervisor, and the matter is withdrawn from the practitioner's scope of authority.

(f) A practitioner serving in the Office shall not in any manner assist his or her former client, or another practitioner in the presentation or prosecution of said former client's patent application before the Office, including, but not limited to, providing assistance regarding the presentation or amendment of the specification, claims, or drawings, a translation of any foreign document, or provision of funds.

(g) As used in this section, the terms *matter, participated, personally,* and *substantially* are described in § 11.10(b)(3).

(h) As used in this section, the term *confidential Government information* means information that has been obtained under governmental authority and which, at the time this section is applied, the Government is prohibited by law from disclosing to the public or has a legal privilege not to disclose, and which is not otherwise available to the public.

(i) Conduct that constitutes a violation of paragraph (a) of this section includes, but is not limited to:

(1) A practitioner preparing or prosecuting or providing assistance in

the preparation or prosecution of a patent application in violation of an undertaking signed under § 11.10(b), or knowingly aiding in any manner another practitioner in conduct violating an undertaking signed by the other practitioner under § 11.10(b).

§ 11.112 Former judge or arbitrator.

(a) Except as stated in paragraph (b) of this section, a practitioner shall not represent anyone in connection with a matter before the Office in which the practitioner participated personally and substantially as an arbitrator, unless all parties to the proceeding give informed consent, confirmed in writing, after disclosure by the practitioner.

(b) A practitioner shall not negotiate for employment with any person who is involved as a party or as practitioner for a party in a matter in which the practitioner is participating personally and substantially as a judge, administrative law judge, administrative patent judge, administrative trademark judge, or other adjudicative officer, or arbitrator. A practitioner serving as a law clerk to a judge, administrative patent judge, administrative trademark judge, other adjudicative officer or arbitrator may negotiate for employment with a party or practitioner involved in a matter in which the clerk is participating personally and substantially, but only after the practitioner has notified the judge, other adjudicative officer or arbitrator.

(c) If a practitioner is disqualified by paragraph (a) of this section, no practitioner in a firm with which that practitioner is associated may knowingly undertake or continue representation in the matter unless:

(1) The disqualified practitioner is screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(2) Written notice is promptly given to the appropriate tribunal to enable it to ascertain compliance with the provisions of this section.

(d) An arbitrator selected as a partisan of a party in a multimember arbitration panel is not prohibited from subsequently representing that party.

§ 11.113 Organization as client.

(a) A practitioner employed or retained by an organization represents the organization, which acts through its duly authorized constituents.

(b) If a practitioner employed or retained by an organization having immediate or prospective business before the Office knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law which reasonably might be imputed to the organization, and is likely to result in substantial injury to the organization, the practitioner shall proceed as is reasonably necessary in the best interest of the organization. In determining how to proceed, the practitioner shall give due consideration to the seriousness of the violation and its consequences, the scope and nature of the practitioner's representation, the responsibility in the organization and the apparent motivation of the person involved, the policies of the organization concerning such matters and any other relevant considerations. Any measures taken shall be designed to minimize disruption of the organization and the risk of revealing information relating to the representation to persons outside the organization. Such measures may include among others:

(1) Asking reconsideration of the matter;

(2) Advising that a separate legal opinion on the matter be sought for presentation to appropriate authority in the organization; and

(3) Referring the matter to higher authority in the organization, including, if warranted by the seriousness of the matter, referral to the highest authority that can act in behalf of the organization as determined by applicable law.

(c) If, despite the practitioner's efforts in accordance with paragraph (b) of this section, the highest authority that can act on behalf of the organization insists upon acting, or a refusal to act, that is clearly a violation of law and is likely to result in substantial injury to the organization, the practitioner may resign in accordance with § 11.116.

(d) In dealing with an organization's directors, officers, employees, members, shareholders, or other constituents, a practitioner shall explain the identity of the client when it is apparent that the organization's interests may be adverse to those of the constituents with whom the practitioner is dealing.

(e) A practitioner representing an organization may also represent any of its directors, officers, employees, members, shareholders, or other constituents, subject to the provisions of § 11.107. If the organization's consent to the dual representation is required by § 11.107, the consent shall be confirmed in writing by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders.

§ 11.114 Client under a disability.

(a) When the ability of a client who has immediate or prospective business before the Office, to make adequately considered decisions in connection with the representation is impaired, whether because of minority, mental disability, or for some other reason, the practitioner shall, as far as reasonably possible, maintain a normal attorney-client or agent-client relationship with the client.

(b) A practitioner may seek the appointment of a guardian or take other protective action with respect to a client having immediate or prospective business before the Office, only when the practitioner reasonably believes that the client cannot adequately act in the client's own interest.

§ 11.115 Safekeeping property.

(a) All funds received or held by a practitioner or law firm on behalf of a client having immediate or prospective business before the Office, other than reimbursement of advances for costs and expenses, shall be deposited in one or more identifiable escrow accounts maintained at a financial institution in the State, authorized by Federal or State law to do business in the jurisdiction where the practitioner or law firm is situated and which is a member of the Federal Deposit Insurance Corporation, or the Federal Savings and Loan Insurance Corporation, or successor agencies or, in the case of a practitioner having an office in a foreign country or registered under § 11.6(c), in said financial institution in the United States or in a comparable financial institution in a foreign country, and no funds belonging to the practitioner or law firm shall be deposited therein except as follows:

(1) Funds reasonably sufficient to pay service or other charges or fees imposed by the financial institution may be deposited therein; or

(2) Funds belonging in part to a client and in part presently or potentially to the practitioner or law firm must be deposited in said financial institution, and the portion belonging to the practitioner or law firm must be withdrawn promptly after it is due unless the right of the practitioner or law firm to receive it is disputed by the client, in which event the disputed portion shall not be withdrawn until the dispute is finally resolved.

(b) A practitioner having an arrangement with an invention promoter for payment of his or her legal fees for legal services rendered for a client referred to the practitioner by the promoter must ascertain upon accepting said referral whether the client advances

funds for legal services to the promoter, and must take all reasonable steps to safeguard the advanced funds.

(c) When in the course of representation before the Office a practitioner is in possession of property in which both the practitioner and another person claim interests, the practitioner shall keep the property separate until there is an accounting and severance of their interests. If a dispute arises concerning their respective interests, the practitioner shall keep the portion in dispute separate until the dispute is resolved.

(d) A practitioner, in connection with a client having immediate or prospective business before the Office, shall:

(1) Promptly notify a client of the receipt of the client's funds, securities, or other properties;

(2) Identify and label securities and properties of a client promptly upon receipt and place them in a safe deposit box or other place of safekeeping as soon as practicable;

(3) Maintain complete records of all funds, securities, and other properties of a client coming into the possession of the practitioner and render appropriate accounts to the client regarding them; and

(4) Promptly pay and deliver to the client or another as requested by such person the funds, securities, or other properties in the possession of the practitioner that such person is entitled to receive.

(e) *Funds, securities or other properties.* Funds, securities or other properties held by a practitioner or law firm as a fiduciary in connection with a client having immediate or prospective business before the Office shall be maintained in separate fiduciary accounts, and the practitioner or law firm shall not commingle the assets of such fiduciary accounts in a common account (including a book-entry custody account), except in the following cases:

(1) Funds may be maintained in a common escrow account subject to the provisions of paragraphs (a) and (c) of this section when authorized by professional conduct rules for lawyers in the jurisdiction where the practitioner or law firm is situated; or

(2) Funds, securities or other properties may be maintained in a common account when authorized by professional conduct rules for lawyers in the jurisdiction where the practitioner or law firm is situated.

(f) *Recordkeeping requirements, required books and records.* Every practitioner in regard to his or her practice before the Office shall maintain or cause to be maintained, on a current basis, books and records that establish compliance with paragraphs (a) and (d) of this section. Whether a practitioner or a law firm maintains computerized records or a manual accounting system, such system shall produce the records or information required by this section.

(1) In the case of funds held in an escrow account subject to this section, the required books and records include:

(i) A cash receipts journal or journals listing all funds received, the sources of the receipts and the date of receipts. Checkbook entries of receipts and deposits, if adequately detailed and bound, may constitute a journal for this purpose. If separate cash receipts journals are not maintained for escrow and non-escrow funds, then the consolidated cash receipts journal shall contain separate columns for escrow and non-escrow receipts;

(ii) A cash disbursements journal listing and identifying all disbursements from the escrow account. Checkbook entries of disbursements, if adequately detailed and bound, may constitute a journal for this purpose. If separate disbursements journals are not maintained for escrow and non-escrow disbursements then the consolidated disbursements journal shall contain separate columns for escrow and non-escrow disbursements;

(iii) A subsidiary ledger containing a separate account for each client and for every other person or entity from whom money has been received in escrow shall be maintained. The ledger account shall by separate columns or otherwise clearly identify escrow funds disbursed, and escrow funds balance on hand. The ledger account for a client or a separate subsidiary ledger account for a client shall clearly indicate all fees paid from trust accounts; and

(iv) Reconciliations and supporting records required under this section.

(2) The records required under paragraph (f)(1) of this section shall be preserved for at least five full calendar years following termination of the fiduciary relationship.

(3) In the case of funds or property held by a practitioner or law firm as a fiduciary subject to paragraph (c) of this section, the required books and records include:

(i) An annual summary of all receipts and disbursements and changes in assets comparable to an accounting that would be required of a court supervised fiduciary in the same similar capacity. Such annual summary shall be in sufficient detail as to allow a reasonable person to determine whether the practitioner is properly discharging the obligations of the fiduciary relationship; and

(ii) Original source documents sufficient to substantiate and, when necessary, to explain the annual summary required under paragraph (f)(2)(A) of this section.

(4) The records required under paragraph (f)(3) of this section shall be preserved for at least five full years following the termination of the fiduciary relationship.

(g) *Required escrow accounting procedures.* The following minimum accounting procedures are applicable to all escrow accounts subject to paragraphs (a) and (c) of this section by practitioners in regard to practice before the Office.

(1) Insufficient fund check reporting.

(i) *Clearly identified escrow accounts required.* A practitioner or law firm shall deposit all funds held in escrow in a clearly identified account, and shall inform the financial institution in writing of the purpose and identity of the account. Practitioner escrow accounts shall be maintained only in financial institutions authorized by these rules.

(ii) *Overdraft notification.* A financial institution may report to the Office of Enrollment and Discipline if any instrument which would be properly payable if sufficient funds were available, is presented against a practitioner escrow account containing insufficient funds, irrespective of whether or not the instrument is honored.

(iii) *Overdraft reports.* All reports made by a financial institution shall be in the following format:

(A) In the case of a dishonored instrument, the report shall be identical of the overdraft customarily forwarded to the depositor, and should include a copy of the dishonored instrument, if such a copy is normally provided to depositors;

(B) In the case of instruments that are presented against insufficient funds but which instruments are honored, the report shall identify the financial institution, the practitioner or law firm, the account name, the account number, the date of presentation for payment, and the date paid, as well as the amount of the overdraft created thereby; and

(C) Every practitioner or law firm shall be conclusively deemed to have consented to the reporting and production requirements mandated by this section.

(2) *Deposits.* All receipts of escrow money shall be deposited intact and a retained duplicate deposit slip or other such record shall be sufficiently

detailed to show the identity of each item.

(3) *Deposit of mixed escrow and non-escrow funds other than fees and retainers.* Mixed escrow and non-escrow funds shall be deposited intact to the escrow account. The non-escrow portion shall be withdrawn upon the clearing of the mixed fund deposit instrument.

(4) *Periodic trial balance.* A regular periodic trial balance of the subsidiary ledger shall be made at least quarterly, within 30 days after the close of the period and shall show the escrow account balance of the client or other period at the end of each period.

(A) The total of the trial balance must agree with the control figure computed by taking the beginning balance, adding the total monies received in escrow for the period and deducting the total escrow monies disbursed for the period; and

(B) The trial balance shall identify the preparer and be approved by the practitioner or one of the practitioners in the law firm.

(5) *Reconciliations.* (i) A monthly reconciliation shall be made at month end of the cash balance derived from the cash receipts journal and cash disbursements journal total, the escrow account checkbook balance, and the escrow account bank Statement balance;

(ii) A periodic reconciliation shall be made at least quarterly, within 30 days after the close of the period, reconciling cash balances to the subsidiary ledger trial balance;

(iii) Reconciliations shall identify the preparer and be approved by the practitioner or one of the practitioners in the law firm.

(6) *Receipts and disbursements explained.* The purpose of all receipts and disbursements of escrow funds reported in the escrow journals and subsidiary ledgers shall be explained and supported by adequate records.

(h) All financial accounts kept by a registered practitioner must comply with the provisions of paragraph (f) of this section, except that:

(1) *Attorneys:* The financial records maintained by a practitioner who is an attorney in good standing of a bar of the highest court in a state will be deemed to be in substantial compliance with the provisions of paragraphs (f) and (g) of this section if the attorney's principal place of business is in the United States, and the financial records are in compliance with the financial recordkeeping requirements of the state bar of which he or she is a member in good standing; or

(2) *Patent agents employed by a law firm:* The trust account records maintained by a law firm with regard to a patent agent employed by the law firm will be deemed to be in substantial compliance with the provisions of paragraphs (f) and (g) of this section for the patent agent if the principal place of business of the law firm and the patent agent are in the United States, the patent agent is employed by the law firm, and the financial records maintained by the law firm comply with the financial record-keeping requirements that apply to at least one attorney in the law firm at the principal place of business.

(i) Conduct that constitutes a violation of paragraph (a) of this section includes, but is not limited to misappropriation of, or failure to properly or timely remit, funds received by a practitioner or the practitioner's firm from a client having immediate or prospective business before the Office to pay a fee which the client is required by law to pay to the Office.

§ 11.116 Declining or terminating representation.

(a) Except as stated in paragraph (c) of this section, a practitioner shall not represent a client before the Office, or where representation has commenced, shall withdraw from the representation of a client before the Office if:

(1) The representation will result in violation of the Rules of Professional Conduct or other law;

(2) The practitioner's physical or mental condition materially impairs the practitioner's ability to represent the client;

(3) The practitioner is discharged; or

(4) The practitioner becomes an employee of the Office, and before becoming an employee the practitioner has a matter, including a patent application, in which the practitioner acts as attorney or agent for prosecuting a claim against the United States, or receives any gratuity, or any share of or interest in such claim, or acts as attorney or agent for anyone before the Office in which the United States is a party or has a substantial interest. In the latter instance, the practitioner shall withdraw before the first day of employment at the Office from every such matter.

(b) Except as stated in paragraph (c) of this section, a practitioner may withdraw from representing a client before the Office if withdrawal can be accomplished without material adverse effect on the interests of the client, or if:

(1) The client persists in a course of action involving the practitioner's services that the practitioner reasonably believes is criminal or fraudulent;

(2) The client has used the practitioner's services to perpetrate a crime or fraud;

(3) A client insists upon pursuing an objective that the lawyer considers repugnant or imprudent;

(4) The client fails substantially to fulfill an obligation to the practitioner regarding the practitioner's services and has been given reasonable warning that the practitioner will withdraw unless the obligation is fulfilled;

(5) The representation will result in an unreasonable financial burden on the practitioner or obdurate or vexatious conduct on the part of the client has rendered the representation unreasonably difficult; or

(6) Other good cause for withdrawal exists.

(c) When ordered to do so by the Office, a practitioner shall continue representation notwithstanding good cause for terminating the representation.

(d) Upon termination of representation before the Office, a practitioner shall take steps reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled, and refunding any advance payment of fee that has not been earned. The practitioner may retain papers relating to the client to the extent permitted by other law, § 11.108(j), but in regard to any proceeding before the Office a practitioner shall not retain:

(1) Any part of the client's files regarding the proceeding, including patent or trademark application files, that has been filed with the Office,

(2) Any work product regarding the proceeding for which the practitioner has been paid, or

(3) Any proceeding-related paper whenever assertion of a retaining lien on the paper would materially prejudice or imperil the protection of the client's interests.

§ 11.117 Sale of practice.

A practitioner may sell or purchase a law practice involving patent or trademark matters before the Office, including good will, if the following conditions are satisfied:

(a) The seller ceases to engage in the private practice before the Office;

(b) The practice, to the extent it involves patent proceedings, is sold as an entirety to another registered practitioner or firm comprising registered practitioners;

(c) Actual written notice is given to each of the seller's clients having immediate or prospective business before the Office regarding:

(1) The proposed sale;

(2) The terms of any proposed change in the fee arrangement authorized by paragraph (d) of this section;

(3) The client's right to retain other counsel or to take possession of the file; and

(4) The fact that the client's consent to the sale will be presumed if the client does not take any action or does not otherwise object within ninety (90) days after receipt of the notice. If a client cannot be given notice, the representation of that client may be transferred to the purchaser only upon entry of an order so authorizing by a court having jurisdiction. The seller may disclose to the court in camera information relating to the representation only to the extent necessary to obtain an order authorizing the transfer of a file.

(d) The fees charged clients having immediate or prospective business before the Office shall not be increased by reason of the sale. The purchaser may, however, refuse to undertake the representation unless the client gives informed consent, confirmed in writing, to pay the purchaser fees at a rate not exceeding the fees charged by the purchaser for rendering substantially similar services prior to the initiation of the purchase negotiations.

§§ 11.118–11.200 [Reserved]

Counselor

§ 11.201 Advisor.

(a) In representing a client having immediate or prospective business before the Office, a practitioner shall exercise independent professional judgment and render candid advice. In rendering advice, a practitioner may refer not only to law but also to other considerations such as moral, economic, social and political factors that may be relevant to the client's situation.

(b) In rendering patentability advice to a client referred by an invention promoter, a practitioner shall identify the element(s) of the references and invention considered, and specify the element or combination of elements of the invention that are believed to support a conclusion that the invention may be patentable.

§ 11.202 Intermediary.

(a) A practitioner may act as intermediary between clients, any one of which has immediate or prospective business before the Office, if:

(1) The practitioner consults with each client concerning the implications of the common representation, including the advantages and risks involved, and the effect on the attorney-client or agent-client privileges, and the practitioner obtains from each client informed consent, confirmed in writing, to the common representation;

(2) The practitioner reasonably believes that the matter can be resolved on terms compatible with the clients' best interests, that each client will be able to make adequately informed decisions in the matter, and that there is little risk of material prejudice to the interests of any of the clients if the contemplated resolution is unsuccessful; and

(3) The practitioner reasonably believes that the common representation can be undertaken impartially and without improper effect on other responsibilities the practitioner has to any of the clients.

(b) While acting as intermediary between clients, any one of which has immediate or prospective business before the Office, the practitioner shall consult with each client concerning the decisions to be made and the considerations relevant in making them, so that each client can make adequately informed decisions.

(c) A practitioner shall withdraw as intermediary between clients, any one of which has immediate or prospective business before the Office, if any of the clients so request, or if any of the conditions stated in paragraph (a) of this section are no longer satisfied. In connection with a proceeding pending before the Office, the practitioner shall submit a written request to withdraw to the USPTO Director. Upon withdrawal, the practitioner shall not continue to represent any of the clients in the matter that was the subject of the intermediation.

(d) Except in unusual circumstances that may make it infeasible, prior to undertaking intermediation in a matter between clients who are an inventor and an invention promoter, a practitioner shall provide both clients with full disclosure of all potential and actual conflicts of interest, and obtain from each client informed consent, confirmed in writing.

§ 11.203 Evaluation for use by third persons.

(a) A practitioner may undertake an evaluation of a matter affecting a client for the use of someone other than the client, where either the client or other person has immediate or prospective business before the Office, if:

(1) The practitioner reasonably believes that making the evaluation is compatible with other aspects of the practitioner's relationship with the client; and

(2) The client gives informed consent, confirmed in writing, after full disclosure by the practitioner.

(b) Except as disclosure is required in connection with a report of an evaluation regarding a patent, trademark or other non-patent law matter before the Office, information relating to the evaluation is otherwise protected by § 11.106.

(c) If a practitioner provides an evaluation regarding a patent, trademark or other non-patent matter before the Office to an invention promoter, which the invention promoter forwards in whole or in part to an inventor, and the evaluation includes any evaluation of patentability, the inventor shall constitute a client of the practitioner and provisions of §§ 11.104(a)(1), 11.107(a)(2), 11.107(b)(2), 11.108(f)(1), 11.201(b), 11.202(d), and 11.701(b), and the practitioner must satisfy the provisions of §§ 11.804(h)(2) or (h)(3) before the practitioner provides any evaluation. The evaluation may not disclose or be based upon knowledge or information that the inventor regards as confidential, and may not otherwise provide publication of the invention prior to the filing of an application for the inventor.

§§ 11.204–11.300 [Reserved]

Advocate

§ 11.301 Meritorious claims and contentions.

A practitioner shall not bring or defend a proceeding before the Office, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous, which includes a good-faith argument for an extension, modification, or reversal of existing law.

§ 11.302 Expediting litigation and Office proceedings.

(a) A practitioner shall make reasonable efforts to expedite proceedings before the Office consistent with the interests of the client.

(b) In representing a client having immediate or prospective business before the Office, a practitioner shall not delay a proceeding when the practitioner knows or when it is obvious that such action would serve solely to harass or maliciously injure another.

§ 11.303 Candor toward the tribunal.

(a) A practitioner, in regard to practice before the Office, shall not knowingly:

(1) Make a false statement of material fact or law to a tribunal;

(2) Fail to disclose a material fact to the Office when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client;

(3) Fail to disclose to the Office legal authority in the controlling jurisdiction known to the practitioner to be directly adverse to the position of the client and not disclosed by opposing counsel; or

(4) Offer evidence that the practitioner knows to be false or misleading. If a practitioner has offered material evidence and comes to know of its falsity or that it is misleading, the practitioner shall take reasonable remedial measures. If a practitioner has offered evidence in the Office material to patentability in regard to a patent or patent application, and comes to know of its falsity or that it is misleading, the practitioner shall disclose to the Office in writing information regarding the falsity or that it is misleading with respect to each pending claim until the claim is cancelled or withdrawn from consideration, or the application becomes abandoned.

(b) The duties stated in paragraph (a) of this section continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by § 11.106.

(c) A practitioner, in regard to practice before the Office, may refuse to offer evidence that the practitioner reasonably believes is false or misleading.

(d) In a proceeding before the Office other than those involving the granting of a patent or registration of a mark, a practitioner shall inform the Office of all material facts known to the practitioner that will enable the Office to make an informed decision, whether or not the facts are adverse. In a patent proceeding before the Office, a practitioner shall inform the Office of all information material to patentability known to the practitioner in accordance with § 1.56, whether or not such information is adverse.

(e) Conduct that constitutes a violation of paragraphs (a) through (d) of this section includes, but is not limited to:

(1) Knowingly misusing a ''Certificate of Mailing or Transmission'' under § 1.8 of this subchapter;

(2) Knowingly violating or causing to be violated the requirements of §§ 1.56 or 1.555 of this subchapter;

(3) Except as permitted by § 1.52(c) of this subchapter, knowingly filing or causing to be filed a patent application containing any material alteration made in the application papers after the signing of the accompanying oath or declaration without identifying the alteration at the time of filing the application papers;

(4) Knowingly signing a paper filed in the Office in violation of the provisions of § 11.18 or making a scandalous statement in a paper filed in the Office; and

(5) Knowingly giving false or misleading information or knowingly participating in a material way in giving false or misleading information, to the Office or any employee of the Office.

§ 11.304 Fairness to opposing party, the Office, and counsel.

A practitioner, in regard to practice before the Office, shall not:

(a) Unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal documents or other material having potential evidentiary value. A practitioner shall not counsel or assist another person to do any such act;

(b) Falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;

(c) Knowingly disobey an obligation under the rules of the Office except for an open refusal based on an assertion that no valid obligation exists;

(d) In an *inter partes* proceeding before the Office, make a frivolous discovery request, or fail to make a reasonably diligent effort to comply with a legally proper discovery request by an opposing party;

(e) In a proceeding before the Office, allude to any matter that the practitioner does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant, or the guilt or innocence of an accused; or

(f) Request a person other than a client to refrain from voluntarily giving relevant information to another party unless:

(1) The person is a relative or an employee or other agent of a client; and

(2) The practitioner reasonably believes that the person's interests will not be adversely affected by refraining from giving such information.

§ 11.305 Impartiality and decorum of the tribunal.

A practitioner shall not:

(a) Seek to influence an administrative law judge, administrative patent judge, administrative trademark judge, hearing officer, tribunal, employee of a tribunal, or other official by means prohibited by law;

(b) Communicate ex parte with such a person except as permitted by law; or

(c) Engage in conduct intended to disrupt a tribunal.

(d) Conduct that constitutes a violation of paragraphs (a) through (c) of this section includes, but is not limited to:

(1) Directly or indirectly improperly influencing, attempting to improperly influence, offering or agreeing to improperly influence, or attempting to offer or agree to improperly influence an official action of any tribunal or employee of a tribunal by:

(i) Use of threats, false accusations, duress, or coercion;

(ii) An offer of any special inducement or promise of advantage, or

(iii) Improperly bestowing of any gift, favor, or thing of value.

§ 11.306 [Reserved]

§ 11.307 Practitioner as witness.

(a) A practitioner shall not act as advocate in a proceeding before the Office in which the practitioner is likely to be a necessary witness except where:

(1) The testimony relates to an uncontested issue;

(2) The testimony relates to the nature and value of legal services rendered in the case; or

(3) Disqualification of the practitioner would work substantial hardship on the client.

(b) A practitioner may act as advocate in a proceeding before the Office in which another practitioner in the practitioner's firm is likely to be called as a witness unless precluded from doing so by §§ 11.107 or 11.109. The provisions of this paragraph do not apply if the practitioner who is appearing as an advocate is employed by, and appears on behalf of, a Government agency.

§ 11.308 [Reserved]

§ 11.309 Advocate in nonadjudicative proceedings.

A practitioner representing a client before a legislative or administrative body in a nonadjudicative proceeding shall disclose that the appearance is in a representative capacity and shall conform to the provisions of §§ 11.303(a) through (c), 11.304(a) through (c), and 11.305.

§§ 11.310–11.400 [Reserved]

Transactions With Persons Other Than Clients

§ 11.401 Truthfulness in statements to others.

In the course of representing a client having immediate or prospective business before the Office, a practitioner shall not knowingly:

(a) Make a false statement of material fact or law to a third person; or

(b) Fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by § 11.106.

§ 11.402 Communication with person represented by counsel.

(a) In representing a client having immediate or prospective business before the Office a practitioner shall not communicate or cause another to communicate about the subject of the representation with a party the practitioner knows to be represented by another practitioner in the matter, unless the practitioner has the consent of the practitioner representing such other party or is authorized by law to do so.

(b) For purposes of this section, the term *party* includes any person, including an employee of a party organization, who has the authority to bind a party organization as to the representation to which the communication relates.

(c) This section does not prohibit communication by a practitioner with Government officials who have the authority to redress the grievances of the practitioner's client, whether or not those grievances or the practitioner's communications relate to matters that are the subject of the representation, provided that in the event of such communications the disclosures specified in paragraph (b) of this section are made to the Government official to whom the communication is made.

§ 11.403 Dealing with unrepresented person.

In dealing with a person who is not represented by counsel on behalf of a client having immediate or prospective business before the Office, a practitioner shall not state or imply to unrepresented persons that the practitioner is disinterested. When the practitioner knows or reasonably should know that the unrepresented person misunderstands the practitioner's role in the matter, the practitioner shall make reasonable efforts to correct the misunderstanding.

§ 11.404 Respect for rights of third persons.

In representing a client having immediate or prospective business before the Office, a practitioner shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.

§§ 11.405–11.500 [Reserved]

Law Firms and Associations

§ 11.501 Responsibilities of a partner or supervisory practitioner.

(a) A partner in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all practitioners in the firm conform to the Rules of Professional Conduct.

(b) A practitioner having direct supervisory authority over another practitioner shall make reasonable efforts to ensure that the other practitioner conforms to the Rules of Professional Conduct.

(c) A practitioner shall be responsible for another practitioner's violation of the Rules of Professional Conduct if:

(1) The practitioner orders or, with knowledge of the specific conduct, ratifies the conduct involved; or

(2) The practitioner is a partner in the law firm in which the other practitioner practices, or has direct supervisory authority over the other practitioner, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

§ 11.502 Responsibilities of a subordinate practitioner.

(a) A practitioner is bound by the Rules of Professional Conduct notwithstanding that the practitioner acted at the direction of another person.

(b) A subordinate practitioner does not violate the Rules of Professional Conduct if that practitioner acts in accordance with a supervisory practitioner's reasonable resolution of an arguable question of professional duty.

§ 11.503 Responsibilities regarding nonpractitioner assistants.

With respect to a nonpractitioner employed or retained by, or associated with a practitioner practicing before the Office:

(a) A partner in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the practitioner;

(b) A practitioner having direct supervisory authority over the nonpractitioner shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the practitioner; and

(c) A practitioner shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a practitioner if:

(1) The practitioner orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or

(2) The practitioner is a partner in the law firm in which the person is employed or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

§ 11.504 Professional independence of a practitioner.

(a) A practitioner or law firm, in regard to practice before the Office, shall not share legal fees with a nonpractitioner, except that:

(1) An agreement by a practitioner with the practitioner's firm, partner, or associate may provide for the payment of money, over a reasonable period of time after the practitioner's death, to the practitioner's estate or to one or more specified persons;

(2) A practitioner who purchases the practice of a deceased, disabled, or disappeared practitioner may, pursuant to the provisions of § 11.117, pay to the estate or other representative of that practitioner the agreed upon purchase price; and

(3) A practitioner or law firm may include nonpractitioner employees in a compensation or retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement.

(b) A practitioner accepting a client referred by an invention promoter shall not divide legal fees paid by the client with the promoter for legal services rendered in regard to practice before the Office, including by accepting payment from the promoter a portion of funds the promoter receives from the referred client, delivering to the promoter a portion of any funds the practitioner receives from the client. The proscribed delivery of funds includes any transfer of funds before or after services are rendered. The legal services include, but are not limited to, providing an opinion regarding the patentability of the client's invention, providing an opinion regarding the registrability of a mark, preparing a patent or trademark application, and prosecuting a patent or trademark application.

(c) A practitioner shall not form a partnership with a nonpractitioner if any of the activities of the partnership consist of the practice of law before the Office.

(d) A practitioner shall not permit a person who recommends, employs, or pays the practitioner to render legal services for another before the Office to direct or regulate the practitioner's

professional judgment in rendering such legal services.

(e) A practitioner shall not practice with or in the form of a professional corporation or association authorized to practice law for a profit in regard to practice before the Office, if:

(1) A nonpractitioner owns any interest therein, except that a fiduciary representative of the estate of a practitioner may hold the stock or interest of the practitioner for a reasonable time during administration;

(2) A nonpractitioner is a corporate director or officer thereof; or

(3) A nonpractitioner has the right to direct or control the professional judgment of a practitioner.

§ 11.505 Unauthorized practice of law.

A practitioner shall not:

(a) Practice law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction, except that a registered practitioner may practice before the Office in patent matters in any State;

(b) Assist a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law;

(c) Aid a non-practitioner in the unauthorized practice of law before the Office;

(d) Aid a practitioner under suspension, exclusion, disbarment, or disbarment on consent, or who resigned during a pending investigation in the unauthorized practice of patent, trademark, or other non-patent law before the Office or aid a suspended or disbarred attorney in the unauthorized practice of law in any other jurisdiction;

(e) Practice before the Office in trademark matters if the practitioner was registered as a patent agent after January 1, 1957, and is not an attorney; or

(f) Practice before the Office in patent, trademark, or other non-patent law if suspended, excluded, or excluded on consent from practice by the USPTO Director under §§ 11.24, 11.25, 11.27, 11.28, or 11.56; if administratively suspended under § 11.11(b); or if in contravention of restrictions imposed on a practitioner under § 11.36(f).

§ 11.506 Restrictions on right to practice.

A practitioner, in regard to practice before the Office, shall not participate in offering or making:

(a) A partnership or employment agreement that restricts the rights of a practitioner to practice after termination of the relationship, except an agreement concerning benefits upon retirement; or

(b) An agreement in which a restriction on the practitioner's right to practice is part of the settlement of a controversy between parties.

§ 11.507 Responsibilities regarding law-related services.

(a) A practitioner shall be subject to the Rules of Professional Conduct with respect to the provision of law-related services before the Office, as defined in paragraph (b) of this section, if the law-related services are provided:

(1) By the practitioner in circumstances that are not distinct from the practitioner's provision of legal services to clients; or

(2) By a separate entity controlled by the practitioner individually or with others if the practitioner fails to take reasonable measures to assure that a person obtaining the law-related services knows that the services of the separate entity are not legal services and that the protections of the client-lawyer or client-agent relationship do not exist; or

(3) By a separate entity controlled by an invention promoter which refers legal services to the practitioner if the practitioner fails to take reasonable measures to assure that a person obtaining the law-related services knows that the services of the invention promoter are not legal services and that the protections of the client-lawyer or client-agent relationship do not exist.

(b) The term ''law-related services'' means services that might reasonably be performed in conjunction with and in substance are related to the provision of legal services in patent, trademark, or other non-patent law matters before the Office, and that are not prohibited as unauthorized practice of law when provided by a nonlawyer.

§§ 11.508–11.600 [Reserved]

Public Service

§ 11.601 *Pro Bono Publico* service.

A practitioner, in regard to practice before the Office, should participate in serving those persons, or groups of persons, who are unable to pay all or a portion of reasonable attorneys' fees or who are otherwise unable to obtain counsel. A practitioner may discharge this responsibility by providing professional services at no fee, or at a substantially reduced fee, to persons and groups who are unable to afford or obtain counsel, or by active participation in the work of organizations that provide legal services to them. When personal representation is not feasible, a practitioner may discharge this responsibility by providing financial support for organizations that provide legal representation to those unable to obtain counsel.

§ 11.602 Accepting appointments.

A practitioner, who is a lawyer, shall not seek to avoid appointment by a tribunal to represent a person except for good cause, such as:

(a) Representing the client is likely to result in violation of the Rules of Professional Conduct or other law;

(b) Representing the client is likely to result in an unreasonable financial burden on the practitioner; or

(c) The client or the cause is so repugnant to the practitioner as to be likely to impair the attorney-client or agent-client relationship or the practitioner's ability to represent the client.

§ 11.603 Membership in legal services organization.

A lawyer may serve as a director, officer, or member of a legal services organization, apart from the law firm in which the practitioner practices, notwithstanding that the organization serves persons having interests adverse to a client of the practitioner. The practitioner shall not knowingly participate in a decision or action of the organization:

(a) If participating in the decision would be incompatible with the practitioner's obligations to a client under § 11.107; or

(b) Where the decision could have a material adverse effect on the representation of a client of the organization whose interests are adverse to a client of the practitioner.

§ 11.604 Law reform activities.

A practitioner may serve as a director, officer, or member of an organization involved in reform of the law or its administration notwithstanding that the reform may affect the interests of a client of the practitioner. When the practitioner knows that the interests of a client may be materially benefited by a decision in which the practitioner participates, the practitioner shall disclose that fact but need not identify the client.

§§ 11.605–11.700 [Reserved]

Information About Legal Services

§ 11.701 Communications concerning a practitioner's services.

(a) A practitioner, or another on behalf the practitioner, shall not make a false or misleading communication about the practitioner or the practitioner's services for persons having immediate, prospective or pending business before the Office. A

communication is false or misleading if it:

(1) Contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading;

(2) Is likely to create an unjustified expectation about results the practitioner can achieve, or states or implies that the practitioner can achieve results by means that violate the Rules of Professional Conduct or other law; or

(3) Compares the practitioner's services with other practitioners' services, unless the comparison can be factually substantiated.

(b) A practitioner, or another on behalf of a practitioner, shall not seek by in-person contact, employment (or employment of a partner, associate, or other person or party) by a potential client having immediate or prospective business before the Office who has not sought the practitioner's advice regarding employment of a practitioner, if:

(1) The solicitation involves use of a statement or claim that is false or misleading, within the meaning of paragraph (a) of this section;

(2) The solicitation involves the use of undue influence;

(3) The potential client is apparently in a physical or mental condition which would make it unlikely that the potential client could exercise reasonable, considered judgment as to the selection of a practitioner;

(4) The solicitation involves the use of an intermediary and the practitioner has not taken all reasonable steps to ensure that the potential client is informed of:

(i) The consideration, if any, paid or to be paid by the practitioner to the intermediary; and

(ii) The effect, if any, of the payment to the intermediary on the total fee to be charged; or

(5) The solicitation involves the use of an invention promoter and the practitioner has not taken all reasonable steps to ensure that the potential client is informed:

(i) In every contract or other agreement between the potential client and invention promoter the specific amount of all legal fees and expenses included in funds the client delivers or is obligated to deliver to the promoter;

(ii) In every communication by the invention promoter requesting funds from the client the specific amount of all legal fees and expenses included in funds the client delivers or is obligated to deliver to the promoter; and

(iii) The discount (expressed as a percent) from the customary fee the practitioner gives or will give in the fees charged for legal services rendered for a client referred by the promoter.

(c) A practitioner shall not knowingly assist an organization that furnishes or pays for legal services to others having immediate or prospective business before the Office to promote the use of the practitioner's services or those of the practitioner's partner or associate, or any other practitioner affiliated with the practitioner or the practitioner's firm, as a private practitioner, if the promotional activity involves the use of coercion, duress, compulsion, intimidation, threats, or vexatious or harassing conduct.

(d) No practitioner shall personally, or through acts of another, with respect to any prospective business before the Office, by word, circular, letter, or advertising, with intent to defraud in any manner, deceive, mislead, or threaten any prospective applicant or other person having immediate or prospective business before the Office.

(e) A practitioner may not use the name of a Member of either House of Congress or of an individual in the service of the United States in advertising the practitioner's practice before the Office.

§ 11.702 Advertising.

(a) Subject to the requirements of §§ 11.701 and 11.703, a practitioner may advertise services regarding practice before the Office through public media, such as a telephone directory, legal directory, newspaper or other periodical, outdoor advertising, radio or television, through written or recorded communication, or through electronic media.

(b) A copy or recording of an advertisement or communication (whether in printed or electronic media) authorized by paragraph (a) of this section shall be kept for two years after its last dissemination along with a record of when and where it was used.

(c) A practitioner shall not give anything of value to a person or organization for recommending the practitioner's services in practice before the Office except that a practitioner may:

(1) Pay the reasonable costs of advertisements or communications permitted by this section; and

(2) Pay the usual charges of a not-for-profit lawyer referral service or legal service organization.

(d) A practitioner who is a lawyer may pay for a law practice in accordance with § 11.117.

(e) Any advertisement or communication to the public made pursuant to this section shall include the name of at least one practitioner responsible for its content.

§ 11.703 Direct contact with prospective clients

(a) A practitioner personally, or through the actions of another, shall not by in-person or telephone contact solicit professional employment from a prospective client having immediate or prospective business before the Office with whom the practitioner has no family or prior professional relationship when a significant motive for the practitioner's doing so is the practitioner's pecuniary gain under circumstances evidencing undue influence, intimidation, or overreaching.

(b) A practitioner personally, or through the actions of another, shall not solicit professional employment from a prospective client having immediate or prospective business before the Office by written or recorded communication or by in-person or telephone contact even when not otherwise prohibited by paragraph (a) of this section, if:

(1) The prospective client has made known to the practitioner a desire not to be solicited by the practitioner; or

(2) The solicitation involves false or misleading statements, undue influence, coercion, duress or harassment.

(c) Every written (including in print or electronic media) or recorded communication from or on behalf of a practitioner, soliciting professional employment from a prospective client known to be in need of legal services in a particular matter before the Office, and with whom the practitioner has no family or prior professional relationship, shall include the words ''Advertising Material'' on the outside envelope, and at the beginning and ending of any electronic or recorded communication.

(d) Notwithstanding the prohibitions in paragraph (a) of this section, a practitioner may participate with a prepaid or group legal service plan operated by an organization not owned or directed by the practitioner which uses in-person or telephone contact to solicit memberships or subscriptions for the plan from persons who are not known to need legal services in a particular matter covered by the plan.

§ 11.704 Communication of fields of practice and certification.

A practitioner may communicate the fact that the practitioner does or does not practice in particular fields of law. A practitioner shall not state or imply that the practitioner has been recognized or certified as a specialist in a particular field of law except as follows:

(a) Unless a practitioner is an attorney, the practitioner shall not hold himself or herself out to be an attorney, lawyer, or member of a bar, or as qualified or authorized to practice general law. Unless authorized by § 11.14(b), a non-lawyer shall not hold himself or herself out as being qualified or authorized to practice before the Office in trademark matters;

(b) A registered practitioner who is an attorney may use the designation ''Patents,'' ''Patent Attorney,'' ''Patent Lawyer,'' ''Registered Patent Attorney,'' or a substantially similar designation;

(c) A registered practitioner who is not an attorney may use the designation ''Patents,'' ''Patent Agent,'' ''Registered Patent Agent,'' or a substantially similar designation;

(d) An individual granted limited recognition may use the designation ''Limited Recognition''; and

(e) A lawyer engaged in Admiralty practice may use the designation ''Admiralty,'' ''Proctor in Admiralty'' or a substantially similar designation.

§ 11.705 Firm names and letterheads.

(a) A practitioner shall not use a firm name, letterhead, or other professional designation that violates § 11.701. A practitioner in private practice may use a trade name if it does not imply a connection with a Government agency or with a public or charitable legal services organization and is not otherwise in violation of § 11.701.

(b) A law firm with offices in more than one jurisdiction may use the same name in each jurisdiction, but identification of the practitioners in an office of the firm shall indicate the jurisdictional limitations of those not licensed to practice in the jurisdiction where the office is located.

(c) The name of a practitioner holding a public office shall not be used in the name of a law firm, or in communications on its behalf, during any substantial period in which the practitioner is not actively and regularly practicing with the firm.

(d) Practitioners may state or imply that they practice in a partnership or other organization only when that is the fact.

§§ 11.706–11.800 [Reserved]

Maintaining the Integrity of the Profession

§ 11.801 Bar admission, registration, and disciplinary matters.

An applicant for registration, or a practitioner in connection with an application for registration, or a practitioner in connection with a disciplinary matter or reinstatement, shall not:

(a) Knowingly make a false statement of material fact, knowingly fail to disclose a material fact, or knowingly fail to update information regarding a material fact; or

(b) Fail to disclose a fact necessary to correct a misapprehension known by the practitioner or applicant to have arisen in the matter, or knowingly fail to respond reasonably to a lawful demand for information from an admissions or disciplinary authority, except that the provisions of this paragraph (b) do not require disclosure of information otherwise protected by § 11.106.

(c) Conduct that constitutes a violation of paragraphs (a) or (b) of this section includes, but is not limited to, willfully refusing to reveal or report knowledge or evidence to the OED Director contrary to paragraphs (a) or (b) of this section.

§ 11.802 Judicial and legal officials.

(a) A practitioner shall not make a statement that the practitioner knows to be false, or with reckless disregard as to its truth or falsity, concerning the qualifications or integrity of a judge, administrative law judge, administrative patent judge, administrative trademark judge, adjudicatory officer, or public legal officer, or of a candidate for election or appointment to judicial or legal office.

(b) A practitioner who is a candidate for judicial office shall comply with the applicable provisions of the Code of Judicial Conduct.

§ 11.803 Reporting professional misconduct.

(a) A practitioner having knowledge that another practitioner has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that practitioner's honesty, trustworthiness, or fitness as a practitioner in other respects, shall inform the appropriate professional authority.

(b) A practitioner having knowledge that an employee of the Office has committed a violation of applicable Federal statutes, and rules adopted by the Office of Government Ethics that raises a substantial question as to the employee's fitness for office shall inform the appropriate authority. The Office of Enrollment and Discipline is not an appropriate authority for reporting under this section unless an imperative rule of the USPTO Rules of Professional Conduct is violated.

(c) The provisions of this section does not require disclosure of information otherwise protected by § 11.106, or information gained by a lawyer or judge, administrative law judge, administrative patent judge, or administrative trademark judge while serving as a member of an approved lawyers assistance program to the extent that such information would be confidential if it were communicated subject to the attorney-client privilege. The provisions of this section do not authorize the filing of frivolous complaints.

(d) A practitioner:

(1) Found guilty of a crime or who pleads guilty or *nolo contendre* or enters an Alford plea to a criminal charge in a court of a State, or of the United States, except as to misdemeanor traffic offenses or traffic ordinance violations, not including the use of alcohol or drugs, shall within ten days from the date of such finding or plea advise the OED Director in writing of the finding or plea and file with the OED Director a certified copy of the court record or conviction or docket entry of the finding or plea; or

(2) Found by a court of record or duly constituted authority of the United States to have engaged in inequitable conduct to obtain a patent shall within ten days from the date of such finding advise the OED Director of the finding and file with the OED Director a certified copy of the court record or finding.

(e) A practitioner:

(1) Reprimanded, suspended, disbarred as an attorney, or disbarred on consent from practice as an attorney on any ethical grounds (including ethical grounds not specified in this Part) by any duly constituted authority of a State, or the United States, or who resigns from the bar of any State, or Federal court while under investigation; shall within ten days from the date of such action advise the OED Director in writing of such action and file with the OED Director a certified copy of the order, finding or plea;

(2) Residing in a foreign country or registered under § 11.6(c), who is reprimanded, suspended, disbarred, disbarred on consent from practice as an attorney on any ethical grounds, by any duly constituted authority of a foreign country, including by any foreign patent or trademark office, or who resigns while under investigation by any duly constituted authority of a foreign country, shall within ten days from the date of such action advise the OED Director in writing of such action and file with the OED Director a certified copy of the order, finding or plea; or

(3) Who, as a result of any other event or change, would be precluded from continued registration under §§ 11.6(a),

or 11.6(b), or 11.6(c), or as a result of any other event or change would be precluded from continued recognition under §§ 11.9 or 11.14, or any event or change that would be grounds for disciplinary action under § 11.25(c) shall within ten days from the date of such event or change advise the OED Director in writing of the event or change and file with the OED Director any records regarding the event or change.

(f) Conduct that constitutes a violation of paragraphs (a) through (e) of this section includes, but is not limited to:

(1) Failing to comply with the provisions of paragraphs (d) or (e) of this section;

(2) Willfully refusing to reveal or report knowledge or evidence to the OED Director contrary to §§ 11.24(a) or (b), or 10.25(b);

(3) In the absence of information sufficient to establish a reasonable belief that fraud or inequitable conduct has occurred, alleging before a tribunal that anyone has committed a fraud on the Office or engaged in inequitable conduct in a proceeding before the Office; or

(4) Being suspended, disbarred as an attorney, or disbarred on consent from practice as an attorney on any ethical grounds (including ethical grounds not specified in this part) by any duly constituted authority of a State, or the United States, or resigning from the bar of any State, or Federal court while under investigation.

§ 11.804 Misconduct.

It is professional misconduct for a practitioner to:

(a) Violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

(b) Commit a criminal act that reflects adversely on the practitioner's honesty, trustworthiness, or fitness as a practitioner in other respects, including crimes for which the practitioner is found guilty, pleads guilty or *nolo contendre,* and crimes to which the practitioner enters an Alford plea to a criminal charge in a court of a State, or of the United States, but does not include misdemeanor traffic offenses or traffic ordinance violations, not including the use of alcohol or drugs;

(c) Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation;

(d) Engage in conduct that is prejudicial to the administration of justice;

(e) State or imply an ability to influence improperly a Government agency or official;

(f) Knowingly assist an administrative law judge, administrative patent judge, administrative trademark judge, patent examiner, other employee of the Office, or judicial officer in conduct that is a violation of applicable Federal statutes, rules adopted by the Office of Government Ethics, or other law; or

(g) Engage in disreputable or gross misconduct.

(h) Conduct that constitutes a violation of paragraphs (a) through (g) of this section includes, but is not limited to:

(1) Knowingly giving false or misleading information or knowingly participating in a material way in giving false or misleading information, to a client in connection with any immediate, prospective, or pending business before the Office;

(2) Representing before the Office in a patent matter either a joint venture comprising an inventor and an invention promoter, or an inventor referred to the registered practitioner by an invention promoter when:

(i) The registered practitioner knows, or has been advised by the Office, that a formal complaint filed by a Federal or State agency, alleging a violation of any law relating to securities, unfair methods of competition, unfair or deceptive acts or practices, mail fraud, or other civil or criminal conduct, is pending before a Federal or State court or Federal or State agency, or has been resolved unfavorably by such court or agency, against the invention promoter in connection with marketing an invention; and

(ii) The registered practitioner fails to fully advise the inventor of the existence of the pending complaint or unfavorable resolution thereof prior to undertaking or continuing representation of the joint venture or inventor;

(3) Accepting referral of a matter or inventor from an invention promoter wherein:

(i) A contract or other agreement for marketing and patenting an invention does not specify the total amount of funds constituting legal fees the inventor becomes obligated to pay the invention promoter,

(ii) A contract or other agreement for marketing and patenting an invention does not specify the total amount of funds constituting costs and expenses for legal services the inventor becomes obligated to pay the invention promoter,

(iii) The inventor delivers funds for legal fees, expenses or costs to the invention promoter,

(iv) A patentability opinion or patent search report by a registered practitioner is included in, accompanies, or is referenced in any report issued by the invention promoter,

(v) A contract or other agreement for marketing and patenting an invention provides for the preparation, drafting, or filing of a patent application for a design or a utility invention, or

(vi) The contract or other agreement for marketing and patenting an invention guarantees a patent;

(4) Accepting assistance in a specific matter from any former employee of the Office who participated personally and substantially in the matter as an employee of the Office;

(5) Representing, or permitting another party, including an invention promoter, to represent, that a fee for non-legal services is inclusive of any fee(s) for a practitioner's professional services without also separately stating in writing the full amount of the legal fees;

(6) Being a partner or associate of an employee of the Office, and representing anyone in any proceeding before the Office in which the employee of the Office participates or has participated personally and substantially as an employee of the Office, or which is subject to that employee's official responsibility;

(7) Accepting or using the assistance of an Office employee in the presentation or prosecution of an application, whether or not the employee is compensated, except to the extent that the employee may lawfully provide the assistance in an official capacity;

(8) Being a Federal employee and practicing before the Office while so employed in violation of applicable conflict of interest laws, regulations or codes of professional responsibility;

(9) Failing to report a change of address within thirty days of the change; or

(10) Knowingly filing, or causing to be filed, a frivolous complaint alleging that a practitioner violated an imperative USPTO Rule of Professional Conduct.

(i) A practitioner who acts with reckless indifference to whether a representation is true or false is chargeable with knowledge of its falsity. Deceitful statements of half-truths or concealment of material facts shall be deemed fraud within the meaning of this Part.

§ 11.805 Disciplinary authority: Choice of law.

(a) *Disciplinary authority.* A practitioner registered or recognized to practice or practicing before the Office in patent, trademark, or other non-patent law is subject to the disciplinary authority of the Office, regardless of

where the practitioner's conduct occurs. A practitioner may be subject to the disciplinary authority of both the Office and another jurisdiction where the practitioner is admitted to practice for the same conduct. An applicant for patent (§ 1.41(b) of this subchapter) representing himself, herself, or representing himself or herself and other individual applicants pursuant to §§ 1.31 and 1.33(b)(4) of this subchapter; an individual who is an assignee as provided for under § 3.71(b) of this subchapter; and an individual appearing in a trademark or other non-patent matter pursuant to § 11.14 is subject to the disciplinary authority of the Office for matters arising in connection with their practice before the Office.

(b) *Choice of law.* In any exercise of the disciplinary authority of the Office, the Rules of Professional Conduct to be applied shall be as follows:

(1) For conduct in connection with practice before the Office in patent, trademark, or other non-patent law a practitioner registered or recognized to practice (either generally or for purposes of that practice), the rules to be applied shall be the rules of the Office;

(2) For conduct in connection with a proceeding in a court before which a practitioner has been admitted to practice (either generally or for purposes of that proceeding), the rules to be applied shall be the rules of the jurisdiction in which the court sits, unless the rules of the court provide otherwise; and

(3) For any other conduct,

(i) If the practitioner is registered or recognized to practice only before the Office, the rules to be applied shall be the rules of the Office, and

(ii) If the practitioner is registered or recognized to practice before the Office, and is licensed to practice in another jurisdiction, the rules to be applied by the Office shall be the rules of the Office in regard to practice before the Office, and otherwise the rules applied shall be those of the admitting jurisdiction in which the practitioner principally practices; provided, however, that if particular conduct clearly has its predominant effect in another jurisdiction in which the practitioner is licensed to practice, the rules of that jurisdiction shall be applied to that conduct.

§ 11.806 Sexual relations with clients and third persons.

(a) *Sexual relations* means sexual intercourse or the touching of an intimate part of another person for the purpose of sexual arousal, sexual gratification, or sexual abuse.

(b) A practitioner shall not:

(1) Require or demand sexual relations with a client or third party incident to or as a condition of any professional representation;

(2) Require or demand sexual relations with an employee incident to or as a condition of employment; or

(3) Employ coercion, intimidation, or undue influence in entering into sexual relations with a client.

(c) Paragraph (b) of this section shall not apply to sexual relations between a practitioner and his or her spouse or significant other, or to ongoing consensual sexual relationships that predate the initiation of the practitioner-client relationship or practitioner-employee relationship.

(d) Where a practitioner in a firm has sexual relations with a client but does not participate in the representation of that client, the practitioners in the firm shall not be subject to discipline under this section solely because of the occurrence of such sexual relations.

§§ 11.807–11.900 [Reserved]

Dated: November 17, 2003.

James E. Rogan,

Under Secretary of Commerce for Intellectual Property and Director of the United States Patent and Trademark Office.

[FR Doc. 03–29150 Filed 12–11–03; 8:45 am]

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Friday,
December 12, 2003

Part III

Department of Homeland Security

Coast Guard

46 CFR Parts 401 and 404

Rates for Pilotage on the Great Lakes; Interim Rule

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

46 CFR Parts 401 and 404

[USCG–2002–11288]

RIN 1625–AA38 (Formerly RIN 2115–AG30)

Rates for Pilotage on the Great Lakes

AGENCY: Coast Guard, DHS.

ACTION: Interim rule with request for comments.

SUMMARY: This interim rule provides a partial rate adjustment for pilotage on the Great Lakes. We last adjusted the rates for pilotage on the Great Lakes in July 2001. The partial rate adjustment is being implemented while the Coast Guard completes its evaluation of issues raised in response to the NPRM and calculates a full rate adjustment.

DATES: This interim rule is effective January 12, 2004. Comments and related material must reach the Docket Management Facility on or before February 10, 2004.

ADDRESSES: You may submit comments identified by Coast Guard docket number USCG–2002–11288 to the Docket Management Facility at the U.S. Department of Transportation. To avoid duplication, please use only one of the following methods:

(1) Web site: *http://dms.dot.gov.*

(2) Mail: Docket Management Facility, U.S. Department of Transportation, 400 Seventh Street, SW., Washington, DC 20590–0001.

(3) Fax: 202–493–2251.

(4) Delivery: Room PL–401 on the Plaza level of the Nassif Building, 400 Seventh Street, SW., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The telephone number is 202–366–9329.

(5) Federal eRulemaking Portal: *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: If you have questions on this rule, call Paul Wasserman, Director, Office of Great Lakes Pilotage, (G-MW–1), Coast Guard, telephone 202–267–2856 or e-mail him at *Pwasserman@comdt.uscg.mil.* If you have questions on viewing or submitting material to the docket, call Andrea M. Jenkins, Program Manager, Docket Operations, telephone 202–366–0271.

SUPPLEMENTARY INFORMATION:

Public Participation and Request for Comments

We encourage you to participate in this rulemaking by submitting comments and related materials. All comments received will be posted, without change, to *http://dms.dot.gov* and will include any personal information you have provided. We have an agreement with the Department of Transportation (DOT) to use the Docket Management Facility. Please see DOT's ''Privacy Act'' paragraph below.

Submitting comments: If you submit a comment, please include your name and address, identify the docket number for this rulemaking (USCG–2002–11288), indicate the specific section of this document to which each comment applies, and give the reason for each comment. You may submit your comments and material by electronic means, mail, fax, or delivery to the Docket Management Facility at the address under **ADDRESSES;** but please submit your comments and material by only one means. If you submit them by mail or delivery, submit them in an unbound format, no larger than 8½ by 11 inches, suitable for copying and electronic filing. If you submit them by mail and would like to know that they reached the Facility, please enclose a stamped, self-addressed postcard or envelope. We will consider all comments and material received during the comment period. We may change this rule in view of them.

Viewing comments and documents: To view comments, as well as documents mentioned in this preamble as being available in the docket, go to *http://dms.dot.gov* at any time and conduct a simple search using the docket number. You may also visit the Docket Management Facility in room PL–401 on the Plaza level of the Nassif Building, 400 Seventh Street SW., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

Privacy Act: Anyone can search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review the Department of Transportation's Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19477), or you may visit *http://dms.dot.gov.*

Public Meeting

We do not now plan to hold a public meeting. But you may submit a request for one to the Docket Management Facility at the address under **ADDRESSES** explaining why one would be beneficial. If we determine that one would aid this rulemaking, we will hold one at a time and place announced by a later notice in the **Federal Register**.

Regulatory History

On January 23, 2003, the Coast Guard published an NPRM in the **Federal Register** [68 FR 3202] proposing to set new rates for pilotage on the Great Lakes. A public meeting was held January 31, 2003, in Cleveland, OH.

On April 1, 2003, the Coast Guard published in the **Federal Register** [68 FR 15697] a correction to the NPRM and extended the NPRM comment period through May 1, 2003. This notice also announced another public meeting that was held April 14, 2003, in Washington, DC.

On May 14, 2003, the Coast Guard published in the **Federal Register** [68 FR 25899] a notice of availability and a request for public comment on a Review of Bridge-Hour Standards for American Pilots on the Great Lakes, dated March 4, 2003.

Program History

In 1996, we established the current methodology for setting rates for pilotage on the Great Lakes.

In July 2001, we last adjusted the rates for pilotage on the Great Lakes. A year later, as a result of litigation, we temporarily revised the rates in District Two, Area 5, until the current rulemaking is completed. That temporary rule expires on December 24, 2003, and this interim rule contains new rates for Area 5.

Discussion of Comments

General

During the comment periods, the Coast Guard received 149 comments mostly expressing concerns about the implementation of the proposed rates and the process used in determining the proposed rates. There were also a number of requests to extend the comment period. Comments were received from pilots, pilot associations, cruise ship and ferry operators, small businesses on the Great Lakes, port authorities from the U.S. and Canada, and domestic and foreign shipping corporations.

Some of these comments stated that a rate adjustment is long overdue. Some of these comments also asked that future rate reviews take place in a timely manner. Another comment stated that the Coast Guard has a legal and moral responsibility to move forward immediately on the 2003 rate adjustment.

One comment wanted more time to complete the Great Lakes Pilotage Advisory Committee's membership so

that the committee could comment on the NPRM.

Schedule for Interim Rule Publication

Numerous comments stated that the Coast Guard should implement the proposed new rate immediately or at least by the start of the 2003 shipping season. Other comments stated if that was not possible, that the proposed rate should be implemented until corrections can be made.

Many other comments, however, expressed concern that our proposed interim rule publication date of February 14, 2003, was before the end of the comment period deadline. One stated because of the proximity of the NPRM's comment period deadline (March 10, 2003) to the planned IR publication date (February 14, 2003) that comments would not have been given full consideration. Several port authorities stated that implementing an interim rule would violate companies' ''right to have their views fairly considered.''

One comment stated that a ''hasty implementation'' of the proposed rate increases would violate the rulemaking provisions of the Administrative Procedures Act (APA; 5 U.S.C. 553) as well as the requirement that the Coast Guard consider the public's interest (46 U.S.C. 9303(f)).

One comment stated that the rush to institute an interim rule would result in significant defects in the ratemaking process.

Requests for Extension and Public Meetings. Some comments asked that the comment period be extended. One said the additional extension would provide time for ample scrutiny and the ability to make necessary adjustments before a final rate is established. Another comment stated that if the comment period is extended an interim rate is needed until the final rule is completed.

Another comment stated that placing the independent accountants' reports for Districts One, Two, and Three in the docket five days after the publication of the NPRM did not allow for an extensive review of those documents. Other comments stated that additional public meetings are needed to provide stakeholders sufficient time to analyze the rulemaking and to prepare and submit comments.

We understand the early concerns about not having enough time to respond to the NPRM. However, because two public meetings were held (January 31, 2003, and April 14, 2003), and the comment period was extended through May 1, 2003, the Coast Guard has provided an adequate opportunity for those wishing to respond to the NPRM and for those needing to review the independent accountant's reports. We do not plan on holding a public meeting on this interim rule.

Boundary Act Treaty

Several comments stated that the proposed rates violate the Boundary Act Treaty of 1910 that stipulates Canadian boundary waters are to be treated with fairness and equity. Comments from the Shipping Federation of Canada and the Thunder Bay Port Authority stated that the proposed rate violates the spirit of the Boundary Act Treaty of 1910. The Coast Guard disagrees. The treaty between Great Britain and the United States established boundaries and mandated free and open navigation for the vessels of both Canada and the U.S. The treaty further called upon national regulations to apply equally to the citizens and vessels of the other party. While the treaty was silent with respect to Great Lakes pilotage rates, the proposed rates, nonetheless, do not discriminate against Canadian vessels since they will apply equally across the board to all prospective carriers.

Beyond the Scope of the Rulemaking

Two comments asked that a surcharge be added as part of the final rule to allow pilots to recoup the portion of the rate that has been lost since the start of the 2003 shipping season.

One comment stated that pilotage should be returned to the auspices of the St. Lawrence Seaway Development Corporation (SLSDC).

One comment from a pilots' association stated that shipping companies should be required to open their books to give full and complete disclosure.

Two comments stated the delay in enacting the new rate before the start of the 2003 shipping season continues the ''essential punishment'' of Great Lakes pilots by denying them the compensation they are ''justly'' due.

All of these comments raise issues and concerns, resolution of which is beyond the scope of this rulemaking.

Classification of Rulemaking

Some comments questioned the appropriateness of the Coast Guard's characterizing this rulemaking as non-significant because the NPRM proposed to increase Great Lakes pilotage rates an average of 26 percent. Some comments claimed that the cost of pilotage could constitute over 30 percent of the total cost of a typical vessel transit into and out of the Great Lakes and thus, the Coast Guard's proposed rate increase was both significant and substantial. Other comments stated that the cost of pilotage is only 2 percent or less of the total cost of Great Lakes transits, and that pilotage fees are an insignificant portion of total vessel costs for operating in the Great Lakes. The Canadian Marine Pilots' Association commented that the cost of pilotage as a percentage cost of shipping in the Great Lakes is 2 percent or less.

One comment stated that the rulemaking should be a ''significant action'' under the regulatory procedures of DOT (now DHS) & OMB because it involves Canadian businesses and the Canadian government.

We disagree. This rulemaking is not ''OMB'' significant under Executive Order 12866 and is categorized as ''non-significant/substantive''. OMB and DHS have reviewed and agreed with the Coast Guard's determination that the rulemaking is substantive, but not significant.

Methodology Used in NPRM

Some comments suggested that the ''significant increase'' in the proposed rates was due to a change in the Coast Guard's interpretation of the ratemaking methodology. The Coast Guard's approach to conducting the rate review was consistent with that used in prior years and the proposed rate increase in the NPRM was not attributable to a change in application of the ratemaking methodology.

Difference in U.S. and Canadian Rates

Several comments suggested that the proposed 26 percent rate increase would further increase the difference between U.S. and Canadian pilotage rates and that the Memorandum of Arrangement (MOA) between the United States and Canada calls for identical rates.

The two countries are aware of the differences in pilotage rates and are working together to minimize and resolve these differences.

Economic Impact Analysis (EIA) of Great Lakes Pilotage

Some comments stated that the proposed increase in pilotage fees would ''chase'' vessels out of the Lakes. Another comment stated that the Coast Guard failed to examine how rate increases would affect users and the economy of the Great Lakes region. Several comments stated that a full regulatory evaluation should be done before issuing a rule.

The Coast Guard has contracted with Martin Associates to perform a full economic review of the Great Lakes basin. The report should be completed by February, 2004, and the results will be considered before we calculate the

full rate adjustment. When completed, a copy of this EIA will be made part of the public docket.

The EIA will provide an economic overview of the Great Lakes. It will explore the value of maritime commerce, generally, and, more specifically, look at the foreign trade shipping industry on both sides of the Great Lakes. It will develop a demand elasticity curve for pilotage services on board foreign-trade vessels on the Great Lakes. It will explore how, and at what point, an increase in pilotage rates might have a negative impact on shippers' decisions to send vessels into the Great Lakes system. This EIA will also address pilotage fees as a percentage of the total costs incurred by vessels operating in the Great Lakes.

Expenses Allowed

Legal fees. Numerous comments raised concerns about the amount of legal fees approved by the Coast Guard as part of the pilots' expense base. Some stated that the expenses incurred by the pilots pursuing judicial review of the Coast Guard's 2001 rates were neither reasonable nor necessary and were not directly related to pilotage.

Some comments questioned whether the Coast Guard had properly assessed the reasonableness of pilots' legal expenses. Some comments stated that a formula used in the 1999 rate review to judge the reasonableness of the legal expenses should have been used in the NPRM. The Coast Guard did not use an industry standard index to determine the reasonableness of the legal fees. The only time a standard was used was in the 1999 rate review. That standard is not sufficiently related to the pilotage industry or a similar regulated industry and was not used in calculating the proposed rates in the NPRM or the rates contained in this interim rule.

One comment stated that it was inappropriate for the Coast Guard to have approved for inclusion in the expense base legal fees paid by District Three in connection with a labor dispute. This comment stated that by allowing this expense the Office of Great Lakes Pilotage is publicly supporting a party in a labor dispute. The comment also disagrees with the decision to approve a percentage of the legal fees paid by District Three to Preston and Gates, because that percentage represented lobbying fees. The Coast Guard disagrees that allowing legal fees paid by a pilotage association to a law firm in connection with a litigation which involves a labor issue, represents support for a party in a labor dispute. The existing ratemaking methodology recognizes all reasonable and necessary legal fees with the exception of lobbying fees.

If the expense is necessary to conduct pilotage business and is reasonable in amount, the regulations allow its inclusion. The regulation does not distinguish between litigated matters involving a labor issue or union and other matter related to pilotage. With respect to the issue of whether all lobbyist fees were removed from the expense base, the Coast Guard will re-examine all of the legal fees in accordance with the regulatory requirements to ensure that only appropriate fees were allowed.

One comment suggested that all legal fees be removed from the rate calculation. To do that, the Coast Guard first would need to change the ratemaking regulations. The Coast Guard disagrees with the suggestion and, in any event, such a change is not within the scope of this rulemaking.

The Coast Guard reviewed all legal fees using the guidelines of necessity and reasonableness contained in 46 CFR 404.5. Only reasonable and necessary legal fees were approved as part of the expense base. No legal fees were allowed in connection with lobbying. Legal fees for litigation against the Government were allowed as long as there was no court proceeding in which there had been a finding of bad faith on the part of the pilot organizations.

Recovery of Legal Fees Under Equal Access to Justice Act (EAJA). Some comments stated that the pilots recovered a portion of their legal fees under the Equal Access to Justice Act (EAJA) and that recovery was not taken into consideration by the Coast Guard.

With respect to the comments regarding recovery of legal fees under the EAJA, only the pilots in District 1 have recovered fees under the EAJA. They recovered approximately $14,000 and the Coast Guard did not allow that amount to be included in their expense base.

Other Expenses

One comment stated that the non-recurring costs of leasing equipment paid by District Two to Erie Leasing, Inc., should be disallowed because the District Two Association terminated many of these leases at the end of the season. During 2001, District Two paid Erie Leasing $62,950 in lease costs for the rental of two pilot boats. Under 46 CFR 404.5(a)(3), lease costs for both operating and capital leases are recognized for ratemaking purposes to the extent that they conform to market rates. In the absence of a comparable market, lease costs are recognized for ratemaking purposes to the extent that they conform to depreciation plus an allowance for return on investment (computed as if the asset had been purchased with equity capital). The portion of lease costs that exceed these standards is not recognized for ratemaking purposes. In this case, with the cost of the pilot boats being $315,000, a market return of 7.04 percent, and a depreciation amount of $9,450, the result is an allowable lease expense of $31,626 ($315,000 × 7.04% = $22,176 + $9,450 = $31,626). District Two's expense base was thus reduced by the excessive lease fee amount of $28,124 ($59,750 rental fee − $31,626 allowable fee = $28,124). The Coast Guard will review the issue of recurring and non-recurring costs before calculating a full rate adjustment.

One comment stated that the $14,289 for health insurance for retired pilots included in the District Two expense base should be disallowed. The Coast Guard is reviewing this issue and will make a determination before calculating the full rate adjustment. Because of its de minimus impact on the rate it was left in the expense base for calculating the partial rate adjustment.

This same comment stated that the augmentation of the District Two and District Three expense bases to allow for employer contributions to employee 401(k) plans was not calculated correctly. This comment stated that the employer should have to contribute based upon daily compensation only that would include no contribution for overtime or extra work days. Under the 2001 American Maritime Officers Union (AMOU) contract, employers are required to make matching contributions to employee 401(k) plans in an amount equal to 50 percent of the employee's contribution, to a maximum of 5 percent of a participating employee's compensation. The Coast Guard will review this issue before calculating the full rate adjustment, but the District Two and Three expense bases have not been changed for calculation of the partial rate adjustment.

Another comment stated that the independent accountant made two mistakes in identifying and classifying expenses—misstating by $23,000 the total reimbursement for meal expenses allowed pilots in District Three, and subtracting the cost of the employer's portion of taxes from pilot compensation and adding them to operating expenses. The comment stated the actual amount adjusted in each case does not correlate with the current rates and limitations for the calculations of FICA and Medicare. The Coast Guard is reviewing these issues, and adjustments,

if appropriate, will be made in calculating the full rate adjustment. However, we have not made any changes in calculating the partial rate adjustment.

Another comment stated that the Coast Guard should have disallowed any payments by District Two to Erie Leasing, Inc., because that company refused to open up its books for the Coast Guard. The Coast Guard disagrees. There is no basis to deny expenses based upon another company's refusal to open its books, even when the service entity (Erie Leasing) is directly or indirectly related by beneficial ownership to the pilot association.

Some comments expressed the opinion that there is an insufficiency of accountability for continuing education training funds in the three districts. They recommended that training programs submitted by a pilot association and approved by the Coast Guard should be published as a part of this docket so that industry can assure itself that this money is spent appropriately and that the training plan meets ''certain criteria.'' They also suggested that a third party should hold the training funds instead of the pilot associations. The Coast Guard disagrees. The public docket used for this rulemaking is not an appropriate place for pilot associations to file their training plans. The Coast Guard does not see any benefit to placing the training funds in the hands of third parties, nor could such an action be properly included within the scope of this rulemaking.

Target Pilot Compensation Issues

With respect to determining target pilot compensation, several comments, including St. Lawrence Seaway Development Corporation, stated that the monthly multiplier should be reduced from its current level of 54 days to either 44 or 45 days to take into consideration vacation time actually taken by the pilots. They stated that pilots actually take vacation days and paying them for not doing so is a form of double dipping that makes a 44 or 45-day number more appropriate. For purposes of this interim rule, the Coast Guard has used a multiplier of 44 days. The Coast Guard is still reviewing this issue and a final determination on the appropriate multiplier will be made before we calculate the full rate adjustment. A proposed full rate adjustment will be subject to notice and comment in an SNPRM before implementation.

Numerous comments stated that the Coast Guard in the NPRM inappropriately increased the number of pilots needed. Some comments focused on the two pilots authorized for District One and the one pilot authorized for District Two. Another comment stated that the Coast Guard had made a mistake by rounding down the number of pilots in District Three, Area 7, to four pilots, and rounding down the total number of pilots required in the undesignated waters of Areas 6 and 8 to 17. The Coast Guard disagrees. The Coast Guard may increase or decrease the number of pilots authorized in the Districts as circumstances warrant. The number of pilots needed by each District is calculated each time the Coast Guard adjusts pilotage rates. The calculation shows the number of pilots needed in each Area to accommodate the projected vessel traffic. In the NPRM, where the calculated number was fractional, the Coast Guard rounded up or down to reflect ''a whole person.'' For purposes of this interim rule, the Coast Guard has not rounded up or down, but has used the actual calculated number, even if that number is fractional. For purposes of the interim rule, and for the sake of precision and accuracy in the computation, the Coast Guard has not rounded the fractionalized number of pilots required. It is up to each Association to determine how many pilots to employ to meet the actual shipping demand.

The Coast Guard will continue to review this step in the calculation and when the Coast Guard's review of the Bridge Hour Study is completed, we should have clearer guidance on this calculation.

Revenue Issues

Accounts receivable. One comment stated that the calculation of revenue was incorrect because it did not include accounts receivable. Before calculating a full rate adjustment, the Coast Guard will address inclusion of accounts receivable as part of revenues.

Target Pilot Compensation

Several comments stated that the Coast Guard had miscalculated the target pilot compensation. These comments stated that the target pilot compensation should be calculated by first adding all pilot wages and benefits together and then multiplying by 1.5, which is the multiplier for pilots working in designated waters. The Coast Guard disagrees. The Coast Guard has always calculated target pilot compensation in the same manner. During the first ratemaking under this methodology, in response to comments which provided detailed and persuasive information, including W–2 tax information, showing that the most accurate way to approximate the total compensation package of a master on the Great Lakes, under the union contract, is to take wages and multiply by 1.5 and then add benefits. See Seaway Regulations and Rules: Great Lakes Pilotage Rates, 62 FR 5917, 5920 (February 10, 1997). This interpretation was recently upheld. See *Lake Pilots Assoc., Inc.* v. *United States Coast Guard,* Civil Action No. 01–1721 (RBW) (D.D.C. April 4, 2003).

Other comments stated that the Coast Guard does not take into consideration all of the benefits received when calculating the total compensation package. One area of particular concern is credit for vacation pay because it is paid on a 1 for 2 basis. The Coast Guard will address this issue when proposing its full rate adjustment, but has not changed the calculation for the partial rate adjustment.

A number of comments from District Two discussed the independent accountant's treatment of reimbursed expenses (workers' compensation dividends), unrecognized expenses (a portion of the pilot boat leases), donations, business promotion, misclassified expenses, undocumented expenses, target pilot compensation, benefits, determination of the number of pilots, and calculation of the investment base. The Coast Guard will review these issues before calculating the full rate adjustment, but has not changed the District Two figures for the calculation of the partial rate adjustment.

One comment from a labor union objected to the Coast Guard requesting information concerning rates charged by longshoremen. The comment stated that the Coast Guard intended to use this, and similar other information, in an attempt to charge shippers as much as the market would bear for pilotage services. The Coast Guard did request public comment on a number of costs included in the total cost of shipping, to use as a comparison with the costs of pilotage services. In addition, the Coast Guard has contracted for an economic impact analysis of pilotage rates on shipping and on the regional economy of the Great Lakes basin.

Delay and Detention

Some comments stated that delay and detention should be included as bridge hours when calculating the number of pilots needed. As discussed elsewhere in this preamble, the Coast Guard's Bridge Hour Study is currently under review. This study specifically examines the issue of whether delay and detention should be included as bridge hours.

One comment stated that just as Districts Two and Three are being allowed added expenses for contributions to employees' 401(k) plans, so should District One. In the NPRM, because District One does not administer a 401(k) or other retirement program as do Districts Two and Three, no allowance was permitted. The Coast Guard is reviewing this issue, but for this partial rate calculation, we used the same figures as in the NPRM.

This comment also stated that the adjustment for inflation should be approximately 5 to 6 percent instead of the 2 percent determined by the Coast Guard. The comment stated that because it will be almost two years from the measurement year (2001) before the rate goes into effect, the pilots should receive twice the inflation. The Coast Guard will calculate a new adjustment for inflation when it calculates the full rate adjustment.

The comment also stated that travel expenses for District One were incorrectly calculated. According to the comment, travel expenses were overstated by $25,380 for Area 1 and understated by $37,075 for Area 2. The Coast Guard will review the allocation of travel expenses before calculating the full rate adjustment.

The comment also stated that the Coast Guard's projection of bridge hours for 2003, which is similar to those of 2001, is too low. The Coast Guard disagrees. The economy has actually performed consistently with the projections in the NPRM.

Other Changes

This rule also corrects the equation used in step 6 of the methodology to compute Return on Investment. Currently in the CFR, the equation illustrating how to arrive at Return on Investment contains an error. The last step of the calculation ''adds'' the Investment Base to the Return Element to arrive at the Return on Investment. Adding would not produce the Return on Investment. To obtain the Return on Investment, it is necessary to divide the Return Element into the Investment Base. We have made the appropriate correction to the equation in this interim rule by removing the ''+'' and adding, in its place, the ''÷''.

Discussion of Interim Rule

This interim rule provides a partial rate adjustment using the methodology in 46 CFR part 404, the 2001 expenses and revenues, and the 2002 American Maritime Officers Union contract.

The Next Steps

Following the partial rate adjustment in this interim rule, the Coast Guard will resolve the remaining rate calculation issues raised by the January, 2003, NPRM. We will calculate a full rate adjustment using the methodology in 46 CFR Part 404.

We plan to publish a supplemental notice of proposed rulemaking (SNPRM) in February, 2004, with an opportunity to comment before effecting a proposed full permanent rate adjustment during the Spring, 2004.

In the full rate adjustment calculation, the Coast Guard is considering using the figures from the 2003 AMOU contract, to replace the 2002 AMOU contract figures that were used to determine the proposed rate in the NPRM. The calculations would also include the rate and revenue figures from each of the three districts for 2002. The Coast Guard specifically requests comments on whether we should use the newer figures to calculate the full rate adjustment.

Regulatory Evaluation

This rule is not a ''significant regulatory action'' under section 3(f) of Executive Order 12866, Regulatory Planning and Review, and does not require an assessment of potential costs and benefits under section 6(a)(3) of that Order. It has not been reviewed by the Office of Management and Budget under that Order. It is not ''significant'' under the regulatory policies and procedures of the Department of Homeland Security (DHS).

We expect the economic impact of this rule to be so minimal that a full Regulatory Evaluation under the regulatory policies and procedures of DHS is unnecessary.

Ratemaking Process and Methodology

This section is a description of the analyses performed, and the seven-step methodology followed, in the development of the interim partial rate adjustment. The first part summarizes the partial rate changes in this interim rule; the second part describes the ratemaking process, explaining the formulas that make up the methodology and the use of the numbers obtained from the report of the independent accountant for the year 2001 in the formulas to show how the partial rate adjustment was actually calculated; and the third part describes how the rate in this interim rule differs from the one proposed in the NPRM published in January, 2003.

Part I: Pilotage Rate Charges—Summarized

The pilotage rates for federal pilots on the Great Lakes contained in 46 CFR 401.405, 401.407, and 401.410 have been adjusted in accordance with the methodology appearing at 46 CFR part 404. The partial rate adjustment results in an average increase across all districts of 5 percent as set out in Figure 1:

FIGURE 1

[Rate in percent]

If you require pilotage service in:	The rate will:
Area 1 (Designated waters)	Increase by 4
Area 2	Decrease by 5
Area 4	Increase by 21
Area 5 (Designated waters)	Decrease by 5
Area 6	Increase by 20
Area 7 (Designated waters)	Decrease by 17
Area 8	Increase by 19

Pilotage rates for ''Cancellation, delay or interruption in rendering services'' and ''Basic rates and charges for carrying a U.S. pilot beyond [the] normal change point or for boarding at other than the normal boarding point,'' in 46 CFR 401.420 and 401.428, respectively, are increased by an average of 5 percent.

The seven-step calculation of the methodology is summarized in the table for each District. The actual calculations are then explained in more detail for each entry in the tables.

TABLE A.—DISTRICT ONE

	Area 1 St. Lawrence River	Area 2 Lake Ontario	Total District One
Step 1, Projection of operating expenses	$359,704	$239,802	$599,506
Step 2, Projection of target pilot compensation	785,279	352,726	1,138,005
Step 3, Projection of revenue	1,105,233	629,149	1,734,382
Step 4, Calculation of investment base	50,000	50,000	100,000

TABLE A.—DISTRICT ONE—Continued

	Area 1 St. Lawrence River	Area 2 Lake Ontario	Total District One
Step 5, Determination of target return on investment	7.04%	7.04%	7.04%
	3,520	3,520	7,040
Step 6, Adjustment determination	1,148,503	596,048	1,744,551
Step 7, Adjustment of pilotage rates (Rate Multiplier)	1.04 (+4%)	.95 (−5%)	1.01 (+1%)

TABLE B.—DISTRICT TWO

	Area 4 Lake Erie	Area 5 Southeast Shoal to Port Huron, MI	Total District Two
Step 1, Projection of operating expenses	$365,292	$446,468	$811,760
Step 2, Projection of target pilot compensation	477,218	930,701	1,407,919
Step 3, Projection of revenue	705,015	1,461,069	2,166,084
Step 4, Calculation of investment base	89,734	140,353	230,087
Step 5, Determination of target return on investment	7.04%	7.04%	7.04%
	6,317	9,881	16,198
Step 6, Adjustment determination	854,237	1,392,460	2,246,697
Step 7, Adjustment of pilotage rates	1.21 (+21)	.95 (−5%)	1.04 (+4%)

TABLE C.—DISTRICT THREE

	Area 6 Lakes Huron and Michigan	Area 7 St. Mary's River	Area 8 Lake Superior	Total District Three
Step 1, Projection of operating expenses	$739,550	$292,739	$508,441	$1,540,730
Step 2, Projection of target pilot compensation	1,099,676	625,315	715,827	2,440,818
Step 3, Projection of revenue	1,540,306	1,119,819	1,030,693	3,690,818
Step 4, Calculation of investment base	111,668	83,752	83,752	279,172
Step 5, Determination of target return on investment	7.04%	7.04%	7.04%	7.04%
	7,861	5,896	5,896	19,654
Step 6, Adjustment determination	1,847,087	923,950	1,230,164	4,001,201
Step 7, Adjustment of pilotage rate	1.20 (+20%)	.83 (−17%)	1.19 (+19%)	1.08 (+8%)

Part 2: Calculating the Rate Multiplier

The authority to establish pilotage rates on the Great Lakes derives from 46 U.S.C. 9303(f), which states, in pertinent part, that: ''[t]he Secretary shall prescribe by regulation rates and charges for pilotage services, giving consideration to the public interest and the costs of providing the services.'' The pilotage regulations provide, at 46 CFR 404.1(b), that the pilotage rates ''shall be reviewed annually in accordance with the procedures detailed in Appendix C'' of the regulations and, ''the Director shall complete a thorough audit of pilot association expenses and establish pilotage rates in accordance with the procedures detailed in § 404.10 of this part at least once every five years.''

Appendix C to part 404 of title 46, CFR, provides the methodology used by the pilotage office in connection with annual reviews. The actual ratemaking methodology is contained in appendix A to part 404 of title 46, CFR, and is comprised of seven (7) steps. Those steps are:

(1) Projection of Operating Expenses;

(2) Projection of Target Pilot Compensation;

(3) Projection of Revenue;

(4) Calculation of Investment Base;

(5) Determination of Target Return on Investment;

(6) Adjustment Determination (Revenue Needed); and,

(7) Adjustment of the Rates.

The financial data used to calculate each of the seven steps comes from an independent accountant's review of the books and records of each association, which is provided the Coast Guard on an annual basis, and other documents and records provided to the Coast Guard by the pilotage associations. All documents and records relied upon in this ratemaking have been made part of the public record and may be found in the docket for this rulemaking.

The methodology is used to develop a multiplier to be used to adjust pilotage rates in each pilotage area. The following is an explanation of each step of the methodology and how the rate multiplier is derived.

Step 1: Projection of Operating Expenses

(1) The Coast Guard projects the amount of vessel traffic annually. Based upon that projection, the Coast Guard forecasts the amount of fair and reasonable operating expenses that pilotage rates should recover. This consists of the following phases:

(a) Submission of financial information from each association;

(b) Determination of recognizable expenses;

(c) Adjustment for inflation or deflation; and

(d) Final projection of operating expenses.

Step 1.A. Submission of Financial Information

(1) Each Association is responsible for providing detailed financial information to the Coast Guard, in accordance with part 403 of title 46, CFR. The information is collected and reviewed

by a Coast Guard-contracted independent accounting firm that compiles this information into financial reports for each District. The financial reports are reviewed by the Coast Guard in accordance with the requirements contained at Appendix C to Part 404, on an annual basis.

(2) Every five years, the Coast Guard is required by the regulations to complete a thorough audit of pilot association expenses and establish pilotage rates in accordance with the procedures detailed in § 404.10. Because we are issuing an interim rule that adjusts the current rate, we are following the methodology appearing at appendix A to part 404.

(3) All data used in this interim rule are taken from these reports. The reports reflect the period ending December 31, 2001. These reports may be found in the docket.

Step 1.B. Determination of Recognizable Expenses

(1) The Coast Guard determines which Association expenses will be recognized for ratemaking purposes, using the guidelines for the recognition of expenses contained in § 404.05.

(2) The following is a summary of the independent CPA's major findings and adjustments to the pilot associations' audited expenses, along with the Coast Guard's corresponding adjustments:

RECOGNIZED EXPENSES

	District One	District Two	District Three
Reported expenses for 2001	$687,591	$1,386,376	$1,336,710
Independent CPA Proposed Adjustments	*Equalization Between Districts*	*Equalization Between Districts*	*Equalization Between Districts*
	$10,120	None	$143,035
	$62,096		$152,535
	Reimbursed Expenses	Reimbursed Expenses	Reimbursed Expenses
	($13,000)	($83,376)	($163,207)
		($174,414)	
		($211,849)	
	Not Recognized or Allowed	Not Recognized or Allowed	Not Recognized or Allowed
	($782)	($74)	($995)
	($43,100)	($720)	($19,780)
		($28,124)	
	Misclassified Expenses	Misclassified Expenses	Misclassified Expenses
	($4,500)	(8,600)	($4,050)
	($11,740)	($20,470)	($23,100)
	($120,377)		
	Undocumented Expenses	Undocumented Expenses	Undocumented Expenses
	None	(125,559)	None
Total expenses 2001 + ...	$566,308	$733,190	$1,421,148
Inflation adjustment (2%)	$11,326	$14,664	$28,423
Coast Guard's Adjustments	$21,872	$20,500	$25,00
		$43,406	$66,159
Total projected expenses for 2003 pilotage season	$599,506	$811,760	$1,540,730

Step 1.C. Adjustment for Inflation or Deflation

(1) In making projections of future expenses, expenses that are subject to inflationary or deflationary pressures are adjusted. Costs not subject to inflation or deflation are not adjusted. Annual cost inflation or deflation will be projected to the succeeding navigation season, reflecting the gradual increase or decrease in costs throughout the year. The inflation adjustment is based on the year 2000 change in the Consumer Price Index for the North Central Region of the United States.

(2) Based upon the foregoing, a 2 percent inflation adjustment was made to the expense base. That adjustment appears in the table above.

Step 1.D. Projection of Operating Expenses

Once all adjustments are made to the recognized operating expenses, the Coast Guard projects these expenses for each pilotage area. In doing so, the Coast Guard takes into account foreseeable circumstances that could affect the accuracy of the projection. General and administrative expenses are apportioned to each area according to the number of pilots needed in that area. The results of Step 1.D for each district are displayed as follows:

DISTRICT ONE

	Area 1 St. Lawrence River	Area 2 Lake Ontario	Total District One
Projection of operating expenses	$359,704	$239,802	$599,506

DISTRICT TWO

	Area 4 Lake Erie	Area 5 Southeast Shoal to Port Huron, MI	Total District Two
Projection of operating expenses	$365,292	$446,468	$811,760

DISTRICT THREE

	Area 6 Lakes Huron and Michigan	Area 7 St. Mary's River	Area 8 Lake Superior	Total District Three
Projection of operating expenses	$739,550	$292,739	$508,441	$1,540,730

Step 2: Projection of Target Pilot Compensation

(1) The second step in the ratemaking methodology is to project the amount of target pilot compensation that pilotage rates should provide in each area. This step consists of the following phases: a. Determination of the target rate of compensation; b. Determination of the number of pilots needed in each pilotage area; and

c. Multiplication of target compensation by the number of pilots needed to project target pilot compensation needed in each area. Each of these phases is detailed below.

Step 2.A. Determination of Target Rate of Compensation

(1) Target pilot compensation for pilots providing services in undesignated waters approximates the average annual compensation for first mates on U.S. Great Lakes vessels. The average annual compensation for first mates is determined based on the most current AMOU contract, and includes wages and benefits received by first mates.

(2) Target pilot compensation for pilots providing services in designated waters approximates the average annual compensation for masters on U.S. Great Lakes vessels. It is calculated as 150 percent of the compensation earned by first mates on U.S. Great Lakes vessels. Based on detailed information provided by commentators, the Great Lakes Pilotage Office has consistently calculated this by multiplying the first mates' salary by 150 percent and adding benefits since this is the best approximation of the average annual compensation for masters.

(3) The table below summarizes how total target pilot compensation is determined for undesignated and designated waters:

Monthly component	Monthly (First mate) pilots on undesignated waters	Monthly (master) pilots on designated waters
$207.70 (Daily Rate) × 44 (Days)	$9,139	N/A
$207.70 (Daily Rate) × 44 × 1.5	N/A	$13,709
Clerical	126	188
Health	1,748	1,748
Pension	513	513
Monthly total	11,526	16,158
Monthly total × 9 months	103,743	145,422

Step 2.B. Determination of Number of Pilots Needed

(1) The number of pilots needed in each area of designated waters is established by dividing the projected bridge hours for that area by 1,000. Bridge hours are the number of hours a pilot is aboard a vessel providing basic pilotage service.

(2) The number of pilots needed in each area of undesignated waters is established by dividing the projected bridge hours for that area by 1,800.

(3) In determining the number of pilots needed in each pilotage area, the Coast Guard is guided by the results of the calculations in steps 2.A. and 2.B. However, the Coast Guard may also find it necessary to make adjustments to these numbers to ensure uninterrupted pilotage service in each area, or for other reasonable circumstances that the Coast Guard determines are appropriate.

(4) Projected bridge hours are based on the vessel traffic that pilots are expected to serve. The Coast Guard projects that bridge hours for the 2003 season will be the same as or comparable to the totals of 2001. Dividing the projected annual number of bridge hours per area by the target number of bridge hours per pilot determines the number of pilots required in each area to service vessel traffic.

(5) The following table shows the calculation of pilots needed:

Pilotage area	Projected 2003 bridge hours	Divided by bridge-hour target	Pilots required
AREA 1	5,407	1,000	5.4
AREA 2	6,130	1,800	3.4

Pilotage area	Projected 2003 bridge hours	Divided by bridge-hour target	Pilots required
AREA 4	8,298	1,800	4.6
AREA 5	6,395	1,000	6.4
AREA 6	19,016	1,800	10.6
AREA 7	4,320	1,000	4.3
AREA 8	12,354	1,800	6.9

Step 2.C. Projection of Target Pilot Compensation

(1) The projection of target pilot compensation is determined separately for each pilotage area by multiplying the number of pilots needed in an area by the target pilot compensation for pilots working in that area (*i.e.*, 5.4 pilots are required in Area 1, target compensation for the designated waters of Area 1 is $145,422, 5.4 × $145,422 = $785,279).

(2) The results for each pilotage area are summarized below:

DISTRICT ONE

	Area 1 St. Lawrence River	Area 2 Lake Ontario	Total District One
Projection of target pilot compensation	$785,279	$352,726	$1,138,005

DISTRICT TWO

	Area 4 Lake Erie	Area 5 Southeast Shoal to Port Huron, MI	Total District Two
Projection of target pilot compensation	$477,218	$930,701	$1,407,919

DISTRICT THREE

	Area 6 Lakes Huron and Michigan	Area 7 St. Mary's River	Area 8 Lake Superior	Total District Three
Projection of target pilot compensation	$1,099,676	$625,315	$715,827	$2,440,818

Step 3: Projection of Revenue

(1) The third step in the ratemaking methodology is to project the revenue that would be received in each pilotage area if existing rates were left unchanged. This consists of a projection of both future vessel traffic and pilotage revenue.

Step 3.A. Projection of Revenue

(1) The Coast Guard projects the pilotage service that will be required by vessel traffic in each pilotage area. These projections are based on historical data and all other relevant data available. Projected demand for pilotage service is multiplied by the existing pilotage rates for that service, to arrive at the projection of revenue.

(2) The results of Step 3.A for each district are summarized below:

DISTRICT ONE

	Area 1 St. Lawrence River	Area 2 Lake Ontario	Total District One
Projection of revenue	$1,105,233	$629,149	$1,734,382

DISTRICT

	Area 4 Lake Erie	Area 5 Southeast Shoal to Port Huron, MI	Total District Two
Projection of revenue	$705,015	$1,461,069	$2,166,084

DISTRICT THREE

	Area 6 Lakes Huron and Michigan	Area 7 St. Mary's River	Area 8 Lake Superior	Total District Three
Projection of revenue	$1,540,306	$1,119,819	$1,030,693	$3,690,818

Step 4: Calculation of Investment Base

(1) The fourth step in the ratemaking methodology is the calculation of the investment base of each Association. The investment base is the recognized capital investment in the assets employed by each Association required to support pilotage operations. In general, it is the sum of available cash and the net value of real assets, less the value of land. The investment base has been established through the use of the balance sheet accounts, as amended by material supplied in the notes to the independent accountant's financial statements, which are in the public docket, and adjustments taken by the Coast Guard after consulting with the accountant.

(2) The formula for determining the investment base appears at appendix B to part 404. The calculation appears in the independent accountant's reports for each district. The Investment Base is the Recognized Assets times the ratio of Recognized Sources of Funds to Total Sources of Funds. The investment base (Step 4) as calculated for each district is displayed below:

DISTRICT ONE

	Area 1 St. Lawrence River	Area 2 Lake Ontario	Total District One
Calculation of investment base	$50,000	$50,000	$100,000

DISTRICT TWO

	Area 4 Lake Erie	Area 5 Southeast Shoal to Port Huron, MI	Total District Two
Calculation of investment base	$89,734	$140,353	$230,087

DISTRICT THREE

	Area 6 Lakes Huron and Michigan	Area 7 St. Mary's River	Area 8 Lake Superior	Total District Three
Calculation of investment base	$111,660	$83,752	$83,752	$279,172

Step 5: Determination of Target Rate of Return on Investment

(1) The fifth step in the ratemaking methodology is to determine the Target Rate of Return on Investment. For each Association, a market-equivalent return-on-investment is allowed for the recognized net capital invested in the Association by its members.

(2) The allowed Return on Investment (ROI) is based on the preceding year's average annual rate of return for new issues of high-grade corporate securities.

(3) Assets subject to return on investment provisions must be reasonable in both purpose and amount. If an asset or other investment is not necessary for the provision of pilotage services, that portion of the return element is not allowed for ratemaking purposes.

(4) The target rate of return on investment for 2002 was set at 7.04 percent. This is based on the preceding year's (2001's) average annual rate of return of new issues of high-grade corporate securities (Moody's AAA rating, average return).

Step 6a: Adjustment Determination—Projected Return on Investment

(1) The next step in the ratemaking methodology is to insert the results from steps 1, 2, 3, and 4 into a formula that is based on a basic regulatory rate structure, and comparing the results to step 5. This basic regulatory rate structure takes into account revenues, expenses and return on investment, as set out below:

ADJUSTMENT DETERMINATION (PROJECTED RETURN ON INVESTMENT)

Line	Calculation
1	+ Revenue (from Step 3)
2	− Operating Expenses (from Step 1)
3	− Pilot Compensation (from Step 2)
4	= Operating Profit/Loss
5	− Interest Expense (from Audit reports)
6	= Earnings Before Tax
7	− Federal Tax Allowance
8	= Net Income
9	Return Element (Net Income + Interest)
10	÷ Investment Base (from Step 4)
11	= Projected Return on Investment

TABLE A.—DISTRICT ONE—PROJECTED RETURN ON INVESTMENT

Step	Area 1	Area 2	Total District One
1	$1,105,233	$629,149	$1,734,382
2	($359,704)	($239,802)	($599,506)
3	($785,279)	($352,726)	($1,138,005)
4	($39,750)	$36,621	($3,129)
5	0	0	0
6	($39,750)	$36,621	($3,129)
7	0	0	0
8	($39,750)	$36,621	($3,129)
9	($39,750)	$36,621	($3,129)
10	$50,000	$50,000	$10,000
11	(0.795)	0.732	(0.031)

TABLE B.—DISTRICT TWO—ADJUSTMENT DETERMINATION

Step	Area 4	Area 5	Total District Two
1	$854,237	$1,392,460	$2,246,697
2	($365,292)	($446,468)	($811,760)
3	($477,218)	($930,701)	($1,407,919)
4	$11,727	$15,291	$37,018
5	($734)	($734)	($1,468)
6	$10,993	$14,557	$25,550
7	($5,410)	($5,410)	($10,820)
8	$5,583	$9,147	$14,730
9	$6,317	$9,881	$16,198
10	$89,734	$140,353	$230,087
11	.0704	.0704	.0704

TABLE C.—DISTRICT THREE—ADJUSTMENT DETERMINATION

Step	Area 6	Area 7	Area 8	Total District
1	$1,847,087	$923,950	$1,230,164	$4,001,202
2	($739,550)	($292,739)	($508,441)	($1,540,730)
3	($1,099,676)	($625,315)	($715,827)	($2,440,818)
4	$7,861	$5,896	$5,896	$19,654
5	($1,909)	($1,909)	($1,909)	($5,727)
6	$5,952	$3,987	$3,987	$13,927
7	0	0	0	0
8	$5,952	$3,987	$3,987	$13,927
9	$7,861	$5,896	$5,896	$19,654
10	$111,668	$83,752	$83,752	$279,172
11	.0704	.0704	.0704	.0704

(2) The Coast Guard compares the projected return on investment (as calculated using the formula in Step 6a) to the target return on investment (from Step 5), to determine whether an adjustment to the base pilotage rates is necessary. If the projected return on investment is significantly different from the target return on investment, the revenues that would be generated by the current pilotage rates are not equal to the revenues that would need to be recovered by the pilotage rates.

(3) It is clear from the table below that the difference between the projected and target Returns on Investment are significant, indicating that a rate adjustment is necessary.

TABLE D.—COMPARISON OF PROJECTED RETURNS ON INVESTMENT VERSUS TARGET RETURNS ON INVESTMENT

	Projected ROI	Target ROI
District 1	(0.031)	.0704
District 2	(0.280)	.0704
District 3	(1.041)	.0704

(4) The base pilotage revenues that are needed are calculated by determining what change in projected revenue will make the target return on investment equal to the projected return on investment. This projection of revenue needed is used in determining the basis for proposed adjustments to the base pilotage rates. The mechanism for adjusting the base pilotage rates is discussed in Step 7 below. The required return, tax, and interest elements may be considered additions to the operating expenses and pilot compensation components of the base pilotage rates.

Step 6b: Revenue Needed Determination

The same formula used in Step 6a, above, is used to calculate the Adjustment Determination. To find the proper adjustment determination, Projected Revenue as determined in Step 3, is adjusted in each area until the formula in Step 6a yields a Projected Return on Investment equal to the Target Return on Investment from Step

5. The following tables show the results of these calculations.

TABLE A.—DISTRICT ONE—ADJUSTMENT DETERMINATION

Step	Area 1	Area 2	Total District One
1	$1,148,503	$629,149	$1,744,551
2	($359,704)	($239,802)	($599,506)
3	($785,279)	($352,726)	($1,138,005)
4	$3,520	$3,520	$7,040
5	0	0	0
6	$3,520	$3,520	$7,040
7	0	0	0
8	$3,520	$3,520	$7,040
9	$3,520	$3,520	$7040
10	$50,000	$50,000	$100,000
11	.0704	.0704	.0704

TABLE B.—DISTRICT TWO ADJUSTMENT DETERMINATION

Step	Area 4	Area 5	Total District Two
1	$854,237	$1,392,460	$2,246,697
2	($365,292)	($446,468)	($811,760)
3	($477,218)	($930,701)	($1,407,919)
4	$11,727	$15,291	$37,018
5	($734)	($734)	($1,468)
6	$10,993	$14,557	$25,550
7	($5,410)	($5,410)	($10,820)
8	$5,583	$9,147	$14,730
9	$6,317	$9,881	$16,198
10	$89,734	$140,353	$230,087
11	.0704	.0704	.0704

TABLE C.—DISTRICT THREE ADJUSTMENT DETERMINATION

Step	Area 6	Area 7	Area 8	Total District
1	$1,847,087	$923,950	$1,230,164	$4,001,202
2	($739,550)	($292,739)	($508,441)	($1,540,730)
3	($1,099,676)	($625,315)	($715,827)	($2,440,818)
4	$7,861	$5,896	$5,896	$19,654
5	($1,909)	($1,909)	($1,909)	($5,727)
6	$5,952	$3,987	$3,987	$13,927
7	0	0	0	0
8	$5,952	$3,987	$3,987	$13,927
9	$7,861	$5,896	$5,896	$19,654
10	$111,668	$83,752	$83,752	$279,172
11	.0704	.0704	.0704	.0704

Step 7: Adjustment of Pilotage Rates

(1) As previously indicated, the final step in the ratemaking methodology is to adjust base pilotage rates if the calculations from Step 6 show that pilotage rates in a pilotage area should be adjusted, and if the Coast Guard determines that it is appropriate to go forward with a rate adjustment. Rate adjustments are calculated in accordance with the procedures found in this step.

(2) Pilotage rate adjustments are calculated for each area by multiplying the existing pilotage rates in each area by the rate multiplier. The rate multiplier is calculated by inserting the result from the steps detailed above into the following formula:

Line	Rate multiplier
1	Revenue Needed (from Step 6(C)).
2	÷ Projected Revenue (from Step 3).
3	= Rate multiplier

(1) Using the formula above, the following are the calculations for the rate multiplier by District and Area:

TABLE A.—DISTRICT 1—RATE MULTIPLIER

[Revenue Needed ÷ Projected Revenue = Rate Multiplier]

Area 1	$1,148,503 ÷ $1,105,233	1.04
Area 2	$596,048 ÷ $629,149	0.95
Total	$1,744,551 ÷ $1,734,382	1.01

TABLE B.—DISTRICT 2—RATE MULTIPLIER

[Revenue Needed ÷ Projected Revenue = Rate Multiplier]

Area 4	$854,237 ÷ $705,015	1.21
Area 5	$1,392,460 ÷ $1,461,069	0.95
Total	$2,246,697 ÷ $2,166,084	1.04

TABLE C.—DISTRICT 3—RATE MULTIPLIER

[Revenue Needed ÷ Projected Revenue = Rate Multiplier]

Area 6	$1,847,087 ÷ $1,540,306	1.20
Area 7	$923,950 ÷ $1,119,819	0.83
Area 8	$1,230,164 ÷ $1,030,693	1.19
Total	$4,001,202 ÷ $3,690,818	1.08

TOTAL ACROSS ALL DISTRICTS—RATE MULTIPLIER

[Revenue Needed ÷ Projected Revenue = Rate Multiplier]

All Districts	$7,992,450 ÷ $7,591,284	1.05

(2) The Coast Guard amends the pilotage rates for the waters treated in 46 CFR 401.405 through 46 CFR 401.410 by multiplying the current pilotage rates by the rate multiplier for each pilotage area. The following table shows the percentage changes in rates by Area.

If you require pilotage service in:	The rate will:
Area 1 (Designated waters).	Increase by 4%.
Area 2	Decrease by 5%.
Area 4	Increase by 21%.
Area 5 (Designated waters).	Decrease by 5%.
Area 6	Increase by 20%.
Area 7 (Designated waters).	Decrease by 17%.
Area 8	Increase by 19%.

The total change across all Districts is 5 percent.

Part 3: Differences Between This Interim Ratemaking Regulation and the NPRM Published in January 2003

(1) Pending an opportunity to finish reviewing certain comments that were received in connection with the NPRM published in the **Federal Register** on January 23, 2003 (68 FR 3202), the Coast Guard has concluded that while many of these comments raised important points to be further explored, it was also equally important to establish at least a partial rate adjustment pending that review. We adopted a number of suggestions raised by comments, which has had the effect of reducing the rates proposed in the NPRM.

(2) Calculations to determine pilot target compensation for undesignated and designated waters of the Great Lakes differs from the calculations published in the NPRM (68 FR 3202). Comments received in response to the NPRM stated that the Coast Guard should credit only 5 days a month as vacations days vice 15 days to determine pilots' target compensation. The Coast Guard, in previous rulemakings, has included 15 days a month in its calculation of pilots' target compensation. For purposes of this interim rule, the Coast Guard has used the figures of those favoring a 44-day multiplier over a 54-day multiplier. This change has decreased the rate proposed in the NPRM. The Coast Guard continues to review this issue and expects to make a determination before calculating the full rate adjustment for the supplemental notice of proposed rulemaking (SNPRM).

(3) Many comments suggested that the needs of pilotage on the Great Lakes could be met with fewer than the total number of pilots recommended in the NPRM. This season's decline in shipping indicates that for the near term the rounding up of pilotage numbers, which is frequently performed in the course of determining the number of pilots needed, is not necessary, pending a full economic review of the Great Lakes basin. This, too, has resulted in a reduction to rates proposed in the NPRM.

Small Entities

Under the Regulatory Flexibility Act (5 U.S.C. 601–612), we have considered whether this rule would have a significant economic impact on a substantial number of small entities. The term ''small entities'' comprises small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000.

There are no small entities that will be directly affected by this interim rule. The businesses directly affected will be owners and operators of vessels who generally are large companies or are affiliated with large companies. Indirectly affected entities, such as shippers of major commodities like steel, iron ore, and grain will be affected only to the extent that these changes cause owners and operators of vessels to adjust shipping charges.

Therefore, the Coast Guard certifies under 5 U.S.C. 605(b) that this rule will not have a significant economic impact on a substantial number of small entities. If you think that your business, organization, or governmental jurisdiction qualifies as a small entity and that this rule will have a significant economic impact on it, please submit a comment to the Docket Management Facility at the address under **ADDRESSES.** In your comment, explain why you think it qualifies and how and to what degree this rule will economically affect it.

Assistance for Small Entities

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121), we want to assist small entities in understanding this rule so that they can better evaluate its effects on them and participate in the rulemaking. If the rule would affect your small business, organization, or governmental jurisdiction and you have questions concerning its provisions or options for compliance, please call Paul Wasserman, Director, Office of Great Lakes Pilotage, (G-MWP–1), Coast Guard, telephone (202) 267–2856 or

send him e-mail at *Pwasserman@comdt.uscg.mil*.

Small businesses may send comments on the actions of Federal employees who enforce, or otherwise determine compliance with, Federal regulations to the Small Business and Agriculture Regulatory Enforcement Ombudsman and the Regional Small Business Regulatory Fairness Boards. The Ombudsman evaluates these actions annually and rates each agency's responsiveness to small business. If you wish to comment on actions by employees of the Coast Guard, call 1–888–REG–FAIR (1–888–734–3247).

Collection of Information

This interim rule calls for no new collection of information under the Paperwork Reduction Act of 1995 [44 U.S.C. 3501–3520].

Federalism

A rule has implications for federalism under Executive Order 13132, Federalism, if it has a substantial direct effect on State or local governments and would either preempt State law or impose a substantial direct cost of compliance on them. We have analyzed this rule under that Order and have determined that it does not have implications for federalism.

Unfunded Mandates Reform Act

The Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538) requires Federal agencies to assess the effects of their discretionary regulatory actions. In particular, the Act addresses actions that may result in the expenditure by a State, local, or tribal government, in the aggregate, or by the private sector of $100,000,000 or more in any one year. Though this rule will not result in such an expenditure, we do discuss the effects of this rule elsewhere in this preamble.

Taking of Private Property

This rule will not effect a taking of private property or otherwise have taking implications under Executive Order 12630, Governmental Actions and Interference with Constitutionally Protected Property Rights.

Civil Justice Reform

This rule meets applicable standards in sections 3(a) and 3(b)(2) of Executive Order 12988, Civil Justice Reform, to minimize litigation, eliminate ambiguity, and reduce burden.

Protection of Children

We have analyzed this rule under Executive Order 13045, Protection of Children from Environmental Health Risks and Safety Risks. This rule is not an economically significant rule and does not create an environmental risk to health or risk to safety that may disproportionately affect children.

Indian Tribal Governments

This rule does not have tribal implications under Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, because it does not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.

Energy Effects

We have analyzed this rule under Executive Order 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use. We have determined that it is not a ''significant energy action'' under that order because it is not a ''significant regulatory action'' under Executive Order 12866 and is not likely to have a significant adverse effect on the supply, distribution, or use of energy. The Administrator of the Office of Information and Regulatory Affairs has not designated it as a significant energy action. Therefore, it does not require a Statement of Energy Effects under Executive Order 13211.

Environment

We have analyzed this rule under Commandant Instruction M16475.lD, which guides the Coast Guard in complying with the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321–4370f), and have concluded that there are no factors in this case that would limit the use of a categorical exclusion under section 2.B.2 of the Instruction. Therefore, this rule is categorically excluded, under figure 2–1, paragraph (34)(a), of the Instruction, from further environmental documentation. An ''Environmental Analysis Check List'' and a ''Categorical Exclusion Determination'' are available in the docket where indicated under the section of this preamble on ''Public Participation and Request for Comments''. We will consider comments on this section before we make the final decision on whether this rule should be categorically excluded from further environmental review.

List of Subjects

46 CFR Part 401

Administrative practice and procedures, Great Lakes, Navigation (water), Penalties, Reporting and recordkeeping requirements, Seamen.

46 CFR Part 404

Great Lakes, Navigation (water), Seamen.

■ For the reasons discussed in the preamble, the Coast Guard amends 46 CFR parts 401 and 404 as follows:

PART 401—GREAT LAKES PILOTAGE REGULATIONS

■ 1. Revise the authority citation for part 401 to read as follows:

Authority: 46 U.S.C. 2104(a), 6101, 7701, 8105, 9303, 9304; Department of Homeland Security Delegation No. 0170.1; 46 CFR 401.105 also issued under the authority of 44 U.S.C. 3507.

■ 2. In § 401.405, revise paragraphs (a) and (b), to read as follows:

§ 401.405 Basic rates and charges on the St. Lawrence River and Lake Ontario.

* * * * *

(a) *Area 1 (Designated Waters):*

Service	St. Lawrence River
Basic Pilotage	$8 per kilometer or $15 per mile[1]
Each Lock Transited	[1]$185
Harbor Movage	[1]$607

[1] The minimum basic rate for assignment of a pilot in the St. Lawrence River is $405, and the maximum basic rate for a through trip is $1,777.

(b) *Area 2 (Undesignated Waters):*

Service	Lake Ontario
Six-Hour Period	$327
Docking or Undocking	$312

■ 3. In § 401.407, revise paragraphs (a) and (b) to read as follows:

§ 401.407 Basic rates and charges on Lake Erie and the navigable waters from Southeast Shoal to Port Huron, MI.

* * * * *

(a) *Area 4 (Undesignated Waters):*

Service	Lake Erie (East of southeast shoal)	Buffalo
Six-Hour Period	$405	$405
Docking or Undocking	$312	$312
Any Point on the Niagara River below the Black Rock Lock	N/A	$796

(b) *Area 5 (Designated Waters):*

Any point on or in	Southeast Shoal	Toledo or any Point on Lake Erie west of Southeast Shoal	Detroit River	Detroit Pilot Boat	St. Clair River
Toledo or any port on Lake Erie west of Southeast Shoal	$939	$554	$1,218	$939	N/A
Port Huron Change Point	[1] $1,634	[1] $1,893	$1,228	$955	$679
St. Clair River	[1] $1,634	N/A	$1,228	$1,228	$554
Detroit or Windsor or the Detroit River	$939	$1,218	$554	N/A	$1,228
Detroit Pilot Boat	$679	$939	N/A	N/A	$1,228

[1] When pilots are not changed at the Detroit Pilot Boat.

■ 4. In § 401.410, revise paragraphs (a), (b), and (c) to read as follows:

§ 401.410 Basic rates and charges on Lakes Huron, Michigan, and Superior, and the St Mary's River.

* * * * *

(a) *Area 6 (Undesignated Waters):*

Service	Lakes Huron and Michigan
Six-Hour Period	$336
Docking or Undocking	$319

(b) *Area 7 (Designated Waters):*

Area	Detour	Gros Cap	Any harbor
Gros Cap	$1,192	N/A	N/A
Algoma Steel Corporation Wharf at Sault Ste. Marie Ontario	$1,192	$449	N/A
Any point in Sault Ste. Marie, Ontario, except the Algoma Steel Corporation Wharf	$999	$449	N/A
Sault Ste. Marie, MI	$999	$449	N/A
Harbor Movage	N/A	N/A	$449

(c) *Area 8 (Undesignated Waters):*

Service	Lake Superior
Six-Hour Period	$311
Docking or Undocking	$296

§ 401.420 [Amended]

■ 5. In § 401.420—

■ a. In paragraph (a), remove the number ''$53'' and add, in its place, the number ''$56''; and remove the number ''$831'' and add, in its place, the number ''$873''.

■ b. In paragraph (b), remove the number ''$53'' and add, in its place, the number ''$56''; and remove the number ''$831'' and add, in its place, the number ''$873''.

■ c. In paragraph (c)(1), remove the number ''$314'' and add, in its place, the number ''$330''; in paragraph (c)(3), remove the number ''$53'' and add, in its place, the number ''$56''; and, also in paragraph (c)(3), remove the number ''$831'' and add, in its place, the number ''$873''.

§ 401.428 [Amended]

■ 6. In § 401.428, remove the number ''$321'' and add, in its place, the number ''$337''.

PART 404—GREAT LAKES PILOTAGE RATEMAKING

■ 7. Revise the authority citation for part 404 to read as follows:

Authority: 46 U.S.C. 2104(a), 8105, 9303, 9304; Department of Homeland Security Delegation No. 0170.1.

Appendix A to Part 404 [Amended]

■ 8. In Appendix A to part 404, in Step 6, paragraph 1, line 10 of the table, remove the symbol ''+'' and add, in its place, the symbol ''÷''.

Dated: December 8, 2003.

T.H. Gilmour,

Rear Admiral, U.S. Coast Guard, Assistant Commandant for Marine Safety, Security and Environmental Protection.

[FR Doc. 03–30711 Filed 12–8–03; 4:37 pm]

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Federal Register

Friday,
December 12, 2003

Part IV

Department of Housing and Urban Development

24 CFR Part 570

Modification of the Community Development Block Grant Definition for Metropolitan City and Other Conforming Amendments; Interim Rule

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

24 CFR Part 570

[Docket No. FR–4872–I–01]

RIN 2506–AC15

Modification of the Community Development Block Grant Definition for Metropolitan City and Other Conforming Amendments

AGENCY: Office of the Assistant Secretary for Community Planning and Development, HUD.

ACTION: Interim rule.

SUMMARY: This interim rule revises the Community Development Block Grant (CDBG) program regulations by replacing the obsolete term ''central city'' with a new term ''principal city'' in the definition of ''metropolitan city'' and other CDBG regulations referencing ''central city.'' The revisions are necessary because of the recent changes to the Office of Management and Budget's (OMB) Standards for Defining Metropolitan and Micropolitan Statistical Areas (MSAs) and the announcement in 2003 of new definitions for those areas using Census 2000 data. The rule updates the affected CDBG program regulations so that the terminology used by HUD is consistent with OMB standards and the purposes of the Housing and Community Development Act of 1974.

DATES: *Effective Date:* January 12, 2004.

Comments Due Date: February 10, 2004.

ADDRESSES: Interested persons are invited to submit comments regarding this interim rule to the Regulations Division, Office of General Counsel, Room 10276, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410–0500. Comments should refer to the above docket number and title. A copy of each comment submitted will be available for public inspection and copying during weekdays between 8 a.m. and 5 p.m. at the above address. Facsimile (FAX) comments are not acceptable.

FOR FURTHER INFORMATION CONTACT: Sue Miller, Director, Entitlement Communities Division, Office of Block Grant Assistance, Office of Community Planning and Development, Room 7282, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410–7000; telephone (202) 708–1577 (this is not a toll-free number). Hearing- or speech-impaired individuals may access the telephone number listed in this section through TTY by calling the toll-free Federal Information Relay Service at (800) 877–8339.

SUPPLEMENTARY INFORMATION:

I. Statutory Background

Title I of the Housing and Community Development Act of 1974 (42 U.S.C. 5301–5320) (the Act) establishes the statutory framework for the CDBG program. HUD's regulations implementing the CDBG program are located at 24 CFR part 570 (entitled ''Community Development Block Grants'').

Section 102(a)(4) of the Act defines the term ''metropolitan city'' as ''(A) a city within a metropolitan area which is the central city of such area, as defined and used by the Office of Management and Budget, or (B) any other city, within a metropolitan area, which has a population of fifty thousand or more. . . .'' The term ''metropolitan area'' is defined in section 102(a)(3) of the Act as ''a standard metropolitan statistical area as established by the Office of Management and Budget.'' Section 102(b) of the Act provides that the Secretary may, by regulation, change or otherwise modify the meaning of the terms defined in section 102(a) in order to reflect any technical change or modification made by the United States Bureau of the Census or OMB.

II. Regulatory Background

The CDBG program regulations at § 570.3 define ''metropolitan city'' as having the meaning provided in section 102(a)(4) of the Act. The term ''metropolitan city'' is defined in section 102(a)(4) of the Act as a city within a metropolitan area which is the central city of such area, as defined and used by OMB, or any other city within a metropolitan area, which has a population of 50,000 or more. OMB has defined ''central city'' and ''principal city'' in its **Federal Register** publications on standards for metropolitan statistical areas. OMB published standards at 55 FR 12154 on March 30, 1990, which included the definition of ''central city'' currently in use (the 1990 standards) in the CDBG program regulations. On December 27, 2000, OMB published at 65 FR 82228 new Standards for Defining Metropolitan and Micropolitan Statistical Areas, collectively called Core Based Statistical Areas (CBSAs) (the December 27, 2000, standards). These new standards replace the previous standards adopted in 1990 for defining metropolitan areas, and also replace ''central cities'' with the new concept of ''principal cities.''

Under the 1990 standards, the term ''central city'' was defined as: (A) The city with the largest population in a Metropolitan Statistical Area (MSA); (B) each additional city with a population of at least 250,000 or with at least 100,000 persons working within its limits; (C) each additional city with a population of at least 25,000, an employment/residence ratio (the number of persons working in the city divided by the number of resident workers with place of work reported) of at least 0.75, and at least 40 percent of its employed residents working in the city; (D) each city of 15,000 to 24,999 population that is at least one-third as large as the largest central city, has an employment/residence ratio of at least 0.75, and at least 40 percent of its employed residents working in the city; (E) the largest city in a secondary noncontiguous urbanized area (an additional urbanized area within an MSA that has no common boundary of more than a mile with the main urbanized area around which the MSA is defined), provided it has at least 15,000 population, an employment/residence ratio of at least 0.75, and at least 40 percent of its employed residents working in the city; and (F) each additional city in a secondary noncontiguous urbanized area that is at least one-third as large as the largest central city of that urbanized area, that has at least 15,000 population and an employment/residence ratio of at least 0.75, and that has at least 40 percent of its employed residents working in the city (55 FR 12155).

Under the 1990 standards, the term ''metropolitan area'' was a collective term that referred to MSAs, Primary Metropolitan Statistical Areas, and Consolidated Metropolitan Statistical Areas (55 FR 12155). In accordance with the requirements of the Act, the CDBG program has utilized the 1990 standards and Census data to determine entitlement eligibility and allocation of CDBG Entitlement program funds to eligible communities.

The December 27, 2000, standards use the new term ''principal city'' instead of ''central city.'' A ''principal city'' is defined in relation to a CBSA rather than an MSA. The principal city (or cities) of a CBSA includes: (A) The largest incorporated place in the CBSA with a Census 2000 population of at least 10,000 or, if no such place exists, the largest incorporated place or census designated place in the CBSA; (B) any additional incorporated place or census designated place with a Census 2000 population of at least 250,000 or in which 100,000 or more persons work; (C) any additional incorporated place or

census designated place with a Census 2000 population of at least 50,000, but less than 250,000, and in which the number of jobs meets or exceeds the number of employed residents; and (D) any additional incorporated place or census designated place with a Census 2000 population of at least 10,000, but less than 50,000, and one-third the population size of the largest place, and in which the number of jobs meets or exceeds the number of employed residents (65 FR 82236).

The terms ''central city'' and ''principal city'' have slightly different meanings based on their respective standards. In the CDBG program, however, the term ''principal city'' will serve the same purpose as the now obsolete ''central city'' in determining CDBG entitlement eligibility.

III. This Interim Rule

This interim rule revises the CDBG program regulations (24 CFR part 570) at §§ 570.3, 570.4(c) and 570.307(e) to conform these sections to OMB's new definitions for CBSAs, and particularly for ''principal cities.'' The rule amends the regulatory definition of ''Metropolitan City'' in 24 CFR 570.3 to include the term ''principal city,'' and makes conforming changes to certain other sections of the CDBG regulations.

IV. Findings and Certifications

Justification for Interim Rulemaking

It is HUD's policy to publish rules for public comment before their issuance for effect, in accordance with 24 CFR part 10. Part 10 provides, however, that prior public procedure will be omitted if HUD determines that it is ''impracticable, unnecessary, or contrary to the public interest'' (24 CFR 10.0). HUD finds that good cause exists to publish this rule for effect without first soliciting public comment, in that prior public procedure is unnecessary and would be contrary to the public interest. Public procedure is unnecessary because this rule simply makes technical amendments that conform the CDBG regulations to new terminology adopted by OMB, in accordance with statutory authority. Delayed effectiveness pending public comment would be contrary to the public interest because potentially eligible cities would be deprived from receiving CDBG entitlement funds due to a change in nomenclature and other CDBG regulations may become misleading by referencing an obsolete term. HUD recognizes that adding principal cities may, depending on appropriations from Congress and the increased number of entitlement communities, result in reduced funding for current entitlement communities. The exact impact of this rule cannot be quantified; some number of the newly qualified communities that meet OMB's designation criteria would have also met OMB's previous ''central city'' criterion. Additionally, a number of entitlement communities that qualify under the existing central city definition and that would not meet the definition of ''principal city'' will qualify for continued entitlement status because they meet section 102(a)(4) of the Act which provides that ''any city that was classified as a metropolitan city for at least two years * * * shall remain classified as a metropolitan city.'' Although HUD believes issuing this interim rule for immediate effect will benefit the public overall, HUD will consider public comments on this issue prior to the publication of a final rule.

Executive Order 12866

The Office of Management and Budget (OMB) reviewed this rule under Executive Order 12866, *Regulatory Planning and Review.* OMB determined that this rule is a ''significant regulatory action'' (but not economically significant) as defined in section 3(f) of the Order. Any changes made in this rule subsequent to its submission to OMB are identified in the docket file. The docket file is available for public inspection between 7:30 a.m. and 5:30 p.m. weekdays in the Office of the Rules Docket Clerk, Office of General Counsel, Room 10276, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC.

Environmental Impact

This rule simply revises existing HUD regulations by replacing ''central city'' or ''central cities'' with ''principal city'' or ''principal cities,'' where applicable, in order to be consistent with OMB standards. This rule does not direct, provide for assistance or loan or mortgage insurance for, or otherwise govern or regulate, real property acquisition, disposition, leasing, rehabilitation, alteration, demolition or new construction, nor does it establish, revise, or provide for standards for construction, construction materials, manufactured housing, or occupancy. This rule revises an existing document where the existing document as a whole would not fall under a categorical exclusion but the amendment by itself does so. Pursuant to 24 CFR 50.19(c)(1) and (c)(2), these revisions are categorically excluded from the environmental assessment required by the National Environmental Policy Act of 1969 (42 U.S.C. 4332).

Impact on Small Entities

The Secretary, in accordance with the Regulatory Flexibility Act (5 U.S.C. 605(b)), has reviewed this rule before publication and by approving it certifies that this rule does not have a significant economic impact on a substantial number of small entities. There are no anti-competitive discriminatory aspects of the rule with regard to small entities and there are not any unusual procedures that need to be complied with by small entities. Although HUD has determined that this interim rule does not have a significant economic impact on a substantial number of small entities, HUD invites comments regarding any less burdensome alternatives to this rule that will meet HUD's objectives as described in this preamble.

Executive Order 13132, Federalism

Executive Order 13132 (entitled ''Federalism'') prohibits an agency from publishing any rule that has federalism implications if the rule either imposes substantial direct compliance costs on state and local governments and is not required by statute, or the rule preempts state law, unless the agency meets the consultation and funding requirements of section 6 of the executive order. This interim rule does not have federalism implications and does not impose substantial direct compliance costs on state and local governments or preempt state law within the meaning of the executive order.

Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1532) establishes requirements for federal agencies to assess the effects of their regulatory actions on state, local, and tribal governments and the private sector. This interim rule does not impose a federal mandate that will result in the expenditure by state, local, or tribal governments, in the aggregate, or the private sector, of $100 million or more in any one year.

Catalog of Federal Domestic Assistance

The Catalog of Federal Domestic Assistance (CFDA) program number is 14.218.

List of Subjects in 24 CFR Part 570

Administrative practice and procedure, Community development block grant, Grant programs—education, Grant programs, housing and community development, Indians, insular areas, Lead poisoning, Loan programs—housing and community development, Low- and moderate-income housing, New communities,

Pockets of poverty, Puerto Rico, Reporting and recordkeeping requirements, Small cities, Student aid.

■ Accordingly, for the reasons discussed in the preamble, HUD amends 24 CFR part 570 as follows:

PART 570—COMMUNITY DEVELOPMENT BLOCK GRANTS

■ 1. The authority citation for part 570 continues to read as follows:

Authority: 42 U.S.C. 3535(d) and 5301–5320.

■ 2. Amend § 570.3 by revising the definition of ''metropolitan city'' to read as follows:

§ 570.3 Definitions.

* * * * *

Metropolitan city shall have the meaning provided in section 102(a)(4) of the Act except that the term ''central city'' is replaced by ''principal city.''

* * * * *

■ 3. Amend § 570.4 by revising the introductory text of paragraphs (c) and (c)(3) to read as follows:

§ 570.4 Allocation of funds.

* * * * *

(c) In determining eligibility for entitlement and in allocating funds under section 106 of the Act for any federal fiscal year, HUD will recognize corporate status and geographical boundaries and the status of metropolitan areas and principal cities effective as of July 1 preceding such federal fiscal year, subject to the following limitations:

* * * * *

(3) With respect to the status of Metropolitan Statistical Areas and principal cities, as officially designated by the Office of Management and Budget as of such date.

* * * * *

■ 4. Amend § 570.307 by revising the first sentence of paragraph (e)(1) to read as follows:

§ 570.307 Urban counties.

* * * * *

(e) *Grant ineligibility of included units of general local government.* (1) An included unit of general local government cannot become eligible for an entitlement grant as a metropolitan city during the period of qualification of the urban county (even if it becomes a principal city of a metropolitan area or its population surpasses 50,000 during that period). * * *

* * * * *

Dated: November 17, 2003.

Roy A. Bernardi,

Assistant Secretary for Community Planning and Development.

[FR Doc. 03–30748 Filed 12–11–03; 8:45 am]

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LIST OF PUBLIC LAWS

This is a continuing list of public bills from the current session of Congress which have become Federal laws. It may be used in conjunction with ''P L U S'' (Public Laws Update Service) on 202–741–6043. This list is also available online at *http://www.nara.gov/fedreg/plawcurr.html*.

The text of laws is not published in the **Federal Register** but may be ordered in ''slip law'' (individual pamphlet) form from the Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402 (phone, 202–512–1808). The text will also be made available on the Internet from GPO Access at *http://www.access.gpo.gov/nara/nara005.html*. Some laws may not yet be available.

H.R. 1/P.L. 108–173

Medicare Prescription Drug, Improvement, and Modernization Act of 2003 (Dec. 8, 2003; 117 Stat. 2066)

H.R. 3348/P.L. 108–174

To reauthorize the ban on undetectable firearms. (Dec. 9, 2003; 117 Stat. 2481)

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